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England
Oct 29, 1841

Frederick Brogger

William Clay Fuller, Jr.
THE INSTITUTES
OF
JUSTINIAN

WITH
ENGLISH INTRODUCTION, TRANSLATION, AND NOTES

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EIGHTH EDITION
REVISED AND CORRECTED

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Justinian

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PREFACE

TO

THE SEVENTH EDITION.

This Edition of the 'Institutes' has been carefully revised and corrected, but scarcely any additions have been made beyond that of giving at the end of the Introduction a chronological list of the chief laws and legal changes noticed in the 'Institutes.'

The object of the work is to aid those who desire to use the 'Institutes' as an introduction to the study of Roman law, or who wish to find in one volume the means of gaining a general acquaintance with the history, principles, and contents of Roman law.

In the Introduction I have endeavoured to give such a general sketch of Roman law and its history as will prepare readers for the details of the work itself. The translation aims at rendering the text in language intelligible to those who have not, as well as to those who have, a long acquaintance with Latin. The notes are intended to embody such information as is necessary to elucidate the text, or to give the results of successive legal changes. In the Summary at the end of the volume I have attempted to arrange in a methodical form the principal contents of the text and the notes.

The value of the 'Institutes' is that of an elementary work, and the value of an elementary work is destroyed if it is made too long and difficult. I have, therefore,
avoided controverted points of law and history as much as possible, and where it was not possible to avoid them, I have stated what seemed to me the soundest conclusion, without attempting to defend it.

The original edition was in the main founded on the works of Ortolan, Ducaurroy, and Puchta. In subsequent editions I was greatly aided by the elaborate commentaries of Demangeat, to which those who wish to find in the 'Institutes' something more than an elementary work may be confidently referred. Lastly, I have derived assistance, which it is impossible to acknowledge too freely, from Mr. Poste's learned edition of 'Gaius,' and from Mr. Hunter's admirable and exhaustive work on 'Roman Law;' while in revising the translation, I have had the great advantage of consulting the careful and accurate translation of Messrs. Abdy and Walker.

The text adopted is, with few variations, that of Huschke (Leipzig, 1868).
INTRODUCTION.

1. The legislation of Justinian belongs to the latest period of the history of Roman law. During the long space of Object of the Introduction. preceding centuries the law had undergone as many changes as the State itself. The Institutes of Justinian embody principles and ideas of law which had been the slow growth of ages, and which, dating their origin back to the first beginning of the Roman people, had been only gradually unfolded, modified, and matured. It is as impossible to understand the Institutes, without having a slight knowledge of the position the work occupies in the history of Roman law, as it is to understand the history of the Eastern Empire without having studied that of the Western Empire and of the Republic. Many, also, of the leading principles of Roman law contained in the Institutes are unfamiliar to the English reader, and though they may be learned by a perusal of the work itself, the reader, to whom the subject is new, may be glad to anticipate the study of details by having placed before him a general sketch of the part of law on which he is about to enter. It is proposed, therefore, in this Introduction, to give first an outline of the history of Roman law, and then an outline of Roman private law. Each, however, will only be given with the very moderate degree of fulness proper to a sketch intended to be merely a preliminary to the study of the Institutes.

HISTORY OF ROMAN LAW.

2. However obscure may be the history of early Rome, we cannot doubt that Roman citizens were, from a very early period, composed of two distinct bodies, the populus and the plebs, of which the first alone originally possessed all political power, and the members of which
were bound together by peculiar religious ties. Nor can we have any reasonable doubt about the general features of the constitution of the *populus*. Whatever may have been their origin, it consisted of three tribes. Each tribe was divided into ten *curiae*, and each *curia* into ten *decuriae*; another name for a *decuria* was a *gens*, and it included a great number of distinct families, united by having common sacred rites, and bearing a common name. In theory, at least, the members of the same *gens* were descended from a common ancestor, and the families of the *gens* were subdivisions of the same ancestral stock, but both individuals and groups were occasionally admitted from outside. A pure unspotted pedigree was claimed by every member of a *gens*, and there was a theoretical equality among all the members of the whole tribe. The heads of the different families in these *gentes* met together in a great council, called the council of the curies (*comitia curiata*). A smaller body of three hundred, answering in number to the *gentes* in each of the three tribes, and called the Senate, was charged with the office of initiating the more important questions submitted to the great council; and a king, nominated by the senate, but chosen by the curies, presided over the whole body, and was charged with the functions of executive government.

3. The *populus* was also bound together by strong religious ties. The religion of Rome was intimately connected with the civil polity. The heads of religion were not a priestly caste, but were citizens, in all other respects like their fellows, except that they were invested with peculiar sacred offices. The king was at the head of the religious body; and beneath him were augurs and other functionaries of the ceremonies of religion. The whole body of the *populus* had a place in the religious system of the State. The mere fact of birth in one of the *familiae* forming part of a *gens* gave admittance to a sacred circle which was closed to all besides. Those in this circle were surrounded by religious ceremonies from their cradle to their grave. Every important act of their life was sanctioned by solemn rites. Every division and subdivision of the State to which they belonged had

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* Gentiles sunt, qui inter se eodem nomine sunt; non est satis: qui ab ingenuis oriundi sunt; ne id quidem satis est: quorum majorum nemo servituetem servivit: absit etiam nunc: qui capite non sunt diminuti.— Cicero, *Topic. 6.*

† *Quirites, regem creare; ita Patribus vicum est.—Liv. i. 17.* Mommsen argues from the analogy of the mode in which the magistrates who replaced the king were appointed, that the king must have been nominated by his predecessor (*Hist. Rome, Dickson's Trans., i, 65*).
its own peculiar sacred ceremonies. The individual, the family, the *gens*, were all under the guardianship of their respective tutelary deities. Every locality with which they were familiar was sacred to some patron god. The calendar was marked out by the services of religion; the pleasure of the gods arranged the times of business and leisure; and a constantly superintending Providence watched over the councils of the State, and showed, by signs which the wise could understand, approval of, or displeasure at, all that was undertaken.

4. By the side of this associated body there was another element of the State, occupying a position very different from that which was occupied by this privileged community. The *plebs* was probably formed by the inhabitants of conquered towns being brought to Rome, by the influx of voluntary settlers, and by freedom being accorded to slaves.* The plebeians were in a position of dependence on the king or on members of the *populus*, and were, as strangers, outside the political circle of members of the *gentes*. They belonged to no *gens*, had no place in the *comitia*, no share in the legislative or executive government; as little had they any share in the *jus sacrum*. They were as much excluded from the pale of the peculiar divine law as from that of the peculiar public law of the ruling body. Even the Servian constitution, and the formation of the thirty local tribes, laid the foundation of future change, rather than altered in early times the basis on which existing institutions were founded. The centuries opened to the *plebs* a door to political power by making the two orders meet on the common ground of a graduated scale of property; and the constitution of the thirty tribes marked off the inhabitants of the town and country into small local divisions, in the *comitia* of which the *plebs* had of course the preponderance, if it is to be supposed that the tribes had any recognised *comitia* before the institution of tribunes at the beginning of the Republican period. But though the *comitia centuriata* took away ultimately almost all political power from the *comitia curiata*, still the old relations of the different members of the body politic remained, in theory at least, long unimpaired. The curies alone could give the religious sanction which was indispensable to the validity of the resolutions of the centuries, and the *plebs* was as much as ever excluded from admission into the body of the *popu-

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* Mommsen considers that the plebeians were simply the *clientes*, looked at as deprived of political rights. (*Hist. Rome*, Dickson's Trans., i. 90.)
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lus; fenced round with its impassable wall of religious privileges, although the plebs and the populus were governed for the most part by the same rules of private law.

5. There could be very little direct law-making, except to meet temporary emergencies, in such a community as early Rome. What laws were made, were first proposed, arranged, and determined on by the Senate, under the guidance of its chief magistrate, the king, and then submitted to the highest source of power, the comitia curiata. After the institution of the centuries, the comitia centuriata gradually succeeded to the political power of the curiata, and the curies only met to give a formal religious sanction to the resolutions of the centuries. The king published regulations on matters that fell exclusively within his province as pontifex maximus, and a collection of these leges regiae, which were probably nothing more than by-laws for the conduct of religious ceremonies, was made, or said to be made, by Papirius, who lived in the time of Tarquinius Superbus.*

6. The king was the supreme judge in all cases. But if, in a criminal trial, the accused was a member of the populus, he could appeal from the king to the comitia curiata. If the accused was a plebeian, he had no tribunal to which he could appeal, until, shortly after the expulsion of the kings, the Valerian laws transferred appeals to the comitia centuriata, of which the plebs formed a part. Civil causes were decided by the king in his quality of pontifex maximus or by the subordinate pontifices acting under him, as all the private law of the populus was so mixed up with the sacred law, that it was part of the duty of a pontifex to know and guard its provisions.†

7. After the expulsion of the kings the plebeians were admitted to the comitia curiata and the Senate, and were allowed, within limits which practically were very narrow, to form gentes of their own.‡ But the old antagonism remained, and the struggle between the plebs and the populus became gradually more and more serious. Besides the right of appeal to the centuries secured by the lex

* There is no reason to doubt that Papirius was a real person (Dionys. ii. 86). But when Pomponius speaks of his collection as the jus civile Papirianum (D. i. 2. 2. 2), he probably uses the term not with reference to the real work of Papirius, but to a work composed towards the end of the republic by Granius Flaccus, De Jure Papiriano (D. l. 18. 144).
† D. i. 2. 2. 6.
‡ Mommsen, Hist. Rome (Dickson's Trans.), i. 287.
Valeria in every case when a citizen was condemned to death, the secession to the Aventine in 260 A.U.C. wrung from the patres the extinction of existing debts, and the creation of tribunes, at first two in number, then five, and afterwards ten, to defend the plebs. These champions of the lower order of the State gave great additional importance and a new character, or perhaps a beginning, to the comitia tributa, which now had to elect magistrates, who were protected themselves by a sacred character, and were specially commissioned to maintain the interest of their fellow-tribesmen. But the plebs had to struggle with an evil which no partial remedies could meet. There was no body of laws to which they could appeal in case they were wronged. The whole administration of the laws was in the hands of the patricians, and there was no appeal from the decision of the magistrate except in cases where life was at stake, or unless the injury, inflicted by wilful perversion of the law, was great enough, as in the memorable instance of Virginia, to rouse the wronged to the redress of physical force. Many of the rights which theoretically belonged to the plebeians as having the same private law with the populus, were practically denied them. At last, a successful revolution enabled the plebs to insist on a changed form of political government, which might open the door of power and office to the members of their own body, and supply a machinery for the preparation of a fixed and permanent body of law. The Decemvirate, superseding and incorporating into itself every other magistracy, and composed of an equal number of patricians and plebeians, was formed 303 A.U.C. for the purpose of collecting and embodying in the shape of written law all those portions of the customary law which it was most essential for the due administration of justice to place on an indisputable footing, and publish for the benefit of the whole body of citizens.

8. The lavish praises bestowed on the laws of the Twelve Tables by the later writers of Rome, and the story of the deputation sent to learn the laws of Greece, would give us an idea of a very different body of laws from that which these Tables actually presented. We should expect to find a systematic exposition of Roman public and private law as it existed in the times previous to the Gallic invasion; and to find, also, that the whole body of law was at least coloured by the infusion of a foreign element. We should naturally think that there was something new and original in a legislation which
Cicero considers as almost the perfection of human wisdom.* The fragments of the Twelve Tables which remain to us show how erroneous are these conceptions of their contents. There is nothing whatsoever which we can decidedly pronounce to be borrowed from a foreign origin, except possibly some provisions respecting the law of funerals, taken from the laws of Solon. These Tables contained, for the most part, short enunciations of those points of law which the conduct of the affairs of daily life required to be settled and publicly announced. The law had existed before, but in a floating, vague, traditionary shape, only some very few laws having been engraved on tablets and publicly displayed. The Twelve Tables left to the decision of the magistrate, and the interpretation of those skilled in law, the application and exposition of these principles; they also left many parts of the customary law wholly untouched on. But what the exigencies of the time required deciding, they decided; and they laid a firm foundation on which the structure of private law would rest for the future. It is not difficult to understand how this was esteemed so great a gain to the large body of the citizens, that these laws were spoken of by the ancients as the creations of a new legislation.

The following are the chief provisions of the Twelve Tables, so far as they are known.†—1. The First Table related to the proceedings in a civil suit. If the person summoned before the magistrate would not come, he was to be forced to go, but for an old or sick man a beast of burden was to be provided. If the adversaries could agree on the way, they were to be allowed to do so. If not, the statements of both were to be heard before midday in the Comitium or the Forum, and then, after midday, the magistrate was to adjudge the thing, but every process was to be stopped at sunset. 2. The Second Table fixed the amount to be deposited in the action by wager, and provided that the affair might be put off if necessary, as if, among other things, the judge or arbiter appointed by the magistrate was ill; and pointed out how witnesses might be summoned. 3. The third Table was apparently made in favour of debtors, for though it left them ultimately at the mercy of the creditor, it gave them new means of averting their

* See especially De Orat. i. 43, 44.
† This summary is taken from the arrangement of the supposed contents of the Twelve Tables adopted by Ortolan; but in many points, and especially in the assignment to a particular Table of a fragment, this arrangement is necessarily conjectural.
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fate. They were to have thirty days before any steps could be taken against them on a debt confessed or decided to be due. They might then be brought before a magistrate, and unless payment was made or a surety (vindex) found, the creditor might put them in irons, but not of more than fifteen pounds weight, and must give them a pound of flour a day. This could last for sixty days only, and the debtor had meanwhile to be produced before the magistrate to show he was alive; and notice of the amount of the debt must be given on three market-days by the creditor, so that an opportunity of ransoming the debtor might be given. Then, but not till then, the debtor was at the mercy of the creditor, who could sell him as a slave beyond the Tiber or kill him, and if there were several creditors, they might hew him in pieces, and although any of them took a part of his body larger in proportion than his claim, he was not to be punished. 4. The Fourth Table referred to the father of the family, who was bidden to destroy deformed children, and whose absolute power over the life and liberty of his children was established, while it was provided that if he sold his son three times, the son should be freed from his power. 5. The Fifth Table related to inheritances and tutorships. Women were to be in perpetual tutorship, except the vestal virgins. As a man disposed by testament, so was the law to be; but if he died intestate, and without a suus heres, his nearest agnati, or, in default of agnati, the gentiles, were to take. In default of appointment by testament, the agnati were to be tutors, and have the custody of madmen who had no curators.

6. The Sixth Table referred to ownership, and provided that the words spoken in the solemn form of transfer, a nexum or mancipium, should be held binding; that he who denied them should pay double; that two years' possession for immovable, and one for moveables, should be the time necessary for usucapion, and that a year should suffice for the usucapion of a wife by her husband, unless she absented herself for three consecutive nights in the time; that no one not a Roman citizen should acquire by usucapion; and that materials built into a house should not be reclaimed by their owner, at least until the building was taken or fell down. The property in a thing sold was not to pass to the purchaser until the vendor was satisfied. The fictitious suit for the transfer of property called in jure cesso, and mancipation, were confirmed. 7. The Seventh Table contained provisions as to buildings and plots of land, as to the width of way to be left,
as to overhanging trees, and so forth; and in case of disputes as to boundaries, the magistrate was to appoint arbitrators. 8. The Eighth Table dealt with delicts. It prescribed capital punishment for libellous songs and outrages. A limb was to be given for a limb, three hundred asses for the breaking of a bone of a free man, and one hundred and fifty for the breaking of a bone of a slave; for an injury or minor outrage, twenty-five asses; a four-footed beast doing injury might be given up to whomsoever it injured, in lieu of compensation. The nocturnal devastation of crops or the incendiaryism of a building was punished with death. Theft, if the thief was caught red-handed, was to be punished by the thief, if a freeman, being beaten and given over to the person robbed, and, if a slave, by his being beaten and thrown from the Tarpeian Rock; while various other provisions were made as to theft, fixing minor penalties, where the circumstances were not so grave. The rate of interest was fixed at one per cent. per month (centesimae usurae), and the usurer who exceeded this was to be fined quadruple. The false witness was to be thrown from the Rock, and the witness in a solemn form who refused his testimony was to be infamous; and the enchanter and poisoner were to be punished capitaly. 9. The Ninth Table related to public law, and provided that there were to be no privilegia, or laws affecting individuals only; that the centuries alone could pronounce capital sentence; that the judge or arbiter taking a bribe should be punishable capitaly; that there should be an appeal to the people from every penal sentence; and that death should be the punishment of leaguing with, or handing over a citizen to, the enemy. 10. The Tenth Table related to funerals, limiting the ceremonies and display attending them. 11. The Eleventh Table prohibited the marriage of patricians and plebeians; and 12. The Twelfth Table had reference to some miscellaneous matters; as that a slave who had done an injury might be abandoned to the person injured, in lieu of compensation. The seizure of anything belonging to the debtor (pignoris capio) was permitted when the debt had been contracted, or the sum due was to be expended, for sacrificial purposes.

It will be observed that the Twelve Tables recognise four of the actions of law, the nature of which will be noticed in a later part of the Introduction, viz., sacramentum, judicis postulatio (in the shape of the arbitration to be given to settle boundaries), manus injectio, and pignoris capio. They further recognise the
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distinction between the magistrate and the judez, which was the characteristic feature of Roman procedure; and probably these actions of law and this distinction between the judge and the magistrate date from a time much earlier than the Twelve Tables. Most, too, of the characteristic points of Roman civil law are to be found in the Twelve Tables. The patria potestas, usucapion, tutelage, testamentary and intestate succession, the nexum, mancipatio, all are enforced, and evidently formed part of the ancient customary law of Rome.

9. The Decemvirate was nominally intended to be a means of removing, as far as was then thought possible, the political distinction between the orders. How little the object was really accomplished is notorious. Although half the decemvirs were plebeians, the suppression of the meetings of the comitia tributa, and the loss of tribunes, were poorly compensated by the presence of magistrates who acted in conjunction with patricians, and readily yielded deference to their colleagues. Besides, the Two Tables added in the year of the second Decemvirate contained provisions which later writers considered manifestly unjust;* and we have seen that, among other things, they expressly refused the connubium to the plebs. The Twelve Tables, as fixing and proclaiming the law, were undoubtedly a source of great strength to the plebeians, and enabled them to maintain a much more secure position in their future struggles; but the Decemvirate, regarded as a crisis in their political history, was certainly unfavourable to them. Nothing shows more completely that this was so than the progress they made immediately after the downfall of Appius Claudius and his colleagues. The laws of Horatius and Valerius not only forbade the constitution of any magistracy from which there should be no appeal, but provided that the ordinances of the comitia tributa should, if sanctioned by the senate and the curies, be binding on all Roman citizens; and in 309 A.U.C., only four years after the abolition of the Decemvirate, the Canuleian law gave the connubium to the plebs, and the marriage of a patrician with a plebeian was no longer forbidden by law. This change was important, not only as removing a distinction mortifying to many individuals and embarrassing many of the relations of private life, but as breaking through one of the barriers which the jus sacrum had hitherto

interposed in the way of the plebs.* The obstacle of a religious disqualification was the reason generally assigned by the populus for the exclusion of plebeians from public offices; † and it was a great step towards political equality that the objection urged to marriages between the two orders—that it would disturb the sacra of the gentes—should be overcome. The advance of the plebs to political equality was, however, very slow; and it was not until a century and a half had elapsed from the passing of the Canuleian law that the two orders were placed on an equal footing. We may take the year 467 a.u.c., the date of the lex Hortensia, as the period when we can first pronounce that the distinction of the two orders was really done away. When that law had been passed, the plebeian had a full share in the jus publicum and the jus sacrum. The ordinances of the comitia tributa required no confirmation of the curies, no sanction of the senate; they were binding on the whole Roman people directly they were passed. The equality between the two orders was so complete that the plebeian could become consul, censor, prætor, curule ædile; he could enter the senate, he could administer justice; he was excluded from none of the privileges of the jus sacrum; he could become pontifex and augur; and though he could not of course take part in any of the sacra belonging to particular gentes, go through certain religious ceremonies, or be engaged in the service of particular gods, these exceptions did not lower his political position. As far as the history of law is concerned, we may henceforward lose sight of the distinction between plebeian and patrician.

10. From the writings of the later jurists, and especially from those of Gaius and Cicero, and from the fragments of the Twelve Tables that have come down to us, we can collect the essential features of the private law of Rome in its earliest period, before a general advance in civilisation had modified it. This early law, which rested on custom as its foundation, and the elements of which, except so far as appeared in the laws of the Twelve Tables, were only known by tradition, was called in subsequent times the jus civile, the peculiar law of the Roman State. The history of Roman law is the history of the changes introduced

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* Ideoque decemviros connubium diremisse, ne incerta prole auspicia turbarentur.—Liv. iv. 6.

Interroganti tribuno, cur plebeium consulem fieri non oporteret? . . . respondit, quod nemo plebeius auspicia haberet.—Liv. iv. 6.
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into this law, of the additions made to it, and of the method adopted in the process. The notion of a body of customary law, in part unwritten, which was not abrogated, but was evaded or amplified by persons acting under the ideas of later times, is the notion which, above all others, must be embraced clearly by any one who wishes to understand Roman law. The *jus civile* must always be taken as the starting point, and in tracing the history of the later law we have always to trace how, while the *jus civile* still remained in force, the law was made to suit the requirements of different periods by evading or adding to the *jus civile*. It was only in the later days of the Empire that the *jus civile* began to be swept away. When we come to speak of the contents of Roman private law, we shall have occasion to notice what were the leading features of the *jus civile*. We need not at present do more than say that, when a student of Roman law has made himself acquainted with its elementary doctrines, he will find that the chief of these peculiar principles, dating from an unknown antiquity, and affecting the whole body of later jurisprudence, are those which determine the position of a father of a family, the succession to his estate, and the contracts and actions relating to the chief possessions of an agricultural proprietor.

11. The conquest of Italy and the gradual spread of Roman conquest materially altered the character of the legal system. A branch of law almost entirely new sprang up, which determined the different relations in which the conquered cities and nations were to stand with reference to Rome itself. As a general rule, and as compared with other nations of antiquity, Rome governed those whom she had vanquished with wisdom and moderation. Particular governors, indeed, abused their power; but the policy of the State was not a severe one, and Rome connected herself with her subject allies by conceding them privileges proportionate to their importance or their services. The *jus Latinum* and the *jusItalicum* are terms familiar to all readers of Roman history. The first expressed that, with various degrees of completeness, the rights of Roman citizenship were accorded to the inhabitants of different towns, some having the *commercium* only, some also the *connubium*; but after the Social War (A.U.C. 663), the *lex Julia* (A.U.C. 664) and the *lex Plautia* (A.U.C. 665) gave the full rights of citizenship to Italy below the Po, and the Italians were distributed among the thirty-five tribes. The *jus Italicum* expressed a certain amount of
municipal independence and exemption from taxation, attached to the different places on which the right was bestowed. The citizens of some particular places in Italy above the Po and in the provinces possessed what was termed Latinitas, i.e. the status of being a Latin, and those possessing Latinitas were termed Latini coloniarii. They had the commercium, but not the connubium, and therefore their children were not in their power, and they could not vote for or fill public offices; and the jus Italicum was attached to certain privileged cities; but the provinces generally had no participation in either right. They were subject to a proconsul or propretor, paid taxes to the treasury of Rome, and had as much of the law of Rome imposed upon them, and were made to conform as nearly to Roman political notions, as their conquerors considered expedient.*

12. But the contact of Rome with foreign nations produced a much more remarkable effect on Roman law than the introduction of a new branch of law regulating the position of subject nations. It wrought, or at least contributed largely to work, a revolution in the legal notions of the Roman people. It forced them to compare other systems with their own. In the language of the jurists, it brought the jus gentium, that is, the law ascertained to obtain generally in other nations, side by side with the jus civile, the old law of Rome. The pretor peregrinus, who was appointed (A.U.C. 507) to adjudge suits in which persons who were not citizens were parties, could not bind strangers within the narrow and technical limits in which Romans were accustomed to move. Many of the most important parts of Roman law were such that their provisions could not be extended to any but citizens. No one, for instance, except a citizen, could have the peculiar ownership termed dominium ex jure Quiritium. But when justice and reason pronounced a stranger to be an owner, it was impossible for a pretor not to recognise an ownership different from that which a citizen would claim; and what magistrates were obliged to do in the case of strangers, the requirements of advancing civilisation soon induced them to do in the case of citizens. They recognised and gave effect to principles different from those of the municipal law of Rome. This municipal law remained in force wherever its provisions could give all that was required to do substantial justice; but when they could not, the pretor appealed to a wider law, and

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sought in the principles of equity a remedy for the deficiencies of the *jus* *civile*. He pronounced decrees (*edicta*), laying down the law as he conceived it ought to be, if it was to regulate aright the case before him. *An* process of time it became the custom for the *praetor* to collect into one *edictum* the rules on which he intended to act during his tenure of office, and to publish them on a tablet (*in albo*) at the commencement of his official year. The edict, put forward at the beginning of the year of office, and running on from one praetor to another, was termed the *edictum perpetuum*. How much the praetor was aided in the formation of a broader and more comprehensive system of law by a change in the form of actions, will appear when we come to speak of the system of civil process. By degrees such a system was introduced and fully established, and the *jus honorarium*, the law of the praetors* (qui honores gerebant), was spoken of as having a distinct place by the side, and as the complement, of the *jus civile*.

The praetors gave the formula of an action to the judge. For many centuries senators alone were judges until the *lex Sempronia* (a.u.c. 632) took away the right of being judges from the senators, and gave it to the knights. After a series of contests the right was shared by the two orders, and extended even to persons of inferior rank, so that the 300 of the senatorial times had become 4,000 by the time of Augustus. Besides the judges placed on the annual list (*in albo relati*) there were the *receptores*, who at first were appointed to determine causes to which *peregrini* were parties, but at a later period had jurisdiction in the causes of citizens. They were taken from every rank for the special occasion, sat three or more together, and were used in cases requiring despatch. And there were also the *centumviri*, taken so many from each tribe, and who judged of cases of *status*, Quiritary property, and testamentary and intestate succession.

13. The progress of law was also much facilitated by the growth of a body of men termed *juris consulti* or *The juris prudi-
*juris prudentes*, men who studied the forms and, in time, the principles of law, and expounded them for the benefit of their friends and dependents. They were generally among the first men of the State, and the employment was considered a natural part of a life of public service and magisterial honours.

* The term also included the edicts of the ediles, who issued decrees in matters that came specially within their province.
In the earlier times of the republic the patricians alone knew the
days on which it was or was not lawful to transact legal business,
and the forms in which actions were to be brought. The story of
the publishing of a collection of these forms, and of a list of the
days on which business could be transacted, by Cneius Flavius, is
familiar to all readers of Livy.* But although to a certain extent
the study of the law became open to all, whether patricians or
plebeians, yet it does not seem to have been ever undertaken except
by men of eminence. Such men used to instruct and protect the
persons who sought their advice, explain the steps necessary for
the successful conduct of an action, and write out the necessary
forms.† They gave answers when asked as to the law on a par-
ticular point; and though they professed only to interpret the
Twelve Tables, not to make laws, their notion of interpretation
was so wide that it included whatever could be brought within the
spirit of anything which the Twelve Tables enacted. Such answers
(responsa) were of course of no legal authority; but as the sage
would frequently accompany his client ‡ (as the questioner was
called) before the magistrate, and announce his opinion, it had
frequently all the effect upon the magistrate which a positive
enactment would have had, and thus the responsa prudentum
came to be enumerated among the direct sources of law. The
names of some of these sages have been handed down to us. Cato
the censor, and Severus Sulpicius, the contemporary of Cicero, are
those otherwise best known to us.§ In the latter days of the
republic the juris prudentes were men acquainted with some por-
tion at least of Greek philosophy, men of learning and general
cultivation; and it is not difficult to understand how powerfully
their authority, acting almost directly on judicial decisions, must
have contributed to the change which the law underwent towards
the end of the republic.

14. By far the most important addition to the system of

* Liv. ix. 46.
† The duty of a jurisprudent was respondere, agere, cavere.—Cic. de Orat.
i. 48.
‡ Clienti promere jura.—Hor. Epist. Bk. ii. Ep. i. 104. Clien means
literally 'a listener.'
§ Gibbon, viii. 81.
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came, and what was understood by it.* It came from the Stoics, and especially from Chrysippus. By *natura*, for which Cicero sometimes substitutes *mundus*, was meant the universe of things, and this universe the Stoics declared to be guided by reason. But as reason is thus a directive power, forbidding and enjoining, it is called law (*lex est ratio summa insita in natura, quae jubeat ea quae facienda sunt, prohibetque contraria*). But nature is with the Stoics both an active and a passive principle, and there is no source of the law of nature beyond nature itself. By *lex naturae*, therefore, was meant primarily the determining force of the universe, a force inherent in the universe by its constitution (*lex est naturae vis*). But man has reason, and as reason cannot be twofold, the *ratio* of the universe must be the same as the *ratio* of man, and the *lex naturae* will be the law by which the actions of man are to be guided, as well as the law directing the universe. Virtue, or moral excellence, may be described as living in accordance with reason, or with the law of the universe. These notions worked themselves into Roman law, and the practical shape they took was that morality, so far as it could come within the scope of judges, was regarded as enjoined by law. The jurists did not draw any sharp line between law and morality. As the *lex naturae* was a *lex*, it must have a place in the law of Rome. The prætor considered himself bound to arrange his decisions so that no strong moral claims should be disregarded. He had to give effect to the *lex naturae*, not only because it was morally right to do so, but also because the *lex naturae* was a *lex*. When a rigid adherence to the doctrines of the *jus civile* threatened to do a moral wrong, and produce a result that was not equitable, there the *lex naturae* was supposed to operate, and the prætor, in accordance with its dictates, provided a remedy by means of the pliant forms of the prætorian actions. Gradually the cases, as well as the modes in which he would thus interfere, grew more and more certain and recognised, and thus a body of equitable principles was introduced into Roman law. The two great agents in modifying and extending the old, rigid, narrow system of the *jus civile* were thus the *jus gentium* and the *lex naturae*; that is, generalisations from the legal systems of other nations, and morality looked on according to the philosophy of the Stoics as sanctioned by a law.

* The most important passages in Cicero with reference to the *lex naturae* are *De Leg*. i. 6–12; *De Nat. Deor.* i. 14, ii. 14. 81; *De Fin*. iv. 7. The expressions used in the text are from *De Leg*. i. 6.
But as, on the one hand, the generalisations from experience had in themselves no binding force, and as, on the other, the best index to ascertain what morality commanded was to examine the contents of other legal systems, the *jus gentium* and the *lex natura* were each the complement of the other, and were often looked on by the jurists as making one whole, to which the term *jus gentium* was generally applied.*

15. The centuries met to decide questions of war and peace, and to choose the higher magistrates; but the laws which, after the *lex Hortensia*, were passed to effect any real change in the body of Roman law, were almost all *plebiscita*. The *comitia tributa* were recognised as almost the exclusive centre of legislative power; but in the later times of the republic a continually increasing importance was attached to the ordinances of the senate. Gaius says that it had been questioned whether the *senatusconsultum* had the force of law.† Perhaps they had not exactly the force of law at any time under the republic, excepting when they related to matters which it was the peculiar province of the senate to regulate; but they were probably of little less weight than enactments recognised as constitutionally binding.

The Senate.

The senate successfully maintained a claim ‡ to exercise a dispensing power, and to release individuals from obedience to particular laws. It was generally able to reject a law, either wholly or partly, by calling in the aid of religious scruples; and if it added a clause to a law, the new portion of the law was as binding as the old.§ In the shape of directions to particular magistrates, it issued injunctions, of which the force was felt by all those who were subject to the magistrate’s power; and it made, we have reason to think, independent enactments in matters belonging to religion, police, and civil administration, and perhaps even in matters of private law.|| The senate comprised the richest and most influential men in the State; the disruption of society attending the civil wars strengthened their influence; and the Romans of the days of Cicero were quite prepared for the place which the senate held, as a legislative body, under the early Cæsars.

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* See Austin, *Jurisprudence*, Lect. xxx. and xxxi.
† Cicero mentions them among the sources of law.—*Topic*. 5.
‡ Ascon. *Argum. in Cornel*. (Orell. p. 57).
|| Puchta, *Instit.* sec. 75.
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The growth of law during the time that elapsed between the promulgation of the Twelve Tables and the commencement of the empire is marked not only by the abolition of the actions of law and the institution of pretorian actions, but by the development of the law of obligations, the old conveyance of nescum having expanded into, or been replaced by, verbal and literal contracts, and real contracts being recognised where no form but the delivery of the thing was required; and four forms of purely consensual contracts being admitted as part of the civil law; to all which the praetor constantly added cases in which he announced that he would recognise and enforce an obligation. The praetor, too, protected and regulated possession as apart from ownership; and his attention was bestowed on the ties of blood, the father being to some extent restrained from disinheriting his children, and cognati taking the place of gentiles in intestate succession.

16. The first emperors were only the chief magistrates of the republic. Augustus and his immediate successors The Emperor. united in their own persons all the highest offices of the State. The imperium, or supreme command, was conferred on them by the lex regia passed as a matter of form at the beginning of their reign, and by which the later jurists supposed that the people devolved on the emperor all their own right to govern and to legislate.* The assumption of despotism was veiled under an adherence to republican forms; and, at any rate during the first century of our era, the emperor always affected to consider himself as nothing more than the princeps reipublicae. Although we have instances, even in the time of Augustus, of edicts intended to be binding by the mere authority of the emperor, yet the people at first, and the senate afterwards, was recognised as the primary source of law. By degrees the emperor usurped the sole legislative authority, either dictating to the senate what it was to enact, or, in later times, enacting it himself. The will of the prince came to have the force of law.† Sometimes this will decided what the law should be by the publication of edicta pronounced by the emperor in his magisterial capacity, or mandata, orders directed to particular officers, or epistolas, addressed to individuals, or public bodies; sometimes by decreta, or judicial sentences given by the emperor, which served as precedents; at other times by rescripta, that is, answers given

* D. i. 4. 1.
† Inst. i. 2. 6: Quod principi placuit legis habet vigorem.
by the emperor to magistrates who requested his assistance in the decision of doubtful points.

17. The people did not cease to make laws for a considerable time after the commencement of the empire. These laws were, of course, really the creations of the emperor's will. Augustus, for instance, procured the sanction of legislation to a series of measures which made a considerable innovation in private law. These measures were designed to repress and discourage the excesses and corruption of a demoralised society. The lex Julia et Papia Poppæae, and others of a similar character, attempted to restore virtue to private life by a system of rewards and penalties, attached to the fulfilment or neglect of family duties, and consisting chiefly in the taking away of testamentary benefits from the unmarried and childless, and giving them to those married with children, and, in default, to the treasury. They failed in their object; but the portion of law to which they belonged, and especially that of testaments and legacies, was considerably modified by their provisions. To the time of Augustus also belongs the introduction of fideicommissa and codicils.

18. After the middle of the first century of our era, all legislative enactments of which we know are senatusconsulta. The election of magistrates was transferred to the senate from the comitia,† and the senate was entrusted with the cognisance of offences against the emperor and the State, and the decision of appeals from inferior tribunals.‡ The later jurists said that the senate was made to represent the whole people, because the number of the citizens became too great to permit of their acting as a political body.§ However historically false this may be, it yet is so far true that the senate was, in the earlier times of the empire, a body distinct from, and, in a certain very limited degree, opposed to, the emperor. We have some few memorable instances in Tacitus of senators who dared to speak what they thought.|| and who showed that the senate was, in more than name, a remnant of the republic. Gradually the very notion of independent action died away, and the senate met merely to adopt the will of its master.

* GAIUS mentions a lex Claudia.—GAIUS, i. 157.
† TACIT. Annal. i. 16.
‡ Suet. Calig. 2 Nero, 17. TACIT. Annal. xiii. 44.
§ Inst. i. 2. 5. Pomponius in Dig. i. 2. 2. 9. FUCHTA, Inst. sec. 106.
|| TACIT. Hist. iv. 8.
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19. The *edictum perpetuum*, the annual edict of the praetor, as being the written exposition of the *jus honorarium*, was the subject of many of the treatises of the Roman jurists. In the time of Hadrian, a jurist of great eminence, Salvius Julianus, was appointed by the emperor to draw up an edict, partly from existing edicts, partly according to his own opinion of what was necessary, which should serve as the guide and rule of all succeeding praetors. The edict which he drew up, and to which the sanction of Hadrian gave the force of law, was itself termed the *edictum perpetuum*, the word *perpetuum*, instead of meaning, as before, that the edict ran on from year to year, being used to express that the edict was permanent and unchangeable. The different magistrates, who had to apply the edict, would thenceforward use their own discretion only when the edict drawn up by Julianus did not serve as an express authority.

20. The writings of the jurists, the authority attached to their decisions, and the admirable manner in which they developed and arranged the law, formed the most marked feature of the legal history of this period. Augustus found the position which the great sages of the law held in public opinion too important a one to be overlooked in his scheme of government. He formally gave to their decisions the weight which usage had in many instances given them already; and it was enacted that their answers should be solicited and announced in a formal manner, and given under the sanction of the emperor. Hadrian decided that they should have the force of law, provided the respondents all agreed in their answer; but, if they differed, the judge was at liberty to adhere to whichever opinion he preferred.* Among the eminent jurists of the days of Augustus was Trebatius, whose opinion, as the Institutes tell us, was specially asked by Augustus as to the propriety of admitting codicils. Two others, of even higher authority, Antistius Labeo and Ateius Capito, represented in the same period two opposite modes of regarding law, and were the founders of schools which maintained and handed down their respective opinions. Labeo, in whom a wider culture had instilled a love of general principles, did not hesitate to make such innovations as he conceived reason and philosophy to require: Capito was distinguished by the fidelity with which

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* GAIUS, i. 7.
he adhered to the law as he had himself received it*. A succession of jurists of greater or less renown divided themselves under the banners of these rival authorities. But the schools of which Labeo and Capito were the first authors did not derive their names from their founders. The one school was termed Proculians, after Proculus, a distinguished follower of Labeo; the other Sabinians, after Sabinus, a follower of Capito. Gaius, who informs us that he was a Sabinian, gives the differing opinions of the two schools on many subtle questions of law. By the labours of this succession of jurists, the law was moulded and prepared until it came into the hands of the five great luminaries of Roman jurisprudence—Gaius, Papinian, Paul, Ulpian, and Modestinus, whose writings, as we shall see, were subsequently made a distinct and special source of law.

21. Gaius, or Caius, as the name is sometimes written, was probably born in the time of Hadrian, and wrote under the Antonines. Of his personal history nothing is known. He himself tells us that he was an adherent of the school of Sabinus. Besides other works which he is known or supposed to have written, he composed a treatise on the *edictum provinciale* (the edict of the proconsul in the provinces) and a commentary on the Twelve Tables. But the work by which he is best known to us is his Institutes. The discovery of the manuscript of this work by Niebuhr in 1816 has contributed greatly to the modern knowledge of Roman law. The manuscript had been written over with the letters of St. Jerome, and its existence was almost entirely unknown until Niebuhr brought it to light while examining the contents of the library of the Chapter at Verona. The Institutes of Gaius formed the basis of those of Justinian, who has followed the order in which Gaius treats his subject, and adopted his exposition of law, so far as it was applicable to the times in which the Institutes of Justinian were composed. The work of Gaius, therefore, showing us what was common to the two periods, and also where the law had changed, enables us to understand what the change was, and what the law had really been at the time when its system was most perfect.

22. Æmilianus Papinianus was the intimate friend of the

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* Aetius Capito in his, quæ ei tradita fuerant, perseverabat. Labeo ingenii qualitate et fiducia doctrinae, qui et ceteris operis sapientia operam dederat, plurima innovare instituit.—Dig. i. 2. 2. 47.
Emperor Septimius Severus, and held under him the office of praetorian prefect, which had now become equivalent to that of supreme judge. He probably accompanied Severus into Britain, and was present at the emperor's death at York in A.D. 211. Severus commended his two sons, Geta and Caracalla, to his care. Caracalla dismissed Papinian from his office; and, after his murder of Geta, is said to have required Papinian to compose his vindication. Papinian refused, and was executed by the orders of Caracalla. He was considered the first and greatest of jurists, and every epithet which succeeding writers could devise to express wisdom, learning, and eloquence, was heaped on him in profusion. We know, from the Digest, of his Books of Questions, Books of Answers, and Books of Definitions. The fragments of his works which we possess amply justify his eminent reputation.

23. Paul, Ulpian, and Modestinus are all said to have been pupils of Papinian. Julius Paulus was a member of the imperial council and praetorian prefect under Alexander Severus (A.D. 222). Besides numerous fragments in the Digest, we possess his Receptæ Sententiaræ, which was long the chief source of law among the Visigoths in Spain. The most celebrated of his works, which were very numerous,* was that Ad Edictum in eighty books.

24. Domitius Ulpianus derived his origin, as he himself tells us, from Tyre in Phœnicia.† He wrote several works during the reigns of Septimius Severus and Caracalla, and perished (A.D. 228) by the hands of the soldiers, who killed him in the presence of the emperor, Alexander Severus. He was praetorian prefect at the time of his death, but the exact time when he was first appointed to the office is unknown. The Digest contains a greater number of extracts from his writings than from those of any jurist. Besides these extracts, we also possess fragments of his composition in twenty-nine titles, known by the name of the Fragmenta Ulpiani.

25. Herennius Modestinus was the pupil of Ulpian as well as of Papinian. He was a member of the imperial council in the time of Alexander Severus, but hardly anything is known of his history. One of the best known of his writings is the Excusationum Libri. We have nothing remaining

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* We know the names of more than seventy, embracing an extraordinary variety of subjects.
† D. I. 15. 1. pr.
of his composition except the extracts from his works given in the Digest.

26. The influence of Christianity on Roman law was partly direct, partly indirect. The establishment of a hierarchical rank, the power granted to religious corporations to hold property, the distinction between Christians and heretics, affecting the civil position of the latter, the creation of episcopal courts, and many other similar innovations, gave rise to direct specific changes in the law. But its influence is even more remarkable in the changes which were suggested by its spirit, rather than introduced as a necessary part of its system. To the community which citizenship had bound together* succeeded another bound by the ties of a common religion. The tendency of the change was to remove the barriers which had formed a part of the older condition of society. If we compare the Institutes of Justinian with those of Gaius, we find changes in the law of marriage, in that of succession, and in many other branches of law, in which it is not difficult to recognise the spirit of humanity and reverence for natural ties, which Christianity had inspired. The disposition to get rid of many of the more peculiar features of the old Roman law, observable in the later legislation, was partly indeed the fruit of secular causes; but it was also in a great measure due to the alteration of thought and feeling to which the new religion had given birth. But it was not only the substance of the law that was changed under the emperor. The forms of procedure became different. Even under the formulary system the magistrate had occasionally, instead of sending the trial of an action to the judex, disposed of it himself (cognitio extraordinaria). The practice grew more frequent as the empire went on, and in A.D. 294 Diocletian ordered the presidents of the provinces themselves to try all cases. The formulary system and the exposition of the law by the pretors became a thing of the past, and the law was altered by the enactments of the emperor, and administered directly by the magistrates.

27. Before we pass to the legislation of Justinian, we must bestow a cursory notice on the efforts made by Theodosius II. to determine and arrange the law, and to

* The value of citizenship was greatly lessened by the recklessness with which it was extended. Caracalla (A.D. 212) gave the citizenship to all persons not slaves, who were then subjects of the empire, leaving it, however, possible, that slaves imperfectly manumitted after this date should hold the place of Latini, not of cives.
promote its study. With a view to keep alive and increase the knowledge of law, he founded (in A.D. 425) a school of jurisprudence at Constantinople. He and Valentinian also constituted the works of the five great writers, Gaius, Papinian, Ulpian, Paul, and Modestinus, into a source of law of the highest authority, enacting by a constitution ("the Law of Citations"), published A.D. 426, that the judge should always be bound by the opinion expressed by the majority of these writers; if those among them who expressed an opinion on the point were equally divided, the opinion of Papinian was to prevail: if he was silent, the judge could use his own discretion. In A.D. 438, Theodosius published his Code, containing a collection of the constitutions of the emperors from the time of Constantine. It was made on the model of two earlier collections compiled by the jurists Gregorianus (A.D. 306) and Hermogenianus (A.D. 365).

28. The Emperor Justinian was of Gothic origin. His native name was Upranda, a word said to mean upright, and thus to have found an equivalent in the Latin Justinianus. He was born at Taurisium in Bulgaria, about the year A.D. 482, and having been adopted by his uncle, the Emperor Justin, succeeded him as sole emperor in the year A.D. 527. He died in A.D. 565, after an eventful reign of thirty-eight years. Procopius, the secretary of his general Belisarius, has left us a secret memoir of the times, which, if we may rely upon his accuracy, would make us believe Justinian to have been a weak, avaricious, rapacious tyrant. His court, wholly under the influence of his wife Theodora, a degraded woman, whom he had raised from the theatre to share his throne, was as corrupt as was customary in the empire of the East. Justinian would never have been distinguished from among the long list of eastern emperors had it not been for the victories of his generals and the legislation to which he gave his name. The successes of Belisarius and Narses have shed the splendour of military glory over his reign. But his principal claim to be remembered by posterity is his having directed the execution of an undertaking which gave to Roman law a form that fitted it to descend to the modern world.

29. In the year A.D. 528, Justinian issued instructions for the compilation of a new code, which, founded on that of Theodosius, and on the earlier codes on which that code was based,* should embrace the imperial constitutions down

* Shortly before the time of Justinian, three attempts had been made to
to the date of its promulgation. The task was entrusted to a body of ten commissioners, who completed their labours in the following year, and in the month of April, A.D. 529, the emperor gave it his sanction, and abolished all preceding collections.

30. In the December of the following year, Tribonian, who had been one of the commission appointed to draw up the code, and who had recommended himself to the emperor by the energy and ability he had shown, was instructed, in conjunction with a body of coadjutors whom he selected to the number of sixteen, to make a selection from the writings of the elder jurists, which should comprehend all that was most valuable in them, and should form a compendious exposition of the law. In spite of the foundation of schools of jurisprudence, of which those of Rome, Constantinople, and Berytus were the most famous, the knowledge which the lawyers of the time had of the writings of the old jurists was exceedingly limited. Justinian wished not only to promulgate a body of law which should not be too bulky and voluminous for general use, but also to provide a work, the study of which should form a necessary part of legal education. The commissioners performed their task in the short space of three years, and on the 30th of December, A.D. 533, the emperor gave to the result of their labours the force of law. The compilation, termed Digesta, or Pandectae, from its comprehensive character, was divided into fifty books, and was arranged on the model of the perpetual edict. Ulpian's work on the edict had been a textbook in the schools of jurisprudence, and probably it was this that determined the commissioners to adopt a model* which has prevented their work having anything like a scientific arrangement. There are thirty-nine jurists from whose writings the Digest contains literal extracts, those from Ulpian and Paul constituting about one-half of the whole work.

31. The Digest was too vast a work, and also required for its comprehension too great a previous knowledge of law, to admit of its being made the opening of a course of

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* Warnkeinig, Hist. du droit romain, p. 182.
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legal study. Justinian, therefore, determined to have an elementary work composed. He had declared his intention in the constitution of December A.D. 530, in which he directed the compilation of the Digest; and Tribonian, in conjunction with Theophilus and Dorotheus, respectively professors in the schools of Constantinople and Berytus, were appointed to draw it up, and like the Digest it became law on the 30th of December, A.D. 533. This elementary work is the Institutes. It was formed on the basis of the Institutes of Gaius, alterations being made to bring it into harmony with the Digest and Code. Theophilus, shortly after the promulgation of the Institutes, published a Greek paraphrase of the work, which throws much light on many passages in the Latin, and which became the sole form in which the Institutes were known to the Greeks of the East.

In the Eastern Empire the works compiled by order of Justinian were only known by Greek paraphrases and abridgments. From these there were made from time to time compilations in which the constitutions of successive emperors were inserted. Otherwise the knowledge of Roman law may be said to have died out of the East altogether. In the West its fate was different. Justinian in 554 ordered that his different works should be observed as the law of Italy. The inroads of the Lombards, however, soon confined the sphere in which the provisions of an emperor of the East could take effect to Rome, Ravenna, and some districts of the south and centre. Here the knowledge of the legislation of Justinian never died out, until in the twelfth century there was established at Bologna a school of commentators (glossatores), who brought much learning, ingenuity, and industry to the study of the old law, and whose labours formed the beginning of modern researches into the subject.*

32. There were still some points which had been debated by the old jurists, and to which the legislation of Justinian did not as yet furnish any answer. To determine these, Justinian published a book of Fifty Decisions; and as the Code of the year A.D. 529 was a very imperfect work, it was determined to revise that Code, and to incorporate the Fifty Decisions in the revised edition. Tribonian was appointed to superintend

* Of the Digest there is one manuscript of unknown antiquity, but certainly prior to the glossatores, which was found at Pisa, and was brought thence to Florence, where it now is. Of the Institutes there is no manuscript of an earlier date than one of the 10th century, known as the codex Bambergensis.
the undertaking, and in December, A.D. 534, the new code, called
The second
Code.
the code repetitae prælectionis, received the force of
law. This is the code we now have; the former code,
that of A.D. 529, was carefully suppressed, and no trace of it
remains. The Code, which is divided into twelve books, is arranged
nearly in the same manner as the Digest.

33. But Justinian could not endure that his having systema-
tised the law should exclude him from law-making.
The Novels.
He announced in the Code* that any legislative
reforms he might at any future time see fit to make should be
published in the form of Novellæ Constitutiones. Many such
Novellæ were afterwards published; the first in January, A.D. 535,
the last in November, A.D. 564. Altogether they amount to 165;
but no collection of them seems to have been made in the lifetime
of Justinian. Few of them bear a later date than A.D. 545, the
year of Tribonian's death.

34. The Institutes of Justinian, after a few general observa-
tions on the nature, the divisions, and the sources of
law, proceed to treat, first of persons, then of things,
then of successions to deceased persons, then of obli-
gations, and lastly of actions. An arrangement as nearly similar
as possible will be observed in the following outline of Roman
private law.

ROMAN PRIVATE LAW.

The reader of Mr. Austin's Treatise on the Province of Juris-
prudence will remember that he proposes, in the outline given
in the Appendix, to treat the subject of Law, by examining, first,
the science of General Jurisprudence, that is, of the legal notions
and principles which enter into every system of law; and secondly,
the science of Particular Law, that is, as he explains it, 'The
science of any such system of Positive Law as now actually ob-
tains, or once actually obtained in a specifically determined
nation;' and he carefully distinguishes between the sciences of
general and particular jurisprudence and the science or sciences
which would tell us, not what law is, but what law ought to be.

The Roman jurists made no approach to a division of the sub-
ject so accurate and so exhaustive. It is their great merit, the
real source of their value to modern Europe, that they apprehended
and elucidated the great leading principles and notions of general

* Const. de Emend. Cod. 4.
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jurisprudence; but they did not clearly distinguish between general jurisprudence and the municipal law of Rome, or between law and morality. As we have said before, they assumed, on the authority of Greek philosophy, that there was a *lex naturae* binding on them because it was a *lex*, and they endeavoured to work up the dictates of this law and of the *jus gentium* together with the provisions of the old *jus civile* into a whole. The Institutes of Gaius open with a declaration that every system of law must contain the two elements of general and municipal law; but in the Institutes of Justinian there are prefixed two definitions taken from the writings of Ulpian; and, while the definitions themselves illustrate the inexactness with which the jurists determined the province of jurisprudence, the place assigned to them in this compilation shows the utter want of anything like philosophy in the age when the Institutes were written. The first definition defines the moral virtue of justice by reference to a legal term (*jus*), which it leaves unexplained: the second pronounces jurisprudence to be the ‘knowledge of things human and divine,’ a phrase which, originally referring, perhaps, to the distinction between pontifical and secular law, has no general meaning, except as a summary of the philosophy which thought that law was the expression of a reason common to the universe and to man. We can only treat the Roman notions of law and jurisprudence historically, and ascertain what they were and whence they came; we cannot make them fit into the more accurate shapes assigned to these general terms by the modern philosophy of law.

35. The preceding historical sketch will have sufficed to show what were the sources of Roman law: (1) There was the old *jus civile*, which mainly depended on custom as its basis. (2) There were the judicial decisions of the *prætori*, and the opinions of the *juris prudentes*, supplementing the *jus civile* from the dictates of the *lex naturae* and the *jus gentium*; and (3) There were positive enactments, which may be divided into *leges*, *plebiscita*, *senatusconsulta*, and announcements of the will of the emperor.

36. The main legal term with which we have to start in approaching Roman law is *jus*. The word is used to signify both the sum of rights and their corresponding duties, sanctioned by law, and also any group, or any single one of these rights. The law prescribes different relations in which the members of a State are to stand to things and to each other.
The claim, protected by legal remedies, which each man has to have any of these relations observed in his own case is a right; and as the right must be conceived to belong to or reside in a person, we speak of a right being the right of a person, e.g. my right to have that book, your right to have that house (jus meum, jus tuum). When we examine the different rights established by law in a State, we find some of a public character, affecting individuals as members of a body politic; others of a private character, affecting individuals directly. It is only of the private rights established by Roman law that we now propose to speak; and as rights are either rights which persons have over things, or rights which persons have against some other person or persons, we shall treat, first, of the mode in which the Roman law regarded persons; then of the mode in which it regarded things; then of the rights it gave to persons against persons; and, lastly, of the method by which the State enforced private rights when disputed or disregarded, that is, the system of civil process.

I. PERSONS.

37. The word persona had, in the usage of Roman law, a different meaning from that which we ordinarily attach to the word person. Whoever or whatever was capable of having, and being subject to, rights was a persona. Slaves were personae in the sense that they were not merely things, and they could go through some legal forms and were entitled in later times to a certain amount of legal protection; but although they are thus treated of under the law of persons, it is chiefly their want of legal capacities that attracts attention. Many personae, however, had no physical existence. The law clothed certain abstract conceptions with an existence, and attached to them the capability of having, and being subject to, rights. The law, for instance, treated the State as a persona, capable, for example, of owning land or slaves (ager publicus, servi publici). So, a corporation, or an ecclesiastical institution, was a persona, quite apart from the individual personae who formed the one and administered the other. Even the fiscus, or imperial treasury, as being the symbol of the abstract conception of the emperor's claims, was spoken of as a persona.

38. The technical term for the position of an individual re-
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Karded as a legal person was status, and the constitutive elements of his status were liberty, citizenship, and membership in a family. First, he must be free. A slave had no rights. In the earlier days of Roman law, no one would have conceived this to be unnatural. But philosophy, and the study of morality, taught the later jurists that the condition of a slave was a violation of natural law. It was not, however, necessary that the person should have been born free (ingenuus); for the process of manumission placed the slave in some degree on a level with the ingenuus by making him a freedman (libertinus, or, if spoken of with reference to his patron, libertus*). It depended on the mode and circumstance of his manumission whether he became at once a Roman citizen; but in whatever way he was enfranchised he still owed certain duties to his patron, and in certain cases his patron was his heir.

39. The second element of the status was citizenship. The Roman notion of the State was that of a compact privileged body separated off from the rest of the world by the exclusive possession of certain public and private rights. In the early times of Rome the cives, or members of the State, were divided into two bodies of patres and plebeians, the former of whom had a public and sacred law peculiar to themselves, while they shared with the latter the system of private law. Beyond the State all were hostes and barbari. But as civilisation advanced, the number of foreigners who resorted to Rome for trade, or were otherwise brought into friendly relations with citizens, was so great that they were looked upon as a distinct class, that of peregrini. To be a citizen was thenceforward not to be a peregrinus, the force of the one idea being brought out by the prominence of its opposite. A peregrinus was subject to the jus gentium; citizens alone could claim the privileges of the jus Quiritium. But when her conquests placed Rome in new and varying relations with the nations of Italy, an intermediate position between the citizen and the peregrinus was accorded to the more privileged of the vanquished. Some of the rights of the citizen were given to them, and some were withheld. These peculiar rights of the citizen were summed up in the familiar term suffragium et honores, the right of voting and the capacity of holding magisterial offices, and in the terms connubium and commercium.

* The Latin for a freedman was libertinus; but libertus Titii is the Latin for the freedman of Titius.
Connubium is a term which explains itself. The foundation of the Roman family was a marriage according to the jus Quiritium, and not to have the connubium was to be incapable of entering into the Roman family system. In the word commercium were included the power of holding property and making contracts according to the Roman law, and also the testamenti factio, or power to make a will, and to accept property under one. By the jus Latinum and the jusItalicum various modifications of the different rights implied in the civitas were granted. The jus Latinum gave private rights to individuals, the jusItalicum gave public rights to towns. In some cases the jus Latinum gave the connubium and commercium; in some only the latter, in many only a portion of the latter, the testamenti factio, the power of making, or taking under, a testament, being withheld. The jusItalicum gave certain favoured towns a free municipal constitution, an immunity from direct taxation, and made the soil subject to Quiritarian ownership (see sec. 58). In the course of time other shades between the civis and the peregrinus were introduced, but all distinction between them was gradually swept away by the increasing recklessness with which the rights of citizenship were bestowed. At last Caracalla made all the free subjects of the empire citizens; and thenceforward the class of peregrini, properly speaking, ceased to exist. All the free inhabitants of the civilised world were cives, and beyond were nothing but barbari and hostes.

40. The Roman family, in the peculiar shape it assumed under the jus Quiritium, was modelled on a civil rather than on a natural basis. The tie which bound members of the same family was not that of blood; it was their common position in the midst of a peculiar system. For the formation of such a family, a legal marriage was an indispensable preliminary; but it was only a preliminary, and the peculiar character of the family did not in any way flow from the tie. The head of the family was all in all. He did not so much represent as absorb in himself the subordinate members. He alone was sui juris, i.e. had an independent will; all the other members were aliiendi juris, their wills were not independent, but were only expressed through their chief. The paterfamilias, the head of the family, was said to have all the other members of his family in his power; and this power (patria potestas) was the foundation of all that peculiarly characterised the Roman family. At the head of the family stood
the *paterfamilias* alone. Beneath him came his children, sons and daughters, and his wife, who, in order to preserve the symmetry of the system, was treated by law as a daughter.* If a daughter married, she left this family, and passed into the family of her husband, but if a son married, all his children were as much in the power of the *paterfamilias* as the son himself. Thus all the descendants through the male line were in the power of the same person. And it was this that constituted the link of family relationship between them, not the natural tie of blood. When the *paterfamilias* died, each of the sons became in his turn a *paterfamilias*; he was now *sui juris*, and all his own descendants through the male line were in his power. Each of the daughters, as long as she remained unmarried, was also *sui juris*; but directly she formed a legal marriage, and thereby entered into her husband's family, she passed into the power of another. Hence it was said that a woman was at once the beginning and end of her family, *caput et finis familie suæ*, for directly she attempted to continue it, she passed into another family.

41. Persons who were under the power of another could not hold or acquire any property of their own. All belonged to the *paterfamilias*; and whatever the son acquired was acquired for the father. In matters of public law the *filiusfamilias* laboured under no incapacities; he could vote or hold a magistracy, but in all the relations of private law he was absolutely in his father's power. He could not make a will, for he had no property to dispose of; nor bring an action, for nothing was owing to him. But in all public relations, whenever this incapability of possessing property was not in question, the *filiusfamilias* had all the privileges of a citizen; he had, for instance, the *connubium*, and could contract a legal marriage; and the *commercium*, and could, therefore, be a witness in sale by mancipation, to which none except citizens could be witnesses. The indulgence of later times permitted the *filiusfamilias* to hold certain property apart from the *paterfamilias*, an indulgence first accorded as an encouragement to military service. But this was always treated as a notable departure from the strict theory of law.

42. The distinction between the legal and the natural family

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* She was technically said to be in the *manus* of her husband; and perhaps *manus* is the old word signifying the power of the *paterfamilias*, and *potestas* is only an expression of later Latin.
is illustrated by its being possible for a member of the legal family to quit it and become an entire stranger to it, and for an entire stranger to be admitted to it, and be as completely a member as if he were a son of the paterfamilias. The mode by which the change in either case was accomplished was by a fictitious sale. Every Roman citizen could sell himself to another by the peculiar form of sale called mancipatio; and as the father possessed over the son the rights which a person sui juris possessed over himself, he sold the filiusfamilias to a nominal purchaser, who was supposed to buy the son. It was declared by the law of the Twelve Tables, that a son thrice sold by his father should be free from his power, and the ceremony was therefore repeated three times, and the son was then emancipatus, or sold out of the family. When a stranger, being himself alieni juris, wished or was compelled to enter a family, the process was effected by adoption. Here, again, then, was another sale, the paterfamilias of the family he quitted being the seller, and the paterfamilias of that he entered being the purchaser. If the stranger was sui juris, he entered his new family by arrogation, which in ancient times could only be effected by a vote in the comitia curiata, it being considered a matter of public policy to keep a watch over such a proceeding, lest the last of his gens should arrogate himself, and its sacra be lost. Much simpler modes for effecting arrogation, as well as for effecting emancipation and adoption, were employed in later times; and one of the most important changes in law introduced by Justinian was that by which he altered the character of adoption, and decreed that, unless the adopter was an ascendant, the person adopted should not pass out of his natural family.

43. A person might be sui juris, and be in possession of every right, and yet be unable, through some imperfection, to exercise the rights he possessed. A child, for instance, was not only not able to conduct his affairs with discretion, but he was unable to understand, perhaps to speak, the forms necessary to be expressly pronounced in almost every legal transaction. A tutor was therefore appointed, who, until the child attained the age of puberty, supplied this defect of his ward, or, as he was called, his pupil. And this is the Roman notion of a tutor: he was a person who supplied something that was wanting, who filled up the measure of his pupil's persona.* He of course

* Persona had in Roman law a double signification. It meant a person
took care of the person and property of the child; but this was only an accessory of his position; his primary office was to supply by his auctoritas* what the pupil fell short of. So, too, in the old law, unmarried women, of whatever age, remained in the tutelage of their relations. Further, a person might be sui iuris, and be of an age to exercise his rights, and yet it might be necessary to insur that he did not hurt himself and his family by the mode in which he exercised them. In such cases, a curator was appointed, whose duty it was to look after his property. This curator had a perfectly different office from a tutor; in technical language, the tutor was said to be appointed to the person, the curator to the property. The curator was only appointed as a check to prevent pecuniary loss. Curators were also appointed to watch over the interests of insane persons, and of persons notoriously prodigal, as well as of those who had attained the age of puberty, but were under the age of twenty-five.

44. While the head of a family lived, all those who were in his power were connected together by the tie of agnati. Subjection to the power of the same person. The tie was called agnatio, and the persons so mutually connected were agnati to each other. When the paterfamilias died, the tie of agnatio still subsisted. Each of those who, by his death, became sui iuris, became the head of a new family; but still they and their descendants were agnati to each other so long as they did not by emancipation or by adoption, or, in the case of women, by marriage, leave their original family. All those, in short, who would have been agnati to each other if the life of the original paterfamilias had been prolonged, were agnati at any distance of time, however great, after his death. A number of distinct families might thus, when looked on as connected by agnatio, be spoken of as one family; for they were all portions of the family of a deceased paterfamilias.

45. Beyond the circle of the agnati, the ancient patrician had that of the gens. They were nearer to him than those who were only related to him by blood. If a patrician died intestate, in

* The derivation of auctoritas should never be lost sight of. When one person increased, augebat, what another had, so as to fill up a deficiency, this increasing or filling up was called auctoritas.
default of agnati, his gentiles, the men of his gens, were his heirs. He was placed in the midst of two artificial circles, shutting out the natural circle of blood relations; while the plebeian, unless he happened to belong to one of the few plebeian gentes, and, when the system of gentes had faded away, the patrician also, acknowledged the ties of blood as next to that of agnatio. All those who were connected together by the ties of blood were cognati. It was the tendency of the later Roman legislation to give greater and greater weight to the ties of blood, and to substitute a natural, for an artificial, system of family relationship. Lastly, the cognati of each of the parties to a marriage were said to be affines to the other party.

46. We have spoken as if the wife had been always in the manus, or power, of her husband. And this was so, probably, in the strict theory of the Roman family, and in the practice of early times. The tie of marriage was formed among the patricians by the ceremony of confarreatio, in which none could partake except those who had the privileges of the jus sacrum; and apparently the mere fact of going through the ceremony placed a wife in the manus of her husband. The plebeians had no corresponding ceremony; and in order that, when two persons came together in marriage, the wife should be in the power of the husband, she was sold to the husband by the father; a process which was termed coemptio, or if she remained with her husband a year, then the power over her was acquired by usus, that is, by the uninterrupted lapse of time. If, however, she absented herself for three consecutive nights in the year, this prevented her falling into the husband's power. Perhaps, at all times, at least in plebeian families, a woman could so marry as not to fall into the manus of her husband; and in later times such marriages formed the rule. It made no difference in other relations of the family whether the wife was in the power of the husband or not. Supposing she and her husband had the connubium, that is, were capable of intermarrying, all the usual incidents of a marriage, such as the patria potestas, attached to the connection. If a man and a woman entered into a permanent connection without marriage (concubinatus), their children were naturales liberi, and were so far favoured by the later law as to be capable of being placed in the position of children sprung from a legal marriage, by the process
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of legitimatio. After the time of Constantine they might be made legitimate by the subsequent marriage of their parents. In all unions of the sexes, other than a legal marriage, the children followed the condition of their mother: being free, that is, if she was free, and slaves if she was a slave. The union of slaves was called contubernium; but however solemnly entered into, and however faithfully its natural tie acknowledged, it was never in the eye of the law regarded as anything better than promiscuous intercourse.

47. It was possible that any one who possessed a complete status should undergo a change of status, and this Diminutio capitis.

change might happen in any one of the three component parts of the status. The capability of exercising all those rights implied in a perfect status was frequently spoken of as a man's caput, and the change in each of these component parts was said to be a diminutio capitis, a lessening or impairing of the caput. First, a man might lose his freedom; he might be taken prisoner by an enemy, or undergo a very severe criminal sentence. The loss of this element of the status, called capitis diminutio maxima, involved the loss of the remaining two, the person who ceased to be free ceasing also to have the rights of citizenship or family rights. Secondly, he might lose his rights of citizenship, and this loss, called capitis diminutio media, involved the loss of family rights, but still left him free. Thirdly, by what was called capitis diminutio minima, he might lose his position in his family by emancipation or arrogation. In early times there were rights, principally those forming part of the jus sacrum, which a person who passed out of his family really lost; but in later times, as in every case the person who underwent this capitis diminutio either entered another family, or became the head of his own family, his status was really not made at all less perfect by the change. Of course this capitis diminutio involved the loss of neither of the two other component parts of the status.

48. When a person was possessed of a perfect status, he was considered to enjoy a high dignity and reputation in the eyes of others. This reputation (existimatio) the Romans considered as one of the chief possessions of a person. It was even to a certain extent regulated by law. If a person ceased to be free, his existimatio was gone. Certain offences were treated by law as impairing it. If the offence was so grave as to
impair the _existimatio_ very seriously, its diminution was said to amount to _infamia_. For example, a partner, or a mandator, condemned in an action _pro socio_ or _mandato_, was stamped with infamy. The consequences of infamy were, that the guilty person could not vote, could not receive public honours, and could not bring a public prosecution. If the offence was rather less grave, the consequence was _turpitude_; and if the person was in some inferior position, as, for instance, an actor, he was said to be marked with a _levis nota_, a slight brand of disgrace.

49. It only remains to be observed that, although persons that were the mere creations of law, as corporations, ceased to exist when the law in any way put an end to their existence, as by the dissolution of the corporation, yet the person of individuals, that is, their legal, as opposed to their natural being, did not become extinct by their death. At the moment of death it was shifted to those who represented them. The son was clothed with the person of the father, the heir with that of the testator. What we mean by saying that the deceased is represented, that is, again made present and brought before us, the Roman jurists expressed by saying that his person had been shifted to those who succeeded in his place.

**II. THINGS.**

50. The word _thing_ (_res_) has, in Roman law, a sense as artificial and as wide as the word _person_. As person comprehends every legal being that has rights and is subject to them, so thing comprehends all that can be considered as the object of a right. The object of a right may be incorporeal, or the pure creation of law, and need not be limited to things corporeal and visible. The law can separate the right to possess a field and the right to walk in it, and the object of each right is called indifferently a thing. When we attempt to classify these objects of rights, we are unable to select any one principle of division according to which we may distribute them. The aspects in which we may view them are too various to admit of a simple arrangement; we may, however, make a division approximately accurate by considering, first, those heads of things which we arrive at by examining the nature of the things themselves; and secondly, those which we arrive at by inquiring into the interest which persons have in them.
51. First, then, things may be corporeal or incorporeal; or, as the jurists expressed it, tangi possunt or tangi non possunt. We see a house or a field; we do not see a right to inhabit the one or reap the fruits of the other. The physical tangible object of sense is a corporeal thing; the intangible abstraction of the mind is an incorporeal thing. Incorporeal things always consist in a right; if we see a stream flowing, or a path winding through a field, the mind sees, as something distinct from the object of sense, the power of using the water or of following the path. This power is, in the language of the law, an incorporeal thing; and a person may have a right to possess it just as he may have a right to possess a house or field. Strictly speaking, the right to own a field, and not the field itself, is what the law takes cognisance of, and this is as much incorporeal as the right to walk over it. But Roman law has adopted or introduced the popular way of speaking, according to which we say, 'I have a field;' 'I have a right of way over a field.'

52. We may again speak of corporeal things as moveable and immovable (res mobiles, se mouventes, and res soli, res immobiles), a distinction so obvious that it needs no other remark than that some moveable things are so incorporated with immoveables, or so constantly associated with their use, that the law treats them as immoveables; as for instance a house, each brick of which is a moveable, is itself an immovable, because attached to the soil.

53. Things are also either divisible or indivisible. We cannot divide a slave or a horse so that the several parts have the same value which they had when they were parts of a whole; but if we divide a field into four, we have four small fields.

54. They are also principal or accessory; that is, they are the direct object of rights, or are only so as forming a portion of, or being intimately connected with, something that is; thus a tree is a principal thing, its fruit an accessory.

55. Another distinction relating to things familiar to the Roman jurists was that between the genus and the species. By the genus was meant a whole class of objects, such as horses, or the general name for an object, such as wine, oil, wheat. Species was the particular member of the
class, or particular portion of the object comprehended under the genus, as this horse, or the wine in this bottle. If a purchaser bought a horse, or a certain quantity of oil, the thing bought was said to be determined genere; if he bought a particular horse or the oil in a certain vase, the thing bought was said to be determined specie. All things which are included under a general name, such as oil or wheat, are commonly divided by being weighed, numbered, or measured, and were therefore spoken of by the jurists as being those things quae pondere, numero, mensurae constant.

56. We may, lastly, regard things as particular, or as collected under some head, when the whole collection is a thing in law. Thus a sheep is a particular thing (res singularis); a flock, composed ex distantibus uni nomini subjectis, is a collection of things, or, as the jurists expressed it, is a res universtas (or simply universitas). As also, of course, are such comprehensive things as an inheritance, a marriage portion, the peculium of a slave.

57. In proceeding to the second division of things according to the persons who have rights over them, and to the extent of those rights, we must first notice the distinction in things caused by certain things having a sacred character (res divini juris). These were res sacrae, consecrated to the superior gods; or res religiousae, such as tombs or burial-grounds, consecrated to the infernal gods; or, lastly, res sanctae (hallowed), things human, but having a sort of sacredness attaching to them, such as the walls and gates of cities.

58. The State, again, impressed on some things a peculiar character. All things which were held by peregrini and not by citizens were peregrina. The soil which was included in the territories of the early State, the ager Romanus, was distinguished from all other land by being alone capable of being the subject of sale by mancipation, and being alone held by the special tenure of the jus Quiritium.* In later times a greater portion of the soil of Italy was placed on the same footing with the soil of the ager Romanus, and solum Italicum came to be the name of all soil wherever situated to which the privileges of the old ager Romanus were accorded, as opposed to solum provinciale, which always remained, at least in theory, the

* Dion. Halicarn. iv. 18.
property of the State, and of which a perfect ownership could not be acquired.* This difference in the tenure of the soil, which had in reality disappeared by the time of Diocletian, was formally abolished by Justinian.

59. In the older law there also prevailed a distinction, abolished by Justinian, between res mancipi and resRes mancipi. nec mancipi. We know from a fragment of Ulpian,+ what things were res mancipi. They were præedia in Italico solo, whether in the country or the city, servitutes (a term to be explained presently) over these præedia, when in the country, slaves and four-footed animals, as oxen and horses, tamed for the service of man. All other things were nec mancipi. We also know that property in res mancipi could only be transferred by in jure cessio (see sec. 73), and by mancipatio, that is, by a form of sale, in which the purchaser took hold with his hand of the thing purchased, and, claiming it to be his, struck the scales with a piece of copper, which he then tendered to the seller.¶ The list of res mancipi is evidently a list of the possessions of an early agricultural community, and there can be scarcely any doubt that the form of sale required to transfer the property in them was the ordinary form of sale in such a community. At some period, and in some manner of which we have no knowledge, these possessions of an early agricultural community were contrasted with other forms of wealth, and the mode of transfer customary in the one case was found not to be customary in the other. The law, sanctioning and embodying the custom, made the form of mancipatio necessary to pass res mancipi, and declared it not to be necessary to pass other things. Manus, as signifying power,§ is, probably, the root of the phrases mancipi and mancipatio. Thus res mancipi meant originally things in the hand, or taken by the hand, of the owner, and the taking by the hand in the form of transfer was symbolic of the purchaser holding or acquiring the thing in the way in which the seller held or acquired it.

60. If we look at things according to the persons by whom they are owned, we have a division into res communes, as the sea

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* Ulp. Reg. xix. 1; Cicero, Pro Flacco, 82; Gaius, ii. 27.
† Ulp. Reg. xix. 1.
‡ The form of mancipatio will be more fully noticed in sec. 81.
§ How manus signifies power is a further question; it may be that the hand is merely a metaphor, as we say 'in the hands' for 'in the power' of a person; or it may mean the hand of a conqueror or plunderer, and thus originally things manu capta would be the booty of plunderers.
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and the air, which cannot be appropriated by any particular individuals; res publicae, things which belong to the State, as the State land (ager publicus), navigable rivers, roads, &c.; res universitatis, things which belong to aggregate bodies, as to corporations; and res private, things which belong to individuals; and these were said to be in nostro patrimonio, i.e. we could, in one way or another, have a property in them: whereas things common, or public, or dedicated to the gods, were extra patrimonium, i.e. could not become the subject of private property. Lastly, there were res nullius, things of which no one has acquired the ownership, as wild animals, or unoccupied islands in the sea.

61. Having thus given a sketch of the position of persons in Roman law, as also of the divisions of things, we now proceed to speak of that connection between persons and things which what are termed rights express. The necessities of his physical position oblige man to exert his power over the world of things. At first property is held by the tribe or community, then by the family, and lastly by the individual; and when society has reached this last stage, which it had reached in the earliest known times of Roman law,* his special interests prompt each man to claim, as against his fellows, an exclusive interest in particular things. Sometimes such a claim sanctioned by law is urged directly: the owner, as he is said to be, of the thing publishes this claim against all other men, and asserts an indisputable title himself to enjoy all the advantages which the possession of the thing can confer. Sometimes the claim is more indirect; the claimant insists that there are one or more particular individuals who ought to put him in possession of something he wishes to obtain, or do something for him, or fulfil some promise, or repair some damage they have made or caused. Such a claim is primarily urged against particular persons, and not against the world at large. On this distinction between claims to things advanced against all men, and those advanced primarily against particular men, is based the division of rights into real and personal expressed by writers of the middle ages;† on the

* We have, however, such expressions as sui heredes applied to children who, after the death of the paterfamilias, took the inheritance as something belonging to themselves, and this is obviously a survival from the times when the family rather than the individual was regarded as the owner of property.

† The term jus in re appears in the summary of law bearing the name of
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analogy of terms found in the writings of the Roman jurists, by
the phrases jura in re and jura ad rem. A real right, a jus in re,
or, to use the equivalent phrase preferred by some later commenta
tors, jus in rem,* is a right to have a thing to the exclusion of
all other men. A personal right, jus ad rem, or, to use a much
more correct expression, jus in personam, is a right in which
there is a person who is the subject of the right, as well as a
thing as its object, a right which gives its possessor a power to
oblige another person to give or procure, or do or not do some-
thing. It is true that in a real right the notion of persons is
involved, for no one could claim a thing if there were no other
persons against whom to claim it; and that in a personal right is
involved the notion of a thing, for the object of the right is a
thing which the possessor wishes to have given, procured, done, or
not done. But the leading principle of the distinction is simple
and intelligible; and though it has not been formally adopted in
the system of the Institutes or of the leading jurists, yet the
classifications of the different relations of persons and things
which they actually employed, are so capable of being assimilated
to that which this distinction suggests that we need not hesitate
to adopt it.

III. RIGHTS OVER THINGS.

62. The most complete right over a thing is of course that
possessed by the absolute owner of the thing, the Dominium.
person who has power to dispose of it as he likes, and
who holds it by a title recognised as valid by law. This owner-
ship was in Roman law expressed by the word dominium, some-
times by proprietas. The dominus was entitled to use the thing
(usuus), to enjoy all its products (fructus), and to consume the
thing entirely if it was capable of consumption (abusus). He
could also dispose of or alienate it at will. In the ancient system
of private law, the owner was said to be owner ex jure Quiritium.

the Brachylogus, which belongs to the twelfth century; both phrases occur
in the pontifical constitutions of the thirteenth century. (See Lib. Sextus
Decret. iii. 7, 8, in quibus jus non esset quasitum in re, licet ad rem.)

* The objection to using the term jus in re is that the expression occurs
in the classical jurists as meaning an interest in a thing short of ownership,
as the interest of a mortgagee in the thing pledged, and on this ground the
term jus in rem, which in this sense is not found in the classical jurists, but
is supported by the analogy of the familiar term actio in rem, seems pre-
ferable.
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Nor did the old law recognise any *dominium* other than that which was enjoyed *ex jure Quiritium*. But the pretors found occasions when they wished to give all the advantages of ownership but were prevented by the civil law from giving the legal *dominium*. Another kind of *dominium* came therefore to be spoken of; and the term *in bonis habere* was used to express an ownership which was practically absolute because it was protected by the pretor's authority, but which was not technically the same as ownership *ex jure Quiritium*. Commentators have called this ownership the *dominium bonitarium*, a term not, however, used by the jurists. The distinction between the *dominium bonitarium* and that *ex jure Quiritium* entirely disappeared under Justinian.

63. To the notion of *dominium* was opposed that of *possessio*.

**Possessio.**

A person might be owner of a thing and yet not possess it, or possess it without being the owner. Possession implied actual physical occupation, or *detention*, to use the technical term, of the thing; but it also implied something more in the sense in which it was used by the Roman lawyers. It implied not only a fact, but an intention; not only the fact of the thing being under the control of the possessor, but also the intention on the part of the possessor to hold it so as to reap exactly the same benefit from it as the real owner would, and to exercise the same rights over it, even though he might be well aware that he was not the real owner, and had no claim to be so. The possessor was entitled to have his possession protected against every one but the true owner, and length of possession would, under certain conditions fixed by law, make the possessor really become the owner of the thing possessed.

64. As the rights over a thing may be very numerous, it is perfectly possible to separate them, and to give some to one person and some to another. We can, for instance, separate the right of walking in a field from the right of digging under the surface, and give the right of doing the one to this person and of doing the other to that. In this way each right that is separated off may be considered as a fragment of the whole *dominium* capable of being given away from the proprietor. These fragmentary rights, these portions of the whole right comprised in the *servitudes*, absolute ownership, were termed *servitudes*, because the thing was under a kind of slavery for the benefit of the person entitled to exercise over it this separate right. In
some servitudes, the right over the thing subject to the servitude, *res serviens,* was attached to the ownership of another thing (*res dominans*): the servitudes were then spoken of as *servitutes rerum* or *praedio rum,* and a distinction was made in these servitudes according as the right given by them referred to the soil itself, as the right to go or to drive over it, when the servitudes were said to be *rusticorum praediorum,* or to the soil as supporting some superstructure, as a house, when the servitudes were said to be *urbanorum praediorum.* In other servitudes, the right was given to particular persons; and the servitudes were then termed *servitutes personarum.* The most important of these latter servitudes were *ususfructus* and *usus.* *Ususfructus* was the right to enjoy a thing belonging to another person so as to reap all the produce derivable from it, as, for instance, all the fruits of the soil; *usus* was the right to use and enjoy a thing belonging to another person, only without reaping any, or only a small portion, of its produce. Only immovable property was subject to the *servitutes praedio rum;* both moveable and immovable to the *servitutes personarum.*

65. There were two other rights over things which had something of the nature of servitudes, but which received a particular name. These were *emphyteusis* and *superficies.* The former was an alienation of all rights except that of the bare ownership for a long term, in consideration of the proprietor receiving a yearly rent (*pensio*); the latter was the alienation by the owner of the surface of the soil of all rights necessary for building on the surface, a yearly rent being generally reserved.

66. Lastly, there was the right given over a thing by pledge or mortgage, *pignus,* *hypotheeca,* the former term being used to express the case of the thing, over which the right was given, being placed in the possession of the creditor, the latter to express the case of it being left in the possession of the debtor. The right was given to secure a creditor the payment of his debt; and he ultimately had power to sell the thing, and to satisfy his claim out of the proceeds, or, if he could find no purchaser, to have himself made owner of the thing.

67. We may now proceed to speak of the mode in which rights over things are acquired. We find at the outset an obvious difference between acquiring rights over a particular thing and
acquiring rights over the entirety of a number of things comprised in such a term as an inheritance, which includes the entirety of the rights belonging to a deceased person, both over things and against persons. We may thus divide the subject of the acquisition of rights into two parts: the first comprising the modes in which rights are acquired over particular things; the second comprising the modes in which an entirety (universitas) of rights, both over things and against persons, passed from one person to another.

68. We may mention, as the first of the modes of acquiring particular things, occupation, i.e. the seizing on a thing which is a res nullius, i.e. without an owner: land in an unoccupied country is a res nullius, so is a wild animal; if we seize on, or, as we should say, occupy the land, or catch the wild animal, we gain our right over the soil or the animal by having been the first to seize it.

69. Accession is the general term for the acquisition of rights either over things which are added by the forces of nature to, and become an inseparable part of, another thing regarded as the principal thing, or over things which by the operation of man are united with other things so as to form an indivisible product. The owner of the principal thing, by virtue of his being owner, is the owner also of the accessory thing.

70. A contract or gift, by which one person promised to give a thing to another, did not make that other the owner of the thing. A further step was necessary. The thing must be handed over to the person who was, under the terms of the contract, to become the owner of it. This handing over was called traditio: and a perfect traditio implied, first, that it was a real absolute owner, capable of alienating the thing, and having the intention of passing the property in it, who transferred it; secondly, that he placed the transferee in actual possession of the thing; and thirdly, that the transferee received it with the intention of holding it as owner.

71. The above are termed natural modes of acquisition; but there are some which are said to derive their force only from the civil law. One is acquisition by gift. Strictly speaking, gift is not a peculiar mode of acquisition, but an acquisition by delivery with a particular motive for the transfer. Probably it was on account of the solemnities with
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which under Justinian gifts had to be made that gifts are treated in the Institutes as a special mode of acquisition. One special kind of gift was a donatio mortis causa, a gift made in contemplation of death, and to take effect in case of the death of the donor in the lifetime of the recipient.

72. The law also gave the ownership of a thing by usucapio, that is, by quiet possession, bona fide, and founded on some mode of acquisition, recognised by law, which sufficed, under the civil law, to transfer the dominium, or legal ownership, if maintained during one year over moveable things, or during two years over immovable. The operation of usucapio was of great importance in Roman law; for by it the interest of a person to whom a res mancipi was transferred otherwise than by mancipation and the interests of all persons who held things in bonis (see sec. 62) were, after a short lapse of time, converted into full Quiritarian ownership. Prescription, before the time of Justinian, was not a means of acquiring rights: it merely gave a means of repelling actions brought to regain rights which had long been held by another than the absolute owner. It was applicable to immovable in the provinces, they being not affected by usucapio, which regarded all moveables, but only such immovable as were in Italy. Justinian made considerable alterations in the law with respect to acquisition of ownership by length of possession. The same law was made to prevail throughout the empire, and possession during three years gave the ownership of moveables, and possession during ten years, if the parties had inhabited the same province during the time, or possession during twenty years if they had not, gave the ownership of immovable.

73. The ownership was also transferred when things were surrendered by the fictitious process of in jure cessio, that is, a suit in which the defendant gave up to the plaintiff all he claimed, or when things were adjudged (adjudicatio) in certain actions, such as those for assigning boundaries, and dividing a family estate, when the judge had a power to assign the respective portions to the different parties.

74. The entirety of rights was acquired when one person succeeded to the persona, or legal existence, of another, and thereby succeeded to all his rights, whether over things or against persons. The cases in which this most naturally occurred were that of arrogation
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(for when a person was arrogated, he, of course, transferred all
that he had to the person whose family he entered),

Arrogation.

and that of succession to the inheritance of testators
and intestates.

75. Testaments were originally made by being proclaimed in
the comitia curiata, or by a fictitious sale, in which
testators transferred their property to a purchaser
(familice empor) who was himself heir, or who was, after their
death, to distribute it according to their wishes. In later times
a testament was made in the presence of seven witnesses, who
affixed their seals to it, and the witnesses and the testator sub-
scribed the testament. In order to make a testament, it was
necessary to have the testamenti facto, a term implying such a
participation in the law of private Roman citizens as to make a
person be considered capable of making, taking under, or being
witness to, a testament.

76. The testator was obliged to disinherit by name every
one who, being among those in his own power, had
a natural claim on his property; and if he failed to
do so, the whole testament was set aside. The great peculiarity
of a Roman testament was the institution of the heir, that is, of

Disinheriting.

the person who was to succeed to the persona of the
testator. Unless there was such a person, no other
disposition of the testament could take effect, for there was no
continuation of the testator's legal existence. The heir was, there-
fore, properly appointed at the beginning of the testament; in case
of the heir accepting, he placed himself exactly in the position
of the testator, received all his property, and was answerable for
all his debts; in receiving his property he was, however, bound
to give effect to the subsequent dispositions of the testament.
Various provisions were made at different times to protect the
heir, and especially he was secured by the Lex Falcidia in a clear
fourth of the inheritance; and under Justinian his position was
altogether altered, and he could take the property of the testator
apart from his own. In order that the testament might not fail
because the heir was not willing to enter on the inheritance, it was
customary to name one or more persons to whom in succession it
might be open to take upon them the office of heir (substitutio).
And a testator could always secure an heir by naming, as the last
of the list, one of his own slaves, whom the law did not permit to
refuse the office (heres necessarius). When some of the conditions
necessary to create an heir, or give a legacy, were wanting in a will, still the expressions of the testator's wishes were binding as trusts upon the heir under the will, or heir *ab in- fideicommissis.* Such trusts (*fideicommissa*) were first made obligatory by Augustus, who also first gave effect to codicils, that is, writings purporting to deal with property in the manner of a testamentary disposition, but not executed with the solemnities which were required to make a testament valid.  

77. If there was no testament to determine the succession to the particular property, the law prescribed the order *succession to intestates.* in which it was to devolve. The first claimants were the *sui heredes,* that is, all persons in the power of the deceased, and who, on his death, became themselves *sui juris.* Thus, a son *in potestate* was a *suus heres* of the deceased, but not a grandson until the son was dead. These persons were termed *sui heredes* as having an interest of their own in the *family* property. If there were no *sui heredes,* the next heirs were the *agnati,* i.e. all members of the same civil family; and then, in default of *agnati,* the law of the Twelve Tables gave the inheritance to the members of the same *gens,* an enactment which could of course only take effect when the deceased was a member of a *gens,* What was the course of devolution beyond the *agnati* under the old civil law, when the deceased was not a member of a *gens,* we do not know; but probably the blood-relations succeeded. In default of *agnati,* under the praetorian legislation, the claims of the natural family were attended to, and the *cognati,* or blood-relations, succeeded to the inheritance. In the later times of the Roman law the claims of blood-relations were more and more favoured, and in many important points were gradually preferred to those of merely civil kinship.

The Institutes also notice three other modes of minor importance by which *universitates rerum* were acquired. *Other modes of acquiring universitates rerum.*

1. *Bonorum addictio,* the giving over of the property of a deceased person to a slave to whom the deceased had given his freedom. 2. *Bonorum venditio,* the compulsory sale of the whole property of an insolvent to a person who would undertake to pay most to the creditors. 3. *Ex senatusconsulto Claudiano,* which gave over a woman with all her property, who had cohabited with a slave, to the slave's master.
IV. RIGHTS AGAINST PERSONS.

78. A personal right is, as we have said before, a right which one person has against another; a right to constrain that other to give something to, or do something for, or make something good to, the possessor of the right. The person to whom the right belonged, and the person against whom it existed, were said in Roman law to be bound by an obligation, the notion of an obligation being that of a tie between two parties of such a nature as to confer on the one a power of compelling by action the other to give, do, or make good something. The obligation did not give any interest in a thing, to get which might be the ultimate object of the proceeding, but only gave a means of acquiring it, or, under the prætorian system, its value.

79. The three words, dare, facere, præstare, were used to embrace all the possible duties an obligation could create. Either the person bound by the obligation was obliged dare, i.e. to give the absolute ownership or the possession of a thing; or facere, that is, to do or not to do some act; or præstare, that is, to make good something, as to make good a loss, or to furnish any advantage or thing, the yielding of which could not be included in the limited sense of the word ‘dare.’ Every person who possessed a personal right against another was termed a creditor, and every one who owed the satisfaction of a claim, or was the subject of a personal right, was a debtor. The word creditor, of course, points to those transactions in which the possessor of the right trusted the person who was the subject of it; but the application of the terms was perfectly general, and must not be confounded with the English usage of the words creditor and debtor.

80. According to the theory of Roman law, all obligations owed their origin either to the consent of the parties (contractus), or to injuries (delicta) done by one person to another, which gave the injured party a right to recompense. Contracts did not, however, include all cases, when an obligation arose from the mutual consent of the parties. The general name for such an obligation was conventio, pactum, conventum. A contract was properly an obligation arising by
mutual consent, and made in one of the forms recognised by the civil law; but all obligations arising from mutual consent are spoken of as arising from contracts, because in the old law no other mode of expressing mutual consent was recognised, and mere agreements were not binding.

81. The mode of transferring res mancipi was, as we have said in sec. 59, called mancipatio. Gaius (i. 119) Nexum. thus describes the form of transfer of a slave: 'Mancipation is effected in the presence of not less than five witnesses, who must be Roman citizens of the age of puberty, and also in the presence of another person of the same condition, who holds a pair of scales, and hence is called libripens. The purchaser, holding in his hand a piece of copper, says: “This slave is mine ex jure Quiritium, and he is purchased by me with this piece of copper and these scales.” He then strikes the scales with the piece of money, and gives it to the seller as a symbol of the price.' But the generic term for this mode of sale was not mancipatio, but nexum,* for this form was used not only when a sale was its real object, but when under the form of a sale the parties intended to effect a contract of deposit or pledge. The purchaser took the thing handed over to him upon the condition of restoring it under certain specified circumstances, and thus a form of transfer came to be a form of contract where part of the contract was still to be executed.

82. In the time when the civil law had assumed its full shape, and apart from the alterations it received from the pretorian system, the nexum was used chiefly as the mode of transferring res mancipi, as contracts of deposit and pledge were ordinarily made, as it was termed re. That is, by the mere delivery of the thing, the person to whom it was delivered, and who accepted it, was bound by an obligation to hold it for the purposes for which it had been delivered. There were four heads of contracts recognised by the civil law, and this of contracts made re is the first noticed in the Institutes, although historically the recognition of such contracts was probably posterior to that of the more formal contracts, verbis and litteris. Under contracts re were classed four kinds of contract, namely, the contracts of mutuum when the receiver had to return as much of the same kind of the thing he received, commodatum when he

* Nexum est, quodcumque per as et libram geritur, idque necti dicitur.—Festus.
had to return the specific thing itself, depositum when the receiver was bound to keep safe a thing committed to his charge, and pignus when the receiver took a thing in pledge.

38. The second head of contract under the civil law was that of contracts made verbis, of executory contracts, that is, made in a prescribed form of solemn words. One of the parties put to the other a formal question (stipulatio), to which the other gave a formal answer (responsio, promissio). To the validity of the contract it was necessary that the question should be couched in the form ‘spondes?’ and the answer in that of ‘spondeo.’ Do you engage? I do engage. It was long before equivalent words, such as promitto or dabo, were admitted as substitutes. A contract made by the pronunciation of these solemn words was said to be made verbis.

34. A third head of contract under the civil law was that of contracts made litteris. An engagement having been made to give a definite amount, the parties agreed to make a memorandum of the terms of the contract. The creditor placed in his book of domestic accounts (tabulae or codex) the name of the debtor, and the sum as pecunia expensa lata, weighed out and given to the debtor; and the debtor entered in his tabulae the same sum as pecunia accepta relata. Either party could call on the other to produce his tabulae, which it was considered so incumbent on a Roman citizen to keep carefully and accurately, that any wilful error was discoverable without much difficulty. The debtor, in fact, furnished the creditor with a means of proving that the debtor had on a certain day received the money, and even if the debtor had not set the sum down in his tabulae, the creditor could show his own tabulae as a proof of the contract. These contracts were peculiar to Roman citizens. Peregrini had as a substitute syngraphae, signed by both parties, or chirographa, signed only by the debtor; and on these documents an action could be brought.

35. There were, also, four particular contracts, for the formation of which the civil law required no formalities whatever, but which were made merely consensus, by the consent of the parties. These four contracts were—sale (emptio-venditio), hiring (locatio-conductio), partnership (societas) and bailment (mandatum). The four modes, then, in which contracts might be entered into under the civil law, were—re, verbis, litteris, and consensus.
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86. When, however, the old law of contracts fell under the manipulation of the prætors, many changes were introduced. The ten forms of contract recognised by the civil law, that is, the four heads of contract made re, the four heads of contract made consensus, and contracts made verbis and litteris, still remained the basis of the whole law of contracts; but the prætors, while nominally adhering to the civil law, introduced changes that had a great practical effect. The nature of this change can only be understood by studying the details of the Roman law of contracts, and it would be out of place in a general introduction to attempt to notice them. But there are three ways in which the prætors wrought a change, which were so important that they may be briefly stated here. By an extension of the theory of the civil law contract re, the prætors permitted an action to be brought to enforce every contract that was in part executed; secondly, agreements (pacta) that would not furnish a cause of action were permitted to be set up by way of defence to an action with which they were inconsistent; and thirdly, there were a few specified particular cases in which the prætor permitted pacts to be enforced by action.

87. Obligations might, however, very well arise, without any fault on the part of any one, and yet without having their origin in mutual consent. The mere fact of occupying a certain position will sometimes involve duties, the performance of which may be enforced by an action, and which give rise to a personal right which the person interested in their performance has against the person bound to perform them. An heir, for instance, was, by the mere fact of accepting the inheritance, bound to pay the legacies given by the testament. Such obligations were said to be quasi ex contractu, not that they really rested on any contract, but there was an analogy between the obligation thus arising and that arising from the formation of a contract.*

88. It was not every wrong deed for which compensation could be obtained that gave rise to an obligation ex delicto; there were certain particular wrong deeds, such as theft and robbery with violence, which the law expressly characterised as delicta, and to procure reparation for which the law provided a special action. It was only when a person suffered by one of these wrong deeds that an obligation ex delicto arose.

* See Austin, Jurisprudence (ed. 1869), p. 944.
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When any wrong deed was done not thus expressly designated by law as a delictum, and when no particular and appropriate form of action was provided, the obligation was said to arise quasi ex delicto. Among the instances given in the Institutes is that of dangerous things being placed so as to fall into a public way. If any one was hurt by the fall, the author of the injury would be bound to make reparation by an obligation quasi ex delicto, there being this point of analogy between this obligation and that in the case of a delict, that the person liable to be sued had done harm to the person or property of another. The division of obligations adopted in the Institutes is therefore into those ex contractu, those quasi ex contractu, those ex delicto, and those quasi ex delicto.

89. The ancient law considered an obligation as existing until the tie of law, the vinculum juris, was loosed by the thing being given, furnished, or done, or by a new tie being formed in place of the old; this loosening of the tie was termed solutio. If payment was made, i.e. if the contract was carried out, this at once put an end to the contract. But it might happen that the parties wished to put an end to the contract before it was carried out. Each mode of forming a contract by the civil law was accompanied by a corresponding mode of dissolving it. When the contract had been formed re, it was enough that the thing should be restored; when it had been formed verbis, a question and answer again furnished the means of accomplishing the desired object. Habesemus acceptum? Habeo, sufficed to put an end to the contract. The parties made an entry of payment in their codices, if the contract had been litteris; and mutual consent dissolved those contracts which it had sufficed to form. The solutio verbis was most frequently employed, and it was easy to employ it on every occasion: for in whatever way the contract might originally have been entered into, its terms could be repeated in the form of a stipulation, and then this stipulation could be dissolved by a solutio verbis. The stipulation extinguished the original contract. For contracts were extinguished not only by payment, but by what was called novatio: that is, by making a new contract, and substituting it in the place of the original one. The law required that the new contract should be always made verbis or litteris. When strict adherence to the rule of law, requiring a particular mode of payment, would work injustice, the praetor would always provide a remedy by means of his equitable jurisdiction.
V. SYSTEM OF CIVIL PROCESS.

1. An action is the process by which a right is enforced. As a means of enforcing it was provided, the right would be a mere inoperative abstraction. Directly it is disputed, it would cease to have any real existence—but in order that it may have a real existence, the State's powers to insure a free exercise of it, as soon as it is made known to the magistrate, who is entrusted with the authority of state, that the right claimed does really belong to the claimant. proceeding by which this is made evident to the magistrate, the machinery set in motion by which the State exerts its power of compulsion, is called an action. The word 'action' is, however, always used exactly in this sense; for it is employed to mean sometimes the right to institute such proceeding, and sometimes the form which the proceeding takes.

1. There are three great epochs in the history of the Roman system of civil process. First, that of the system of *eius actiones*, certain hard, sharply defined forms of rude civilisation prescribed for all proceedings. Secondly, that of the system of *formulae*, by which the State, adopting a most flexible form of organising the proceedings, enabled to give a means of enforcing every right which the enlarged views of an advancing civilisation pronounced to be due on equity; and thirdly, that of the *extraordinaria judicia*, which, under the later emperors, the supreme authority took whole conduct of the proceeding into its own hands, and at what seemed to it to be just in as direct and speedy a manner as it found possible.

2. In enforcing rights two very different functions have to be discharged by those to whom the powers of the State are delegated. First, there must be some one invested with magisterial authority, giving the sanction and dignity of his position to the whole proceeding, who shall sent the law and say what the law is, and who shall have r to employ the force which the State places at the disposal of it selects to administer justice. Secondly, an inquiry has
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to be made into particular facts, evidence has to be received and weighed, and an opinion formed and pronounced as to the real merits of the case. The person who exercised the one function was spoken of by the Romans as *magistratus*; the person who exercised the other as *judea*. To the law, represented, pronounced, vindicated, by the *magistrate*, they applied the term *jus*; to the examination of contested facts by the judge, the term *judicium*. It is perfectly possible that the same person should act as magistrate and judge; but it is also possible that the two provinces should be separated and placed in the hands of different persons. Among the Romans the *magistratus* was a different person from the *judea*, until the introduction of the system of *extraordinaria judicia*. The two functions were kept almost entirely apart under the system of *formulae*, and, from a comparatively early period of Roman history, the notion of a judge distinct from the magistrate was familiar to the national mind. After the expulsion of the kings, and during the time of the first period of the system of civil process, first the *consuls*, then the *pretor urbanus*, and in some cases the *aediles*, acted as the magistrate, and the magistrate was said to have two functions, (1) *Jurisdictio*, the elements of which were summed up in the three solemn words by which the *pretor* announced that he was exercising his authority on one of the *dies fasti*, when alone legal business could be done (Ov. *Fast.* i. 47): *do*, I give an action or possession of goods; *dico*, I express the law, issue edicts or interdicts; *addico*, I give ownership; and (2) *Imperium*, the power of using the public forces to insure obedience to his orders. As *judea*, any member of the senatorial body, so long as senators alone were qualified to act as judges, could act who was chosen by the mutual consent of the parties: if they could not agree, the choice was determined by lot. There was also a standing body of plebeian judges dating from a remote antiquity, the *centumvirs*, elected annually by the *comitia*, three from each local tribe, and constituting a *collegium* divided into sections. They had special jurisdiction over questions of *status*, of *dominium* *ex jure Quiritium*, and of successions, and a spear (*hasta*), the special symbol of Quiritan ownership, was set up in front of the place where they met. In cases involving any question into which the *centumvirs* were the proper persons to inquire, it was not open to the parties to ask for a judge, and the whole proceedings were carried on before the *centumvirs*. Lastly, in cases where the interests of *peregrini*, and afterwards even where the interests of
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s, were involved, recuperatores, i.e. persons not on any list, invited to act, and, so acting, furnished the body who were the part of the judex. It may be added that the circumstances of the case demanded that judge, in pronouncing his opinion on the facts, should exercise discretion than was ordinarily open to him, or decide from acknowledge, he was spoken of as an arbiter; and although could never be more than one judex, there were sometimes arbitri, but the arbiter was chosen from the same class as lex.

All judicial proceedings, whether before a magistrate or e, were conducted publicly at Rome. The progs began with the in jus vocatio, or summons to before the magistrate. If the adversary would me, the summoner called, by touching them on r, bystanders to witness that he had made the summons; cendants and patrons could not be summoned except by pre-authorisation of the magistrate. When before the magishe parties had to give security for their further appearance sonium), and called witnesses to testify that the litigation only begun (litis contestatio). In early times, the magistrate at the forum, and openly dispensed justice to all comers. ng, perhaps, conveys a more correct picture of the ideas and gs that lay at the bottom of the public life of a Roman t, while Rome was still the rival of the Volscians or the ans, than the mode in which the actions of law were con-

The magistrate and the judge of the patrician order, theotion of days fasti and nefasti, the key to which only those new the jus sacrum possessed, the solemn and indispensable of words by which every stage of the proceeding must be panied, would throw over the conduct of the action much of me character which the existence of a privileged and partly total order impressed on the whole body politic. •

The most ancient and most important of the actions of law, actio sacramenti,* brings before us, in the most ed manner, the delight in appeals to the external s, and the use of symbolical acts, sanctioned by usage and expressive in themselves, which belongs e early times of so many nations. It was originally the

*GAIUS, iv. 18–17.
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only form of action; and every species of right could be enforced by it. When it was employed to enforce a right over things, the proceedings opened by the thing being brought before the magistrate (in jure); the claimants appeared, each touched it with a rod (vindicata or festuca), and said, 'Hunc ego hominem (the instance given in Gaius is that of a claim to a slave) ex jure Quiritium meum esse aio secundum suam causam, sicut dixi. Ece tibi vindictam imposui.' His adversary repeated the same words. At the same time that the words were spoken each party seized hold of the thing claimed; this was termed the manuum consortio, representing a combat which was supposed to take place in the presence of the magistrate before he would interpose, and the imposing the rod was termed vindicatio. If the thing was one that could not be brought into court, a portion of it was brought to represent the whole. A piece of turf, a twig, a brick, or one sheep, stood in place of a field, a house, or a flock.* When the vindicatio and manuum consortio were over, the magistrate said to the parties, mittite ambo hominem; both were to place their claims in his hands. Then came the wager, the sacramentum, each party challenging his adversary to deposit a certain sum, which the loser of the cause was to forfeit to the treasury of the people (aerarium), to be applied to the expenses of sacrifices. The law of the Twelve Tables fixed the amount of the wager at 500 or 50 asses, according as the value of the thing contested fell above or below 1,000 asses. The formal words by which this was done are thus given by Gaius. He who had first gone through the vindicatio asked his adversary why he claimed it. Postulo anne dicas, qua ex causa vindicaveris. The other replied that it was in conformity with right and law that he had made his claim. Jus peregi sicut vindictam imposui: the first answered, Quando tu injuria vindicasti, D. eris sacramento te provoco, 'I challenge you to a deposit of 500 asses;' and the other accepted the challenge by saying, Similiter ego te. The magistrate then awarded the possession of the thing contested, until a decision was pronounced, to the party that appeared to have the best right to it, requiring him to furnish security that it would be forthcoming at the proper time. These sureties were

* If the thing was an immovable, there appears to have been an old ceremony of the parties going to the land or other immovable thing, and one expelling the other from it, and leading him before a magistrate (deductio). See AULUS GELLIUS, Noct. Att. xx. 10; CICERO, Pro Muræna, c. 12.
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The details of the *actio sacramenti* furnish so lively a picture of the actual working of early Roman law, *Actio per judicis postulatio* and *actio sacramenti*, that other actions of law may be passed over with much more cursory notice; indeed, our knowledge of them is deficient, as the portion of the manuscript of Gaius which contained a sketch of the proceedings is imperfect. Perhaps the action was employed in complicated cases, where the rights of several persons to a common object had to be settled, as in the settlement of boundaries (see sec. 103); but the machinery of the *actio sacramenti* being obviously but very apted for enforcing rights of this kind. We know little about the magistrates asked to allow the appointment of an arbiter, to decide the matter in question; and that form of action was probably adopted, not where some certain sum was asked for as the fulfilment of the engagement, but where greater uncertainty in the circumstances of the case led to a greater latitude of opinion, and where an appearance of good faith would naturally colour the whole cause.† In the year A.U.C. 510 (as it is conjectured) the *lex Silicia* instituted a form of action where the obligation was for the payment of a definite sum of money, and a *lex Calpurnia* (c. 520) extended the scope of the action to all obligations for certain definite thing.‡ This action was called *condictio*, the plaintiff gave notice (condicere) to the defendant to appear before the magistrate, at an interval of thirty days to receive a judge. Probably its institution completed theRAW_TEXT_END
actio sacramenti. The judicis postulatio may have left to the
sphere of the actio sacramenti the demand for things certi, and
then the condicio took that also away.

96. There were two other actions of law, that per manus
injectionem, and that per pignoris capionem. These
were, however, not really actions so much as methods
of obtaining execution. If it was a right over a thing
that was claimed, then, if the sentence was in favour of the claim-
ant, the magistrate at once put the claimant in possession of the
thing, having recourse to force, manus militaris, if necessary.
But when a right against a person had to be enforced, there was
nothing which could be thus handed over; the remedy was against
the person, the liberty of the defeated adversary, and the action
per manus injectionem was the means by which the successful
litigant exerted his power. He laid hands on him, manus injecit,
and brought him before a magistrate, stating that he had been
cast in the previous suit; if this was denied, a judex was appointed,
and inquiry made whether judgment had really been given against
him as alleged. If this was found to be the case, he was adjudicatus
to the claimant, who kept him prisoner, and then being
brought, after sixty days, before the magistrate, was addictus, or
assigned over, and became the slave of his creditor.

To the principle that the person, and not the property, of the
debtor was bound, an exception was made when the debt was due
to a soldier for military service, to the fund for sacrifices, or the
public treasury.† The creditor, in such cases, might seize on any-
thing belonging to the debtor, and take it as a pledge
for the payment of a debt. This pignoris capio was
only spoken of as an actio because it was conducted
with certain solemnities, and accompanied by the repetition of a
peculiar form of words.

The following are some of the marked features of actions of law,
in respect of which great differences were gradually introduced
under the later systems. (1) The procedure in the actions of
law was one open only to Roman citizens. (2) The parties were
almost always obliged to appear personally, but an assertor libertatis
could appear to claim the freedom of a person wrongly treated
as a slave. (3) So rigid was the necessity of adherence to the
prescribed forms, as Gaius informs us (iv. 11), that if, in an action

* GAIUS, iv. 21-25.
† GAIUS, iv. 26-29. (See also ante, sec. 8.)
for damage to a vineyard, the plaintiff used the word *vites* instead of the general word *arbores*, employed in the law of the Twelve Tables, he lost his action. (4) If the action was once brought, it was exhausted, or if it failed, even on the most technical ground, the plaintiff had no further remedy. (5) The sentence was ordinarily to give the thing demanded, not a pecuniary equivalent.

97. The *legis actiones* were necessarily replaced by other forms of actions more convenient as Rome advanced in civilisation. They were in a great measure suppressed by the *lex Aedutia* (about A.U.C. 573), and afterwards, in the time of Augustus, by the *leges Juliae*. They were, however, long retained in cases where the *centumviri* were the proper *judices*, that is, in questions of *status*, Quiritian ownership, and disputed succession, the *praetor* presiding personally over the deliberations of the *centumviri*, and not instructing them by a formula; and a fictitious process, termed *in jure cessio*, which was nothing else than an undefended action at law, in which a disputant gave up (*cessit*) before the magistrate (*in jure*) the thing in dispute, was retained as a ready means of many legal changes, such as manumission or adoption, long after the actions of law had fallen into disuse. Before the actions of law were suppressed, the *praetor peregrinus* had for years been administering justice through forms of action devised by him where *peregrini* were concerned.

98. The changes wrought by intercourse with foreign nations, the new duties of extended dominion, and the stimulus given to the national mind by the long internal struggles which had now subsided, produced by degrees a general change in the mode in which justice was administered. A new system succeeded the old *legis actiones*; the *magistrate* was more strongly marked off from the *judez*, and it was the directions which the former gave the latter that constituted the important feature of the new system of procedure. At home the *praetors*, of whom there were eighteen in the days of Pomponius,* and one or two other magistrates; and in the provinces the *praesides* or prefects, who held *conventus* or *assizes* in the principal towns at stated intervals, sat as magistrates. At Rome the long struggle between the senate and the *equites* for the exclusive right to furnish the judges ended, as has been already

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*D. i. 2. 2. 84.*
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said (sec. 12), in the judges ceasing to be taken entirely either from the senate or the equites; and two, at least, out of the five decuries of judges appearing in the album were taken from a comparatively humble class. The recuperares and centumviri still continued to act in the cases which properly fell within their province.

99. The directions which the magistrate sent to the judge were always conveyed in a formal shape, and the word formula was used to express the different forms in which directions were given. These formulae were preserved and collected, and it became the great object of the contending parties that the right formula should be used in their case, the judge not being allowed to depart from the instructions he received. As there was no legal form to bind the magistrate, he could easily vary the formula so as to render substantial justice, and had thus a ready means of availing himself of any equitable doctrine, which a more refined jurisprudence or his own sense of what was right suggested to him. These formulae, so flexible in their general character, yet couched in terms always precise and simple, furnish one of the many admirable instances of the power of the Romans to express correctly the subtlest legal ideas; and it was by this machinery that the praetors principally introduced their great legal changes. But it may be observed that, although the old actions of law became obsolete, traces of them are to be found in the praetorian system. Thus, in certain actions the parties entered into a wager, sponsio penalis, evidently a relic of the old actio sacramenti, by which each stipulated with the other for a sum of money to be paid as a penalty by the loser in the action to the successful party.

100. To show what these formulae were, it will perhaps be best to give at length one of those we find in Gaius, and then to explain its different parts. One which we may collect from different sections of the Fourth Book runs thus:—

**Judea esto**: Quod Aulus Agerius Numerio Negidio hominem vendidit; si paret Numerium Negidium Aulo Agerio sestertium X. millia dare oportere, judex Numerium Negidium Aulo Agerio sestertium X. millia condemna; si non paret, absolve.*

**Judea esto** is merely the order for the appointment of the

* Gaius, iv. 40–43.
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judge, and is not, strictly speaking, a part of the formula. From 'quod' to 'vendidit' is what is called the demonstratio; from 'si paret' to 'dare oportere' is the intentio; and from 'judex' to the end is the condemnatio. The formula ordinarily consisted of these three parts—the demonstratio, the intentio, and the condemnatio.

101. The demonstratio is the statement of the fact or facts which the plaintiff alleges as the ground of his case. Aulus Agerius, the plaintiff, says that he has sold a slave to Numerius Negidius. The demonstratio varied, of course, with each particular case.

102. The intentio was the really important part of the formula. It was a precise statement of the demand which the plaintiff made against (tendebat in) his adversary. It was necessary that it should exactly meet the law which would govern the facts alleged by the plaintiff, if true. Whether Aulus Agerius has sold this slave to Numerius Negidius at the price he alleges, and whether the debt is still owing, this is what the judex has to determine; if the judge thinks he has (si paret), then the judge is instructed to pronounce his judgment against him; if he thinks he has not (si non paret), he is to be absolved.

103. The condemnatio is the direction to condemn or absolve according to the true circumstances of the case. The judex was only a private citizen, and, unless specially authorised by a magistrate, could have no power to pronounce a judicial sentence. It is to be observed that the condemnatio was, under the formulary system, always pecuniary; the judge was always directed to condemn to a payment of money, never to do or give a particular thing. In three particular actions, however, and perhaps in more, the judge was directed to 'adjudicate' a thing, in the sense of dividing it out among several litigants. These three actions were those brought to divide a family inheritance, to divide property held in common, and to settle boundaries. In these actions there was a part of the formula running thus: quantum adjudicari oportet, judex Titio adjudicato. This was called the adjudicatio; so that in these actions the parts of the formula might be four—demonstratio, intentio, adjudicatio, and condemnatio. Of course when a thing, and not a sum of money,

* Gaius, iv. 40. † Gaius, iv. 41. ‡ Gaius, iv. 48.
§ The judge might think it right, in order to equalise the division, to
was claimed, it was not possible for the magistrate always to fix a
precise sum in which the defendant was to be condemned. Some-
times, therefore, the condemnatio merely fixed a maximum sum,
and ran duntaxat X. millia condemnna. Sometimes the direction
was still more indefinite, and the sum was left to the discretion
of the judge. Quanti ea res erit, tantam pecuniam, &c., con-
demna. Sometimes, too, as when the action was real, i.e. brought
to claim a thing, the actio was arbitraria, and the words nisi
restituat were inserted in the condemnatio. The defendant was
ordered to give up the thing, and then was condemned to pay the
money if he did not restore the thing, in accordance with the
order (arbitrium) of the judge, or if the thing was in his posses-
sion, he was forced to give it up.

104. The intentio sometimes stood quite alone, as in what was
prejudicialis called a prejudicialis formula;* when the object of
the action was merely to establish a point which it was
necessary to have settled with a view to a future action. The
decision of such a preliminary point was called a prejudicium.
Of course the intentio took any form that best suited the case;
and accordingly it was the intentiones that were so carefully pre-
erved as precedents, and so keenly debated by the contending
parties. Sometimes the grounds of the defence made part of the
intentio. The defendant might admit the plaintiff's statement,
but say that there were special circumstances to take this particular
case out of the general rule of law under which it would naturally
fall. He might own, for instance, that he had bought a slave at the
price alleged, but say that he had been induced to do
so by fraud. This plea was called an exceptio (i.e. a
taking out), and was made to form part of the intentio, some such
words as these being added: si in ea re nihil dolo malo Auli

exceptio. 

Agerii factum sit neque fiat. The plaintiff, again,

might have something to urge as an exception in reply
to this plea: his answer was called replicatio; if the defendant
had a further answer, it was called a duplicatio, the plaintiff's
further reply a triplicatio, and so on. There was also sometimes
an accessory part of the formula called the prescriptio, placed, as
its name denotes, at the beginning of the whole formula for the
purpose of limiting the inquiry. As employed by the defendant,
it answered the purpose of the exceptio, and belongs, probably, to

order that some of the parties should, in receiving their share, make a money
payment to others, and for this there would be a condemnatio.

* Gaius, iv. 44. 183.
a time before the exceptio had its regular place in the formula. A well-known example of its use is that by which the defendant stopped an action for the possession of provincial lands, by raising the question whether he had not been in possession for a particular period, which is the origin of the familiar term 'prescription.' (See sec. 72.) But the plaintiff also might, in the early days of the formulary system, have occasion to resort to a præscriptio. He might, for instance, wish that, in enforcing a security on which payments were due from time to time, the action brought to try whether this security was valid should only affect his claim to payments already due, so that if he failed he might have a further action for future payments. In such a case some such words as ea res agatur cujus rei dies fuit (let the inquiry only be made as to the sum for the payment of which the time has arrived) were prefixed to the formula. Gradually, however, the præscriptio fell into disuse, and the intentio and exceptio were so constructed as to serve every purpose for which it had been employed.

105. In the Roman system of civil process the time when a contested right was to be considered as really made litis contestatio, was very carefully marked. It was very necessary that this should be clearly ascertained. The claimant in whose favour the ultimate decision was given was entitled to all that accrued to the thing claimed from this moment; and when once a point had been submitted to litigation, it could not be again litigated, both parties surrendering all their interest into the hands of the court, which assigned to the successful claimant such a fresh interest in the thing claimed as might appear to be due to him. This time was marked by each party, at the end of the proceedings before the magistrate, calling bystanders to witness that they submitted the matter to the decision of the judge. This was called the litis contestatio, as has been said (see sec. 98). In process of time the ceremony might be omitted, or at any rate become a mere form, but the conclusion of the proceedings before the magistrate (in jure), i.e., in the formulary system, the time when the prætor delivered the formula, still formed the crisis at which the claims of the different parties were considered to be finally submitted to the decision of the law. Up to the litis contestatio, the proceedings in an action under the formulary system were as follows. The plaintiff applied to the prætor for a summons to make the

* Festus, sub voce Contestari.
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defendant appear (in jus vocatio). If the defendant on appearing would not come to any compromise (transactio), the plaintiff announced that he would go on with legal proceedings. This was termed edere actionem. He had to announce the kind of action to which he proposed to resort. He then called on the defendant to give bail (vadari) that he would appear in court. The plaintiff on the day fixed submitted the formula as he thought it ought to be drawn up; the defendant proposed the exceptions on which he relied, and the prætor settled it. The plaintiff then asked for a judge (postulatio judicis), and when the prætor gave the judge the litis contestatio took place, and the proceedings in jure were finished.*

106. Actio meant, under the system of the actions of law, a particular form of procedure; under that of the formulae, it meant the right granted to a plaintiff by the magistrate to seek what was due to him before a judge. Sometimes, however, the formula by which the judge was to determine the right, and sometimes the judicium, the proceedings by which the judge determined the right, were spoken of as if formula, judicium, and actio were synonymous terms. Of the divisions under which the formulary actions may be grouped, the following were the most important. 1. The first division turns on the difference in the nature of the thing claimed, and, according to this division, actions were in rem and in personam. If the object of the proceedings was to enforce a right to a thing, then the formula ran si paret hominem Auli Agerii esse; if to enforce an obligation, then the formula ran si paret Numerium Negidium Aulo Agerio dare, facere, praestare oportere; and it was according to this difference in the intentio that actions were said to be in rem or in personam. Vindicatio came to be used as a generic term for actions in rem, and condictio for actions in personam. 2. Another division of actions refers to the modes in which the prætor extended or modified the law by the shape he gave to the formula. In shaping actions, the prætor introduced changes of two kinds: First, he gave actions for the enforcement of actions outside the old civil law, and this he principally effected by giving an actio in factum concepsta, in which the demonstratio and intentio were blended, and the prætor directed that, if a given state of facts was found to be true, the defendant was to be con-

* See note in Appendix (page 458) to Abdy and Walker’s Gaius.
demned, the action being thus contrasted with one in jus concepta, i.e. given to try an issue by the rules of law. Secondly, the praetor extended existing actions (actiones directae) by giving actions (actiones utiles) to suit cases and persons outside the limits of the direct actions; and this he did either by means of actions in factum, which could be used for these purposes equally well as to give new remedies, or by giving a fictitious action, i.e. an action in which the plaintiff was allowed to feign that he was within the scope of the unextended action. When there was a contract not falling under the old heads, but executed on one side, the praetor enforced it by an action in factum praescriptis verbis, an action to meet the case with the circumstances set forth at the beginning; but such an action, as it was to try an issue according to known rules of law, was in jus concepta. 3. A further division depended on the varying amount of latitude given to the judge. The actions depending on the old civil law were stricti juris, and the judge had merely to decide the question submitted to him, without taking into account considerations of equity. Other actions were bonae fidei, i.e. the judges were allowed to take such considerations into account. In real actions, and in some few special actions, the judge had always a particular kind of latitude given him, as the action was arbitraria (see sec. 103), i.e. he could order the thing claimed to be given up, and, if it was not, could condemn the defendant in as much as he thought equitable; and if the thing was in the possession of the defendant he was made to give it up. Among personal actions which were arbitrariae was one termed ad exhibendum, which was used in order to make a person in possession of a thing produce it, so that its existence in his hands and the state in which it was might be ascertained, or pay damages for not so producing it.

107. In connection with actions under the system of formulæ, we have to notice the interdicts of the praetor.* An interdict was an order issued by the praetor, and was in fact an edict addressed to some person or persons with reference to a particular thing. Vin fieri veto, exhibeas, restituis, 'I forbid you to have recourse to violence; you are to produce, you are to restore;' such were the forms in which these commands were couched. Interdicts were granted where some danger was apprehended, or some injury was being done to something to which a public character attached, as, for instance, if a road was stopped

* Garus, iv. 188-170.
up; but they were also granted to protect private interests, and especially to protect or regulate possession. If the person to whom the interdict was addressed acquiesced and obeyed the pretor's injunction, nothing remained to be done; but if he refused to obey, the magistrate then referred to the decision of a judge, whether the terms of the interdict ought to be complied with. For instance, an interdict ordering a thing to be restored might have been issued; but the person to whom it was directed might deny that by law he was bound to restore the thing. On his statting this to the magistrate, the magistrate would give an action to try the question, shaping the terms of the interdict into the intentio of the formula, si paret A. A. rem restituere opor-
tere, &c. And it is thus that interdicts are connected with actions, as their validity depended on no action being brought to contest them, or the result of an action being to support them. Gradually the action superseded the interdict which was no longer used as a preliminary step, and, by the time of Justinian, the interdict had become obsolete.

108. There were under the system of formula certain cases which the magistrate decided without sending to a judge. In these cases the magistrate was said extra ordinem cognoscere, and the proceedings were termed extra ordinem cognitiones, judicia, or actiones. Among the cases in which the magistrate proceeded in a summary way, were restitutiones in integrum (that is, certain cases in which he restored a person suffering from something from which he ought not by law to suffer, to the same position as he had occupied before the injury was sustained), and cases relating to fideicommissa. But he was called upon most frequently to proceed in this way in order to give execution to the sentence of a judge. The proper remedy of the creditors was still against the person of the debtor until a lex Julia, probably of the time of Augustus, permitted a debtor to avoid arrest by giving up all his goods (cessio bonorum). If, however, the debtor could not be found, then the pretor protected the creditors by what was termed a venditio bonorum or compulsory sale. The creditors were placed in full possession of all that the debtor had belonging to him; his persona was, in fact, transferred to them. This was termed the missio in bonorum possessionem. After a certain delay, the creditors sold their interest in the debtor's property to the person

* Garus, iii. 78.
who would offer to pay the largest proportion of the sums they claimed. He became the purchaser, and this *emptio bonorum* transferred to him the *persona*, or legal existence, of the debtor, who thereby suffered a *capitis deminutio*, and became, in the language of the law, 'infamous.' It was in the exercise of his 'extraordinary' jurisdiction that the magistrate gave this mode of execution.

In the times of the Republic there was no fixed tribunal of appeal, but the authority of one magistrate might be suspended by the veto of another magistrate. Under the Empire the emperor acted as a supreme judge whenever he chose to interfere; but Hadrian ordered that appeals might be brought to the Senate, and that the decision of the Senate should be final.

109. In the third period of the Roman system of civil process, the period of *extraordinaria judicia*, his summary jurisdiction was the only jurisdiction the magistrate exercised. There was no longer any distinction between *jus* and *judicium*; the magistrate and the judge were the same person, so that in the language of the Institutes *judex* means a magistrate deciding a cause. By a constitution published A.D. 294, Diocletian directed all magistrates in the provinces to decide causes themselves. The practice was, in course of time, extended throughout the whole of the empire; and in the days of Justinian it was possible to speak of the *ordinaria judicia* as quite obsolete.*

110. In the days of the later emperors, the provinces were classed together into prefectures. Over each province was a *praeses*, who had a *vicarius*, or vice-president, under him, and who, either himself or by his *vicarius*, tried all cases above a certain amount, fixed by Justinian at 300 *solidi*; cases below that amount were tried by inferior judges, called *judices pedanei*, or by the *defensores* of provincial towns. The great cities, such as Constantinople and Alexandria, were under a separate jurisdiction. The praetorian prefect was the head judge of appeal.

111. Under the system of *extraordinaria judicia*, an action was begun by the plaintiff announcing to a magistrate that he wished to bring an action, and furnishing a short statement of his case. No written statement was necessary,

*Inst. iv. 15. 8.*
but one was often made, and then this statement, called the *libellus conventionis*, was sent by a bailiff of the court (*viator, executor*) to the defendant. The parties or their procurators appeared before the magistrate, and the magistrate decided the case. *Exceptio* was still used as the term to express the plea of the defendant, which he often, but not necessarily, reduced to writing. There was no marked stage in the proceedings, like the conclusion of the proceedings *in jure* under the formulary system, to show when the action had really begun. But the beginning of the action, to describe which the term *litis contestatio* was still used, was said to take place when the magistrate had heard the plaintiff open his case, at the time when, all preliminaries having been gone through, the real hearing began. The condemnation was no longer merely a pecuniary one, and the judge gave sentence for the thing asked for, and not for its equivalent. Constantine had abolished imprisonment for debt unless the debtor could pay, but would not. But already, before the system of *extraordinaria judicia* began, in the time of Antoninus Pius, the simple process of levying executions on so much of the debtor’s property as was requisite had been introduced.

So many of the rules of Roman law relating to evidence which are known to us, date from the period in which the *extraordinaria judicia* prevailed, that it may be convenient to give here a brief statement of what the chief of these rules were. Written evidence was not, as a rule, necessary, but when existing was alone admissible, unless the writing was lost. Two witnesses were necessary to prove a fact, and among those who could be witnesses great consideration was paid to the relative character and position of witnesses. But many persons could not be witnesses, such as persons below the age of puberty, criminals, women guilty of adultery, and, under Justinian, Pagans, and some heretics. Slaves could only be admitted to complete other testimony. The parties to the suit and their near relations were excluded. The burden of proof rested, as a rule, on him who would fail if no evidence was given, and therefore on him who affirms, not on him who denies. Legal presumptions (*presumptiones juris*) were recognised, such as that a formal transaction like emancipation has been properly carried through. Witnesses were made to appear by summons from the judge, and were put on their oath. The torture of slaves, even in civil cases, if they were supposed to be keeping back material evidence, was a very ancient practice, and appears to have
been recognised in the time of Justinian. Each of the parties was put on his oath that he was not bringing or defending the action except on grounds that he believed to be good, and in the last resort either party could, as it were, compromise the action by challenging the other to swear to the true state of the facts, and was then bound by what was so deposed. Justinian also enacted that the costs, according to a fixed scale, should be determined by the oath of the successful litigant; and the advocates of the parties had to take a preliminary oath that they would not pervert justice.

112. Although the subject of crimes and criminal procedure does not fall properly within the scope of the Institutes, which is a treatise on Private Law, yet as the subject is slightly noticed at the end of the Institutes, and is connected with the general history of Roman law, it may be convenient to give some slight account of it here. Criminal jurisdiction was under the kings an attribute of the king himself, but there was an appeal in capital cases to the comitia curiata. After the establishment of the republic the comitia centuriata alone could judge capital cases. The comitia tributa exercised a criminal jurisdiction (but without the power of inflicting death) for political offences, such as those committed by a magistrate during his year of office. Before both these comitia the accusation had to be made by the presiding magistrate. The senate also exercised a special power of judging offenders in times of public danger, and sometimes under such circumstances inflicted death as punishment, but it did not properly belong to the senate to deal with capital cases, and the senate also exercised an ordinary jurisdiction and dealt with such crimes as it thought proper to notice. But all these authorities, the king, the comitia, and the senate, while they sometimes discharged themselves the functions of the judge, were in the habit of delegating their powers to others charged to make an investigation (questio) of the crime. At first each delegatio was made to try one particular offence, and when the case had been tried the questio was at an end. These questiones, the term being transferred from the inquiry to the persons making it, were subsequently appointed to try all offences of a particular kind that it might be necessary to inquire into, while the delegated persons held their authority. Lastly, the questiones began to be made perpetuo, the first of these being probably the questio pecuniæ repetundæ.

* Hunter, 844, 858, 889, 889.
established by the *lex Calpurnia* (A.U.C. 605), and this change was accompanied by the introduction of something like a body of criminal law. When a *questio* was made *perpetua*, the crimes it was to try were in some degree defined, and the punishment prescribed; whereas previously, the body exercising criminal jurisdiction or its delegates had been bound by no rules of law as to the nature of the crime or its punishment, except that the *comitia centuriata* could alone inflict death. Each *questio* consisted of a number of judges varying according to the regulations laid down in the law creating it; sometimes of thirty-two, or of fifty, or of a hundred—the judges being appointed for a year and taken from the same list as that from which judges in civil suits were selected, so that the history of the contests between the senatorial and equestrian orders for the right of being judges already referred to (see sec. 12) applies to criminal and civil judges equally. Before the *questiones perpetuae* any citizen might be an accuser. He had to swear that his charge was not false, and he had to prove the guilt of the accused—so that the system under which a criminal trial is regarded as a suit between parties was thus introduced into Roman law. Private persons had from an early time of Roman law recovered penalties in a civil action for delicts committed to their injury, and so, too, the criminal proceeding took the form of an action between the private person accusing and the accused. The judges were under the guidance of a president (*praeses*), and each judge pronounced that he condemned, absolved, or that there was not proof either way, by dropping into an urn one of three tablets, bearing respectively the words *condemno*, *absolvo*, *non liquet*. If the accused was condemned, he received the precise punishment provided by the law creating the *questio perpetua*. During the last century of the republic, and in the early days of the empire, a great number of laws, each handing over a special head of offence to a *questio perpetua*, were passed, and thus something like a system of criminal law and criminal procedure was established. Under the empire, as time went on, exactly what happened in civil suits happened in criminal proceedings. The magistrates had exercised a power of dealing with some offences in a summary manner (*extra ordinem*), and the sphere of their authority was gradually enlarged until it superseded the *questiones perpetuae* altogether, as the formulary system of actions was superseded by the extraordinary jurisdiction of the magistrate in civil suits.
LIST OF THE CHIEF LAWS, EVENTS, ETC.,
REFERRED TO IN THIS WORK.

NOTE.—Most of the dates are merely approximate.

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INSTITUTIONUM JUSTINIANI
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IN NOMINE DOMINI NOSTRI
JESU CHRISTI

Imperator Caesar Flavius Justinianus Alamannicus Gothicus Francicus Germanicus Anticus Alanicus Vandalicus Africanus plus felix inlatus victor ac triumphator semper Augustus cupidus legum juventutis.

Imperatoriam majestatem non solum armis decoratam, sed etiam legibus oportet esse armatam, ut utrumque tempus et bellorum et paras recte possit gubernari et princeps Romanus victor existat non solum in hostilibus proelis, sed etiam per legitimos tramites calumnianum iniquitates expellens, et fiat tam juris religiosissimus quam victis hostibus triumphator.

1. Quorum utramque viam cum summis vigiliis et summa providentia adnuente Deo perfecimus. Et bellicos quidem sudores nostros barbariae gentes sub juga nostra deductae cognoscunt et tam Africa quam alius innumerose provincie post tanta temporum spatia nostris victoriis a celesti numine prestitis iterum dici: Romane nostoque addite imperio protestantur. Omnes vero populi legibus jam a nobis promulgatis vel compositis reguntur.

2. Et cum sacratissimae constitutions antea confusa in luculentam ereximus consonantiam, tunc nostram extendimus curam et ad immensa

THE EMPEROR CAESAR FLAVIUS JUSTINIANUS, VANQUISHER OF THE ALAMANI, GOTHES, FRANCS, GERMANS, ANTES, ALANI, VANDALS, AFRICANS, PIOUS, HAPPY, GLORIOUS, TRiumphant conqueror, ever August, to the youth desirous of studying the law, greeting.

The imperial majesty should be not only made glorious by arms, but also strengthened by laws, that, alike in time of peace and in time of war, the state may be well governed, and that the emperor may not only be victorious in the field of battle, but also may by every legal means repel the iniquities of men who abuse the laws, and may at once religiously uphold justice and triumph over his conquered enemies.

1. By our incessant labours and great care, with the blessing of God, we have attained this double end. The barbarian nations reduced under our yoke know our efforts in war; to which also Africa and very many other provinces bear witness, which, after so long an interval, have been restored to the dominion of Rome and our empire, by our victories gained through the favour of heaven. All nations moreover are governed by laws which we have already either promulgated or compiled.

2. When we had arranged and brought into perfect harmony the hitherto confused mass of imperial constitutions, we then extended our
PROCÆMIUM.

prudentiae veteris volumina et opus desperatum, quasi per medium profundum euntes, celesti favore jam adimplevimus.

3. Cumque hoc Deo propitio peractum est, Triboniano, viro magno, magistro et ex questore sacri palatii nostri, nee non Theophiloi et Dorotheoi, viris illustribus, antecessoribus, quorum omnium sollicitam et legum scientiam et circa nostras jussiones fidem jam ex multis rerum argumentis accepiimus, convocatis, specialiter mandavimus, ut nostra auctoritate nostriisque suasionibus componant institutiones: ut liceat vobis prima legum cunabula non ab antiquis fabulis discere, sed ab imperiali splendore appetere, et tam aures quam animae vestre nihil inutili nihilque perperam positum, sed quod in ipsa rerum opinet argumentis, accipiant et quod in priore tempore vix post triennium inferioribus contingebat, ut tunc constitutiones imperatoriae legerent, hoc voe a primordio ingrediamenti, digni tanto honorre tantaque reperti felicitate, ut et initium vobis et finis legum eruditionis a voce principali procedat.

4. Igitur post libros quinquaginta digestorum seu pandectarum, in quos omne jus antiquum collatum est (quos per eundem virum excellsum Tribonianum nec non ceteros viros illustres et facundissimos confectum), in hos quattuor libros easdem institutiones partiri jussimus, ut sint totius legitimae scientiae prima elementa.

5. Quibus breviter exposuit est et quod ante optinat, et quod postea desuetudine innumbratum ab imperiali remedio illuminatum est.

6. Quas ex omnibus antiquorum institutionibus et presciplis ex commentarioriis Gaii nostri tam institutionum quam rerum cotidianarum, alisque multiis commenatarius compositae cum tres predicti viri prudentes nobis optulerunt, et legimus et cognovimus et plenissimum nostrarum constitutionum robur eis accommodavimus.

care to the vast volumes of ancient law; and, sailing as it were across the mid ocean, have now completed, through the favour of heaven, a work that once seemed beyond hope.

8. When by the blessing of God this task was accomplished, we summoned the most eminent Tribonian, master and ex-questor of our palace, together with the illustrious Theophilus and Dorotheus, professors of law, all of whom have on many occasions proved to us their ability, legal knowledge, and obedience to our orders; and we have specially charged them to compose, under our authority and advice, Institutes, so that you may no more learn the first elements of law from old and erroneous sources, but apprehend them by the clear light of imperial wisdom; and that your minds and ears may receive nothing that is useless or misplaced, but only what obtains in actual practice. So that, whereas, formerly, the junior students could scarcely, after three years' study, read the imperial constitutions, you may now commence your studies by reading them, you who have been thought worthy of an honour and a happiness so great as that the first and last lessons in the knowledge of the law should issue for you from the mouth of the emperor.

4. When therefore, by the assistance of the same eminent person Tribonian and that of other illustrious and learned men, we had compiled the fifty books, called Digests or Pandects, in which is collected the whole ancient law, we directed that these Institutes should be divided into four books, which might serve as the first elements of the whole science of law.

5. In these books a brief exposition is given of the ancient laws, and of those also, which, overshadowed by disuse, have been again brought to light by our imperial authority.

6. These four books of Institutes thus compiled, from all the Institutes left us by the ancients, and chiefly from the commentaries of our Gaius, both in his Institutes, and in his work on daily affairs, and also from many other commentaries, were presented to us by the three learned men we have above named. We have read and examined them and have accorded to them all the force of our constitutions.
7. Summa itaque ope et alacri studio has leges nostras accipite et vosmet ipsos sic eruditos ostendite, ut spes vos pulcherrima foveat, toto legitimo opere perfecto, posse etiam nostram rem publicam in partibus ejus vobis credendis gubernare.

Data undecimo kalendas December Constantinopoli domino nostro Justiniano perpetuo Augusto tertium consule.

7. Receive, therefore, with eagerness, and study with cheerful diligence, these our laws, and show yourselves persons of such learning that you may conceive the flattering hope of yourselves being able, when your course of legal study is completed, to govern our empire in the different portions that may be entrusted to your care.

Given at Constantinople on the eleventh day of the calends of December, in the third consulate of the Emperor Justinian, ever August (588).
LIBER PRIMUS.

Tr. I. DE JUSTITIA ET JURE.

Justitia est constans et perpetua voluntas jus suum cuique wish to render every one his due.

tribuens.

D. i. 1. 10.

The term *jus*, in its most extended sense, was taken by the Roman jurists to include all the commands laid upon men that they are bound to fulfil, both the commands of morality and of law. The distinction between commands which are only enforced by the sanction of public or private opinion, and those enforced by positive legal sanctions, may seem clear to us; but the Roman jurists, in speaking of the elementary principles and divisions of jurisprudence, did not keep law and morality distinct. Celsus defined *jus* as *ars boni et aequi*. (D. i. 1. 1.) This extension of the term would sink positive law in morality; that only would be supposed to be commanded which ought to be commanded. The confusion arose principally from the view of the law of nature, borrowed from Greek philosophy by the jurists. (See Introd. sec. 14.)

*Jus*, used in its strictly legal sense, has two principal meanings. It either signifies *law*, that is, the whole mass of rights and duties protected and enforced by legal remedies, or it means any single right, that is, any faculty or privilege accorded by law to one man accompanied by a correlative duty imposed on another man. *Jus itineris*, for instance, is the right given to one man of going through the land of another who is placed under a duty to let him pass. Neither a right nor a duty, at any rate in the sphere of *private law* with which alone the Institutes deal, can exist without the other. (See Introd. sec. 36.)

1. Jurisprudentia est divinarum et humanarum rerum notitia, of things divine and human; the science of the just and the unjust.

D. i. 1. 10. 2.
Jusprudentia is the knowledge of what is jus, and jus, according to the theory of the law of nature, laid down what is commanded by right reason, this right reason being common to the divine scheme of things and to man. On this ground, and also because public law has to deal with religious worship, the knowledge of divine things was necessary, as well as the knowledge of human things, to say what were the contents of jus. Both this and the preceding definition are taken at random out of the writings of Ulpian. (See Intro. sec. 34.)

2. His generaliter cognitis et incipientibus nobis exponere jura populi Romani ita maxime videtur posse tradi commodissime, si primo levi ac simplici, post deinde diligentissima etque exactissima interpretatione singula tradantur. Alioquin si statum ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneraverimus, duorum alterum aut desertorum studiorum efficiemus aut cum magnó labore ejus, sepe etiam cum diffidentia, que plurumque juvenes avertit, serius ad id perducemus, ad quod leniorem via ductum sine magnó labore et sine ulla diffidentia maturius perduci potuisset.

3. The maxims of law are these: to live honestly, to hurt no one, to give every one his due.

4. The study of law is divided into two branches; that of public and that of private law. Public law is that which regards the government of the Roman Empire; private law, that which concerns the interests of individuals. We are now to treat of the latter, which is composed of three elements, and consists of precepts belonging to natural law, to the law of nations, and to the civil law.

D. i. 1. 1. 2.

Both the jus publicum and the jus privatum fall under municipal law, that is, the law of a particular state. Publicum jus in sacris, in sacerdotibus, in magistratibus consistit. (D. i. 1. 1. 2.) Public law regulates religious worship and civil administration; private law determines the rights and duties of individuals. The threefold division of private law given in the text is discussed in the next section.
Trr. II. DE JURE NATURALI, GENTIUM ET CIVILI.

Jus naturale est, quod natura omnis animalia docuit. Nam jus istud non humili generis proprium est, sed omnium animalium, que in celo, que in terra, que in mari nascuntur. Hinc descendit maris atque feminae conjugatio, quam nos matrimonium appellamus, hinc liberorum procreatio et educatio: videmus etenim cetera quoque animalia istius juris peritiae censeri.

The law of nature is that law which nature teaches to all animals. For this law does not belong exclusively to the human race, but belongs to all animals, whether of the air, the earth, or the sea. Hence comes that yoking together of male and female, which we term matrimony; hence the procreation and bringing up of children. We see, indeed, that all the other animals besides man are considered as having knowledge of this law.

D. i. 1. 1. 8.

In the Introduction (sec. 14) a sketch has been given of what the jurists meant by the lex naturae. It was the expression of right reason inherent in nature and man, and having a binding force as a law. It was contrasted with the jus civile, the old strict law of Rome (Introd. sec. 10), and also with the jus gentium, the sum, that is, of the law found to obtain in other nations besides the Romans, as well as in Roman law. (Introd. sec. 12.) There thus arose the threefold division of law adopted in the last paragraph of the last title; but the jus gentium and the jus naturale were often placed in the same head of division, for the law common to all nations was but the embodiment and indication of what right reason was supposed to command to all men. Thus while the threefold division of law was adopted by some jurists, a twofold division was adopted by others, and is adopted in the next and the eleventh paragraphs of this title, Justinian first borrowing from Ulpian, who adopted the threefold division, and then from Gaius, who adopted the twofold.

Unfortunately, in order to give a notion of jus naturale, Justinian has borrowed a passage from Ulpian, in which that jurist runs off into a subsidiary and divergent line of thought. It is easy to see that if we begin to make inherent reason the foundation of law, we may find it necessary to take into account the community of actions which, in some of the primary features of physical life, reason or instinct suggests to man and animals. If jus is that which nature commands, nature may be said to command the propagation of the species in animals as much as in man, and thus there would be a jus common to animals and to men. A jurist, to whom the theory of the lex naturae was familiar, might easily pursue the subject to a point in which men and animals seemed to meet. But the main theory had nothing to do with animals, as it looked only to the reason inherent in the universe and in man, and in considering what the Roman jurists meant by jus naturale this fragment of Ulpian may be dismissed almost entirely from our notice.
1. Jus autem civile vel gentium ita dividitur: omnes populi, qui legibus et moribus reguntur, partim suum proprio, partim communi omnium hominum jure utuntur; nam quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est vocaturque jus civile, quasi jus proprium ipsius civitatis: quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos persequae custoditur vocaturque jus gentium, quasi quo jure omnes gentes utuntur. Et populus itaque Romanus partim suum proprio, partim communi omnium hominum jure utitur. Quae singula quaelia sunt, suis locis proponemus.

2. Sed jus quidem civile ex unaquaque civitate appellatur, veluti Atheniensium: nam si quis velit Solonis vel Draconis leges appellare jus civile Atheniensium, non erraverit. Sic enim et jus, quo populus Romanus utitur, jus civile Romanorum appellamus vel jus Quiritium, quo Quirites utuntur; Romani enim a Quirino Quirites appellantur. Sed quotiens non addimus, cujus sit civitatis, nostrum jus significamus: sicut cum poetam dici mus nee addimus nomen, subauditur apud Graecos egregius Homerus, apud nos Vergilius. Jus autem gentium omni humano generi commune est. Nam usu exigente et humanis necessitatisbus gentes humanae quedam sibi constituerunt: bella eternum orta sunt et captivitates secutae et servitutes, quae sunt juri naturali contrarie (jure enim naturali ab initio omnes homines liberi nasciabantur); ex hoc jure gentium et omnes pene contractus introducti sunt, ut emptio venditio, locatio conductio, societas, depositum, mutuum et alii innumerables.

D. i. 4. 5.

The term *jus civile*, as used here, entirely depends for its meaning on the contrast between it and the *jus gentium*. When the jurists came to examine different systems of laws, they found much in each that was common to all. This common part they termed the *jus gentium*; and the residue, the part peculiar to each state, they called *jus civile*. The contracts of sale, hiring, and the others mentioned in the text, were, they found, carried
on much in the same way in every country, and they therefore assigned them to the head of *jus gentium*, and contrasted them with forms of contract which were peculiar to the old Roman law, and were therefore considered part of the *jus civile*. In the usual sense of *jus civile*, in which it means the old law of Rome prior to the *jus honorarium* (see Introd. sec. 10), these contracts were part of the *jus civile*, that is, they were part of, and were recognised by, the old law, but they were also part of the general law of nations, and no forms peculiar to Roman law were necessary for their creation.

3. Our law is written and un-written, just as among the Greeks some of their laws were written and others not written. The written part consists of laws, *plebiscita*, *senatus-consulta*, enactments of emperors, edicts of magistrates, and answers of jurisprudents.

4. A law is that which was enacted by the Roman people on its being proposed by a senatorial magistrate, as a consul. A *plebiscitum* is that which was enacted by the plebs on its being proposed by a plebeian magistrate, as a tribune. The *plebs* differs from the people as a species from its genus; for all the citizens, including patricians and senators, are comprehended in the people; but the *plebs* only includes citizens, not being patricians or senators. But *plebiscita*, after the Hortensian law had been passed, began to have the same force as laws.

**GAL. i. 8.**

A *lex* or *populi scita*, to use a word made by the commentators on the analogy of *plebiscitum*, was passed originally only in the *comitia curiata*; after the establishment of the *comitia centuriata* in both these *comitia*; but, excepting in the case of conferring the *imperium*, almost always in the *centuriata*. (See Introd. sec. 5, 15.)

The *lex Hortensia*, 467 A.U.C., had been preceded by the *lex Valeria Horatia*, 304 A.U.C., and the *lex Publicia*, 414 A.U.C., by both of which it was provided that *plebiscita* should bind the whole people. Either the effect of their provisions had been disputed, or exceptions had been made to them, or perhaps the extension of the authority of the *plebiscitum* which they gave was not so complete as their terms would seem to imply. (Nieb. ii. 366.) The term *lex* is very frequently applied to *plebiscita* as well as to *populi scita*. (See Introd. sec. 9.)

5. *Senatus-consultum* est, quod *senatus* jubeat atque constituit. Nam cum auctum est populus Romanus in eum modum, ut difficile sit in
Senatus-consulta had in some instances the force of a law even in the times of the republic, for we have a few preserved of a date antecedent to the Caesars, which undoubtedly had the force of law; but they all relate to matters of social administration, such as forbidding burial within the city, or the importation of wild beasts. (See Introd. sec. 15.) But we cannot speak of senatus-consulta as a substantial part of the general legislation till the times of the emperors, when they superseded every other except the emperor's enactments. The appeal of the emperor to their authority dwindled down into a mere form. (Cod. i. 14. 12. 1, in praeasserti leges condere soli imperatori concessum est.)

6. Sed et quod principi placuit, legis habet vigorem, cum lege regia, qua de imperio ejus lata est, popularis ei et in eum omne suum imperium et potestatem concessit. Quodcumque igitur imperator per epistulam constituit vel cognoscens decretiv vel edicto precepit, legem esse constat: haec sunt, quae constitutiones appellantur. Plane ex his quaedam sunt personales, quae ad exemplum traduntur, quoniam non hoc princeps vult: nam quod alicui ob merita indulesit, vel si quod penam irrogavit, vel si quod sine exemplo subvenit, personam non egreditur. Alias autem, cum generalessunt, omnes procul dubio tenent.

6. That which seems good to the emperor has also the force of law; for the people, by the lex regia, which is passed to confer upon him his power, make over to him their whole power and authority. Therefore whatever the emperor ordains by rescript, or decides in adjudging a cause, or lays down by edict, is unquestionably law; and it is these enactments of the emperor that are called constitutions. Of these, some are personal, and are not to be drawn into precedent, such not being the intention of the emperor. Supposing the emperor has granted a favour to any man on account of his merits, or inflicted some punishment, or granted some extraordinary relief, the application of these acts does not extend beyond the particular individual. But the other constitutions, being general, are undoubtedly binding on all.

Gal. i. 5; D. i. 4. 1.

The imperial constitutions, though known in the time of the previous emperors, first attained, under Hadrian, the position of being in reality the only source of law. They were of three kinds: first, epistola, letters or answers to letters addressed by the emperor to different individuals or public bodies, or mandata, orders given to particular officers, and rescripta, answers given by the emperor to magistrates who requested his assistance in the decision of doubtful points (Bk. i. Tit. 8. 2); secondly, judicial sentences, decreta, given by the emperors (Bk. ii. Tit. 15. 4); both these kinds having force only by serving as a precedent in similar cases; and thirdly, edicta, or laws binding generally on all the subjects of the emperor. (See Introd. sec. 16.)
It is here said, on the authority of Ulpian (D. i. 4. 1), that the emperor derives his authority from the *lex regia*. This refers to the law of the *comitia curiata* by which the *imperium* was conferred. Gaius says, 1. 5, *nec unquam dubitatum est quin principis constitutio legis vicem optineat, cum ipse imperator per legem imperium accipiat*. This law was a relic of that by which the king had been invested with the royal authority, intrusted to him by the *curia* representing the *populus*; and it was considered that the emperor was in like manner invested with all the power of the Roman people transferred to him on his receiving the *imperium*. (See Introd. sec. 16.)

7. The edicts of the *praetors* are also of great authority. These edicts are called the *jus honorarium*, because those who bear honours in the state, that is, the magistrates, have given it their sanction. The curule *sediles* also used to publish an edict relative to certain subjects, which edict also became part of the *jus honorarium*.

Gal. i. 6; D. xxi. 1. 1.

Papinian says (D. i. 1. 7), that the *jus praetorum* was introduced by the *praetors*, *adjuvandi vel supplendi vel corrigendi juris civilis gratia*. New circumstances, new habits of thinking, and, in the case of the *praetor peregrinus*, a new scope for authority, compelled the *praetor* to use an equitable power, and frequently equitable fictions, to extend the narrow limits of the old civil law. (See Introd. sec. 12.) The decisions by which he did this were called *edicta*. At the beginning of his year of office, the *praetor* published a list of the rules by which he intended to be bound, and this was called the *edictum perpetuum*, as it ran on from year to year under successive *praetors*, each making such additions and changes as he thought necessary. *Edictum repentinum* was one made to meet a particular case. The *lex Cornelia* (B.C. 67) forbade a *praetor* to depart during his term of office from the edict he had promulgated at its commencement. In the time of Hadrian, a jurist named Salvius Julianus, who filled the office of *praetor*, systematised and condensed the edicts of preceding *praetors* into a final *edictum perpetuum*, which, if further annual edicts were issued at all, which is doubtful, served as their basis, and is specially known as the *edictum perpetuum*. (See Introd. sec. 19.)

8. The answers of the jurisprudents are the decisions and opinions of persons who were authorised to determine the law. For anciently it was provided that there should be persons to interpret publicly the law, who were permitted by the emperor to give answers on questions of law. They
sententiae et opiniones eam auctoritatem tenebant, ut judicii recedere a responsa eorum non liceret, ut est constitutum. were called jurisconsults; and the authority of their decisions and opinions, when they were all unanimous, was such, that the judge could not, according to the constitutions, refuse to be guided by their answers.

GAI. i. 7.

It is to the change in the position of the jurists effected by Augustus (Introduct. sec. 20) that reference is made in the words quibus a Cæsare jus respondendi datum est, and it is to the constitutions of Hadrian (sec. 20) and Theodosius (sec. 27) that the words judicii recedere a responsa eorum non liceret, ut est constitutum, refer.

9. Ex non scripto jus venit, quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur. 9. The unwritten law is that which usage has established; for ancient customs, being sanctioned by the consent of those who adopt them, are like laws.

D. i. 3. 32.

Quid interest suffragio populus voluntatem suam declarat apud rebus ipsis et factis? (D. i. 3. 32.) The Roman jurists did not trouble themselves to ascertain very accurately whence laws derive their binding force. The vague expression in the text mores legem imitantur, and the question asked in these words of the Digest, leave undecided the question of the relation of customs to laws. The Roman law held that customs could not only interpret law (optima legum interpres consuetudo, D. i. 3. 37), but also abrogate it. In the eleventh section of this Title it is said that the enactment of a state may be changed tacito consensu populi, and in the Digest (i. 3. 32. 1) it is expressly stated that leges tacito consensu omnium per desuetudinem abrogantur. The Code, certainly, lays down (viii. 58) that the authority of a custom is not so great that it can ‘conquer reason or law;’ but this is said of particular not general customs. A law fallen into desuetude might be abrogated by general custom, but a particular custom, of only local force, would not be suffered to prevail against the general law.

10. Et non ineleganter in duas species jus civile ab distributum videtur. Nam origo ejus ab institutis duarum civitatum, Athenarum scilicet et Lacedæmonis, fluxisse videatur: in his enim civitatis iba agi solitum erat, ut Lacedæmonii quidem magis ea, quæ pro legibus observarent, memoris mandarent, Athenienses vero ea, quæ in legibus scripta reprehendissent, custodi- rent. 10. The civil law is not improperly divided into two kinds, for the division seems to have had its origin in the customs of the two states Athens and Lacedæmon. For in these states it used to be the case, that the Lacedæmonians rather committed to memory what they were to observe as law, while the Athenians rather kept safely what they had found written in their laws.

It is hardly necessary to say, that the distinction between written and unwritten law must always exist where laws are written at all, and where no attempt has been made to express all
law in positive terms; and that this Greek origin for the two branches of Roman law is quite imaginary.

11. Sed naturalia quidem jura, quae apud omnes gentes servantur, divina quadam providentia constituta, semper firma atque immutabilia permaneat: ea vero, quae ipsa sibi quaeque civitas constituit, sepe mutari solent vel tacito consensus populi vel alia postea lege lata.

D. i. 3. 32. 1.

Justinian, abandoning the threefold division of Ulpian, which he had adopted in the earlier paragraphs of this chapter, now follows the twofold division of Gaius (i. 1), into *jus naturale* and *jus civile*.

12. Omne autem jus, quo utimur, vel ad personas pertinet vel ad res vel ad actiones. Ac priscus de personis videamus. Nam parum est jus nosse, si personae, quarum causa statutum est, ignorantur.

GAL. i. 8.

In Gaius, and in the Institutes of Justinian, obligations are treated of under the head of things. The division of law which compels them to be so treated is obviously inaccurate, for actions themselves are just as much things as obligations; and if obligations were classed under the head of things because they are a mode of obtaining things, there is the objection to the classification, that the obtaining of a thing is only an ultimate and accidental result, not a necessary part, of an obligation.

**TIT. III. DE JURE PERSONARUM.**

Summa itaque divisio de jure personarum hec est, quod omnes personas sunt: homines aut liberi sunt aut servi. or slaves.

GAL. i. 9.

Every being capable of having, and being subject to, rights was called in Roman law a *persona*. (See Intro. sec. 37.) Thus not only was the individual, when looked at as having this capacity, a *persona*, but so also were corporations and public bodies. Slaves were *personae* in the sense that they were not merely things, and they could go through some legal forms, and were entitled in later times to a certain amount of legal protection; but, although they are thus treated of under the law of persons, it is chiefly their want of legal capacities that attracts attention. The word *persona* has also another sense. It was used not only for the being who had the capacity of enjoying rights and fulfilling duties, but also for the different characters or parts in which this capacity showed itself; or, to borrow the metaphor suggested by the etymology of the word, for the different masks or faces which the
actor wore in playing his part in the drama of civic and social life. Thus, for instance, the same man might have the persona patris, or tutoris, or mariti; that is, might be regarded in his character of father, tutor, or husband.

Status is the position which a persona occupies in the eye of the law (D. i. 5.) In the possible position of a persona the Roman law recognised three main heads (capita), viz.: libertas, the capacity to have and be subject to the rights and obligations of a freeman; civitas, the capacity to have and be subject to the rights and obligations of a Roman citizen; and familia, the capacity to have and be subject to the rights and obligations of a person belonging to a Roman family. These three 'heads' were again, by an expression borrowed from that applied to citizens when appearing as 'heads' in the censor's list, summed up in the singular 'caput'; the 'head' of a persona thus meaning the sum of the person's legal capacities. The status of a free Roman citizen was that of having this caput. The status of a slave was that of having no caput. Since freeborn members of a Roman family acquired, as such members, the position of cives, modern jurists sometimes use status in the sense of family position. (See Introd. sec. 38, 39, 40.)

The extent and meaning of each of the capacities summed up in caput may be illustrated by contrasting it with its corresponding negative, that is, with the absence of the capacity spoken of. In order to determine the capacity of freemen, we may speak of the position of (freedmen and) slaves; in order to determine the capacity of a citizen, we may speak of the position of a Latinus and a peregrinus; in order to determine the capacity of persons having the amplest family position, i.e. being sui juris, we may speak of persons having a less ample position, and being either under the power of others (alieni juris) or under the authority or guidance of others, i.e. under tutors or curators. This is the method adopted in the Institutes, and the discussion of the points thus suggested occupies the remainder of the first book.

1. Et libertas quidem est, ex qua etiam liberi vocantur, naturalis facultas ejus, quod cuique facere libet, nisi si quid aut vi aut jure prohibetur.

2. Servitus autem est constitutio juris gentium, qua quis dominio alieno contra naturam subicitur.

1. Freedom, from which is derived the term free as applied to men, is the natural power of doing each what we please, unless prevented either by force or by law.

2. Slavery is an institution of the law of nations, by which one man is made the property of another, contrary to natural right.

D. i. 5. 4. 1.

The institution of slavery was the one thing in which the jus gentium seemed to be irreconcilable with the jus naturale; and it was this, probably, more than anything else, that made some of the jurists adopt the threefold division of law.

3. Servi autem ex eo appellati sunt, quod imperatores captivos ven- 3. Slaves are denominated servi, because generals order their captives
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dere jubent ac per hoc servare nec occidere solent: qui etiam mancipia dicti sunt, quod ab hostibus manu capturatur.

4. Servi autem aut nascentur aut sunt. Nascentur ex ancillis nostris: sunt aut jure gentium, id est ex captivitate, aut jure civili, veluti cum homo liber major viginti annis ad pretium participandum sese vendendari passus est.

to be sold, and thus preserve them, and do not put them to death. Slaves are also called mancipia, because they are taken from the enemy by the strong hand.

4. Slaves either are born or become so. They are born so when their mother is a slave; they become so either by the law of nations, that is, by captivity, or by the civil law, as when a free person, above the age of twenty, suffers himself to be sold, that he may share the price given for him.

D. i. 5. 5. 1.

Children born out of the pale of lawful marriage always followed the condition of the mother; and as slaves were incapable of contracting a lawful marriage, in the peculiar sense of 'lawful' adopted by Roman law, the children of a female slave were necessarily slaves. They were called vernæ when born and reared on the property of the owner of their mother. (See Introd. sec. 46.)

In order to prevent a fraud, by which a person, having allowed himself to be sold in order to share the price with the vendor, turned round on the purchaser and claimed his liberty as being freeborn, a law, perhaps the senatusconsultum Claudianum (D. x1. 3. 5), enacted that the perpetrator of the fraud should be bound by his statement, and be held to be a slave. In the early law of Rome, it may be observed, a citizen could really sell himself so as to lose his freedom; but he always retained a right of redemption.

There were other modes by which slavery could arise under the Roman law, as (1) when a free woman had commerce with a slave, or (2) when malefactors were condemned to the amphitheatre or the mines, the guilty parties were held in law to be slaves. These latter modes of legal slavery were abolished by Justinian. (Bk. iii. Tit. 12. 1. Nov. 22. cap. 8.) Lastly (3) an emancipated slave, if guilty of any gross act of ill behaviour towards his patron, i.e. his late owner, such as a violent attack on his reputation or person, might be reclaimed to slavery. (D. xxv. 3. 6.)

In the older law, addictio, that is, delivery of the person to a creditor by way of execution for a debt, the being detected in furtum manifestum, and the omitting to be inscribed in the tables of the census in order to defraud the revenue, were each a cause of slavery; but these causes had become obsolete long before the time of Justinian.

5. In servorum condicione nulla differentia est. In libris muliebre differentiae sunt: aut enim ingenui sunt aut libertini.

5. In the condition of slaves there is no distinction; but there are many distinctions among free persons; for they are either born free, or have been set free.

D. i. 5. 5. 5.
In the later empire there was introduced an important novelty in the condition of slaves by the institution of *coloni*, that is, serfs attached to the soil, *ascripti glebeae*, passing with it, and bound to remain on it, but having much of the position of freemen. They were of two kinds: if *coloni inquilini* or *liberi*, they were entitled to retain for their own use all they could gain from the soil beyond the value of a yearly payment, which they had to make to the owner of the soil; if *coloni adscriptiti* or *consiti*, they had no rights of property as against their masters. (C. xi. 47 et seq.)

**TIT. IV. DE INGENUIS.**

Ingenuus is est, qui statim, ut natus est, liber est, sive ex duobus ingenuis matrimonio editus, sive ex libertinis, sive ex altero libertino, altero ingenuo. Sed et si quis ex matre libera nascatur, patre servo, ingenuus nihil minus nascitur: quemadmodum qui ex matre libera et incerto patre natus est, quoniam vulgo conceptus est. Sufficit autem liberam fuisset matrem eo tempore, quo nascitur, licet ancilla conceperit. Et ex contrario si libera conceperit, unde ancilla facta pariet, placuit eum, qui nascitur, liberum nasci, quia non debet calamitas matris ei nocere, qui in utero est. Ex his et illud quiescit, si ancilla praematuri manumissa sit, deinde ancilla postea facta peperit, liberum an servum pariet? Et Marcellus probat, liberum nasci: sufficit enim ei, qui in ventre est, liberam matrem vel medio tempore habuisse: quod et verum est.

A person is *ingenuus* who is free from the moment of his birth, by being born in matrimony, of parents who have been either both born free, or both made free, or one of whom has been born and the other made free; and when the mother is free, and the father a slave, the child nevertheless is born free; just as he is if his mother is free, and it is uncertain who is his father; for he has been conceived promiscuously. And it is sufficient if the mother is free at the time of the birth, although a slave when she conceived; and on the other hand, if she be free when she conceives, and is a slave when she gives birth to her child, yet the child is held to be born free; for the misfortune of the mother ought not to prejudice her unborn infant. The question hence arose, if a female slave with child is made free, but again becomes a slave before the child is born, whether the child is born free or a slave. Marcellus thinks it is born free, for it is sufficient for the unborn child, if the mother has been free, although only in the intermediate time; and this also is true.

**GAI. i. 11, 82, 89, 90; D. i. 5. 5.**

If a child was born *in matrimonio*, a tie which could only, in the eyes of the civil law, be contracted between two free persons, the child was free from the moment of conception. If it was not born *in matrimonio*, then it followed the condition of the mother; and it was her condition at the time of birth, not at that of conception, which decided the *status* of the child. It was only by a departure from the strict theory of law that the enjoyment of liberty by the mother before the birth was allowed to make the child free. (GAI. i. 89.)

1. Cum autem ingenuus aliquid natus sit, non officit illi in servitute, but postea et postea manumissionem esse: 1. When a man has been born free, he does not cease to be *ingenuus* because he has been in the position of
sepsimine enim constitutum est, natalibus non officere manumissionem. a slave, and has subsequently been enfranchised; for it has been often settled that enfranchisement does not prejudice the rights of birth.

In servitute fuisse. This does not mean to have been a slave, but to have been in the position of one. As if a freeborn child was considered erroneously to be a slave, and was manumitted, and then his free birth was discovered, his status would be that of an ingenuus, and not of a libertinus.

Trt. V. DE LIBERTINIS.

Libertini sunt, qui ex justa servitute manumissi sunt. Manumissio autem est datio libertatis: nam quondam quis in servitute est, manu et potestate suppositus est, et manumissus liberatur potestate. Quae res a jure gentium originem sumpeit, utpote cum jure naturali omnes liberi nascerentur, nec esset nota manumissio, cum servitus esset in cognita: sed posteaquam jure gentium servitus invasit, secutum est beneficium manumissionis. Et cum uno naturali nomine homines appellaremur, jure gentium tria genera hominum esse ceperunt, liberi et et contrarium servi et tertium genus libertinii, qui desierant esse servi.

Freedmen are those who have been manumitted from legal servitude. Manumission is the 'giving of liberty.' For while any one is in slavery, he is under 'the hand' and power of another, but by manumission he is freed from this power. This institution took its rise from the law of nations; for by the law of nature all men were born free; and manumission was not heard of, as slavery was unknown. But when slavery came in by the law of nations, the boon of manumission followed. And whereas we all were de-nominated by the one natural name of 'men,' the law of nations introduced a division into three kinds of men, namely, freemen, and in opposition to them, slaves; and thirdly, freedmen who had ceased to be slaves.

Gal. i. 11; D. i. 1. 4.

In some few cases a slave could obtain liberty without manumission. Many of these cases are enumerated in the Digest (xl. 8). A slave, for instance, who was abandoned by his master on account of disease or infirmity (ob gravem infirmitatem), was pronounced free by an edict of Claudius.

1. Multis autem modis manumissio procedit: aut enim ex sacris constitutionibus in sacrosanctis ecclésiis aut vindicta aut inter amicos aut per epistulam aut per testamentum aut aliam quamlibet ultimam voluntatem. Sed et alius multis modis libertas servo competent petest, qui tam ex veteribus quam nostris constitutionibus introducunt.

Gal. i. 17; D. xl.; C. i. 18; vii. 6. 1. 1.

A manumissio was said to be legitima when made in one of the three ways recognised by the old law. These three modes of effecting a legitima manumissio were census, vindicta, and testa-
mentum. A *legitima manumissio* was made: 1st, *censu*, i.e. by the master and the slave appearing before the censor at the time of the census being taken, and the slave’s name being, at the master’s desire, enrolled on the census list. This mode became obsolete in the time of the empire (ULP. *Reg.* i. 8; *GAI.* i. 140), the census having been rarely taken under the early emperors, and not at all after Decius, A.D. 249. 2nd, *vindicta*, i.e. by means of a fictitious suit called *causa liberalis* (D. xi. 12), in which a person, termed the *assertor libertatis*, that is, a friend of the slave, or in his place a lictor, asserted before the praetor that the slave was free, by touching him on the head with a wand (which represented the *hasta* or symbol of proprietorship), and thus claiming him as against the master. In token of his consent, the master turned him round and then let him go, and the magistrate pronounced him free. 3rd, *testamento* (D. xl. 4), i.e. by testament. Freedom might be given by testament, either as a legacy to the slave himself, in which case the slave was called *orcinus*, because his patron, i.e. the person to whom he owed his liberty, was dead when he gained it; or the heir might be charged to grant or procure the liberty of the slave, in which case the heir would be the patron. If a slave was made by testament conditionally free, he was said to be *statu liber—statu liber est, qui statutam et destinatam in tempus vel conditionem libertatem habet* (D. xl. 7. 1). The solemnities attached to manumission by the *vindicta* ceased to be strictly observed long before the time of Justinian. Although the magistrate was at his country seat (D. xi. 2. 8), no lictors present, or the master silent, the manumission was still held good.

By *manumissio legitima* the slave became a Roman citizen, and the state, therefore, was represented in the proceedings by the censor and by the praetor in the two first-mentioned modes of emancipation, and in the third case by the Roman testament having always, theoretically, a public character attached to it; and it was when the state was so represented that the manumission was *legitima*. But manumission was not always *legitima*. Usage and the praetor’s authority established gradually many other less formal methods of accomplishing the same object, and the imperial constitutions added others. Of those mentioned in the text, that in presence of the Church was established long before the time of Constantine, as we gather from a constitution dated A.D. 316 (C. i. 13). The ceremony was generally performed at some one of the great feasts, and it was necessary it should take place before the bishops. Freedom could also be given by a master writing to a slave (*per epistolam*), or declaring before his friends (*inter amicos*), that he gave the slave liberty, or by his making a codicil to that effect (*per quamlibet aliam ultimam voluntatem*), witnesses, however, being necessary in each of these cases (C. vii. 6. 1; C. vii. 6. 2; C. vi. 36. 8. 3). Other methods are noticed in the Code (vii. 6. 3–12), all based upon an implied wish of the master to free the slave. Until the time of Justinian,
however, the slave emancipated by any of these private modes was only thereby placed in the position of a *Latinus* or a *dediticius*, and not in that of a Roman citizen.

2. Servi vero a dominis semper manumitti solent, adeo ut vel in transitu manumittantur, veluti cum preitor aut proconsul aut preses in baneum vel in theatrum est.

3. Libertinorum autem status triperitum antea fuerat: nam qui manumittantur, modo majorem et justam libertatem consequebantur et fiebant eves Romani, modo minor et Latini ex iure Junia Norbana fiebant, modo inferior et fiebant ex iure Aelia Sentia dediticiorum numero. Sed dediticiorum quidem pessima condicio jam ex multis temporibus in desuetudinem abit, Liberorum vero nomen non frequentabatur: ideoque nostra pietas, omnibus augere et in maiorem statum reducere desiderans, in duabus constitutioibus hoc emendavit et in primum statum reduxit, quia et a primis urbis Romae cunabulis una et simplex libertas competebat, id est eadem, quam habebat manusmissor, nisi quod societ libertinis sit, qui manumittitur, licet manusmissor ingenius sit. Et dediticos quidem per constitutionem expulsimus, quam promulgavimus inter nostras decisiones, per quas, suggerente nobis Tribonianus, viro excelsa, questore, antiqui juris altercationes placavimus: Latinos autem Junianos et omnem, que circa eos fuerat, observantiam alia constitutione per ejusdem questoris suggestionem correximus, que inter imperiales radiat sanctiones, et omnes libertos, nullo nec statis manumissi nec dominii manusmissoris nec in manusmissionis modo discrimine habito, sicut antea observabatur, civitate Romana donavimus: multis additis modis, per quos posset libertas servis cum civitate Romana, que sola in presenti est, prestari.

2. Slaves may be manumitted by their masters at any time; even when the magistrate is only passing along, as when a preator, or proconsul, or *praeses*, is going to the baths or the theatre.

3. Freedmen were formerly divided into three classes. For those who were manumitted sometimes obtained a complete liberty, and became Roman citizens; sometimes a less complete, and became Latins under the *lex Junia Norbana*; and sometimes a liberty still inferior, and were ranked as *dediticii*, by the *lex Aelia Sentia*. But this lowest class, that of the *dediticii*, has long disappeared, and the title of Latins become rare; and so in our benevolence, which leads us to complete and improve everything, we have introduced a great reform by two constitutions, which re-established the ancient usage; for in the infancy of the state there was but one liberty, the same for the enfranchised slave as for the person who manumitted him; excepting, indeed, that the person manumitted was a freedman, while the manusmissor was freeborn. We have abolished the class of *dediticii* by a constitution published among our decisions, by which, at the suggestion of the eminent Tribonian, questor, we have put an end to difficulties arising from the ancient law. We have also, at his suggestion, done away with the *Latinia Juniana*, and everything relating to them, by another constitution, one of the most remarkable of our imperial ordinances. We have made all freedmen whatsoever Roman citizens, without any distinction as to the age of the slave, or the interest of the manusmissor, or the mode of manumission. We have also introduced many new methods, by which liberty may be given to slaves, together with Roman citizenship, the only kind of liberty that now exists.

Gal. i. 12-17; C. vii. 5, 6.

For a complete emancipation it was originally necessary that the owner should have quiritary, i.e. complete, ownership (see Introd. sec. 62) of the slave, and that the *manumissio* should be *legitima*. If the ownership was less full, or the ceremony pri-
vate, the slave lived in a state of freedom, and the prætor forbade the master to exert his strictly legal power of reasserting his right to the services of the slave; but the condition of the slave as regarded the state was not that of a citizen, and at his death his master took all his property.

By the lex Ælia Sentia, A.D. 4, it was enacted that, to make the emancipation complete, that is, to make the slave a citizen, a third requisite should be added. He was to be thirty years old (GAI. i. 18); or else, if he was under that age, the ceremony was to be performed by vindicta, after the reason for the emancipation had been held good by a consilium, consisting, at Rome, of five senators and five equites; in the provinces of twenty recuperatores, i.e. judges specially appointed, and who were necessarily Roman citizens. This council sat under the presidency of the prætor at Rome, and of the proconsul in the provinces. (GAI. i. 20.)

The lex Junia Norbana was made A.D. 19; and the effect of its provisions, coupled with that of the lex Ælia Sentia, was to place those whose emancipation was defective in any one of these three requisites on the footing of Latini coloniarii. (GAI. i. 17; see Introd. sec. 38, 39.) The old relation of the Latin in the sense of dwellers in Latium to Rome, some of whom enjoyed the connubium and others did not, was terminated by the Lex Julia, B.C. 90, by which all such Latini were made Roman citizens. But the status of being a Latin (Latinitas), but without the connubium, was preserved as an artificial creation of the law, and was bestowed on towns or peoples. The Transpadani, for example, received the Latinitas in B.C. 89. Those receiving the Latinitas were Latini coloniarii, and such Latin colonies seem to have existed in the days of Gaius (GAI. i. 28). The effect of the lex Junia Norbana was to place the liberti Latini to whom it applied nearly but not quite on the footing of Latini coloniarii.

Latini (liberti) Juniani, as having this Latinitas, might trade with Romans on the footing of Roman citizens, but could not vote at elections or fill public offices, and had not the connubium, and therefore their children were not in their power. They could not make a testament, or become heirs, legatees, or guardians under a testament, although they could receive the benefit of fideicommissa (GAI. i. 24); and at their death their original owner took their property exactly as if they had never ceased to be slaves. (See Bk. iii. Tit. 7, sec. 4, ipso ultimo spiritu simul animam atque libertatem amittebant.) But there were many ways in which a libertinus, in this position, could attain citizenship: as by an imperial rescript; by holding a magistracy in a Latin colony; by proving before a magistrate his marriage with a Roman or Latin wife, or a person he believed to be a Roman or Latin, and the birth of a son who was a year old; or by going through the ceremony of emancipation again and fulfilling the three conditions requisite (this was called iteratio); or by the modes noticed by Ulpian (Reg. 3. 1) in the words militia, nave, edificio, piscinio, that is
by military service, building a ship and carrying wheat for six years, making a building, or establishing a bakeshop. (Gai. i. 22, 23, 24–28, 31; ii. 275; iii. 56, et seq.)

The lex Aelia Sentia provided that slaves who had been guilty of a crime for which they had been put in chains, branded, or put to the torture, should, by emancipation, be only raised to the level of dediticii, that is, of people who have surrendered themselves to their conquerors in war. They enjoyed personal liberty, but that was all. They could not trade except on the footing of strangers; could not make a testament; were forbidden to live within a hundred miles of Rome, on pain of being themselves sold, together with all their property; they could never become citizens; and at their death their master took all their property by right of succession if the emancipation had been complete; and, if not, by the right an owner always had to the slave’s peculium. (Gai. i. 12–15, 25–27; iii. 74–76.) The children of the Latini Juniani were Latini, and those of the dediticii were peregrini, and the patron had no rights over them. (Demangeat, i. 194.)

Where above we speak of a Latin libertus holding a magistracy in a Latin colony, or marrying a Latin, i.e. a member of a Latin colony, it must be understood that we are speaking of the law as it stood before the time of Caracalla, when all the free inhabitants of the empire received the civitas, and consequently the position of Latini, other than Latini Juniani, was swept away; and in the same way, after the legislation of Caracalla, there were no peregrini (see Introd. sec. 39), but the children of liberti in the position of dediticii were treated as peregrini.

There were thus three classes of freedmen:—1. Those who were citizens; 2. Those who were in the position of Latini; 3. Those in the position of dediticii. (Gai. i. 12.) But these distinctions were abolished by Justinian, nullo nec ostatis manumissi nec dominii manumittentis nec in manumissionis modo discrimine habito (C. vii. 5 and 6); and under his legislation a slave became at once completely free by any act of the owner signifying his intention to bestow liberty. By a Novel (78. 1) Justinian abolished all distinction between libertini and ingenii, retaining, however, the jus patronatus. The libertus owed his patronus reverence (Dig. xxxvii. 15), and also in many cases had to discharge certain services (Dig. xxxvii. 14) for him; but the chief feature of the jus patronatus was the right of the patron to succeed to the inheritance of his libertus; for if the libertus died childless, the patron succeeded to his whole inheritance, supposing he left no testament; and if he left one, still the patron took a third part of the property, where it exceeded one hundred aurei. (Bk. iii. Tit. 7. 3.)
Tit. VI. Qui quibus ex causis manumittere non possunt.

Non tamen cuicunque volenti manumittere licet. Nam is, qui in fraudem creditorum manumittit, nihil agit, quia lex Ælia Sentia impedit libertatem.

It is not, however, every master who wishes that may manumit, for a manumission in fraud of creditors is void, the lex Ælia Sentia restraining the power of enfranchisement.

Gal. i. 87.

A person, as the third section informs us, manumitted his slaves in fraud of creditors, who knew that he was insolvent, or that by the manumission he would make himself unable to pay his debts; and in such a case, as the Roman law held that liberty once given could not be revoked, the lex Ælia Sentia provided that the act of manumission was entirely void (nihil agit): the freedom was considered never to have been given. The slave would indeed be treated as free until the creditors attacked the manumission as fraudulent; but directly they did so successfully, he was exactly in the position in which he would have been if never enfranchised. If, however, though the master was insolvent at the time of manumission, his debts were paid before the manumission was attacked, the creditors could no longer impugn the manumission, and the slave was considered to have been free from the date of the manumission. Probably there was a time limited, beyond which creditors were not allowed to attack the manumission. We learn from the Digest that if the manumission was made in fraud of the fiscus, it must be impugned within ten years; and it is not probable that the private creditor would have had a longer time allowed him.

(Dig. xl. 9. 11.)

1. Licet antem domino, qui solvendo non est, in testamento servum suum cum libertate heredom institueret, ut fiat liber heresque ei solus et necessarius, si modo nemo alius ex eo testamento heres extiterit, aut quia nemo heres scriptus sit, aut quia is, qui scriptus est, qualibet ex causa heres non extiterit. Idque eadem lege Ælia Sentia provisum est, et recte: valde enim prosopiciendum erat, ut egentes homines, quibus alius heres extaturus non esset, vel servum suum necessarium heredom habeant, qui satisfacturus esset creditoribus, aut, hoc eo non faciente, creditores res hereditariae servii nomine vendant, nec injuria defunctus afficiatur.

Gal. ii. 154.

1. A master, who is insolvent, may, however, by his testament, institute a slave to be his heir, at the same time giving him his liberty, so that the slave becoming free may be his only and necessary heir, provided that there is no other heir under the same testament, which may happen, either because no other person was instituted, heir, or because the person instituted, from some reason or other, does not become heir. This was wisely established by the above-mentioned lex Ælia Sentia: for it was very necessary to provide that men in insolvent circumstances, who could get no other heir, should have a slave as necessary heir, in order that he might satisfy their creditors; or that if he failed to do so, the creditors might sell the property forming part of the inheritance in the name of the slave, so as to prevent the deceased suffering disgrace.
The heirs under a Roman testament accepted all the liabilities of the deceased. When, therefore, the debts exceeded the value of the inheritance, the heir named in the testament would probably refuse the inheritance; and if no one would accept the heirship, the creditors stepped in and had the estate sold for their benefit. As this was thought a great stigma on the memory of the deceased, a slave was frequently enfranchised by the testator and named heir; and as the slave could not refuse to take the office upon him (being thence called heres necessarius), the sale of the effects, if necessary, was made in his name, and not in that of his master. Of course this could only take place when the slave was the sole heir. If there was any other heir, the slave would not be heir by necessity; and hence, in the text, the expression solus et necessarius heres is used. A slave so emancipated became a Roman citizen. (Gal. i. 21.)

2. Idemque juris est et si sine libertate servus heres institutus est. Quod nostra constitutio non solum in domino, qui solvendo non est, sed generaliter constitut nova humanitas ratione, ut ex ipse scriptura institutionis etiam libertatam eis competere videatur, cum non est verissima, eum, quem heredem sibi elegit, si pretermiserit libertatem dationem, servum remanere voluisse et neminem sibi heredem fore.

3. In fraudem autem creditorum manumittere videtur, qui vel jam eo tempore, quo manumittit, solvendo non est, vel qui datis libertatibus desiturus est solvendo esse. Pravallisse tamam videtur, nisi animum quoque fraudandi manumissor habuit, non impediri libertatem, quamvis bona ejus creditoribus non sufficient: see enim de facultatibus suis amplius quam in his est sperant homines. Itaque tunc interlegimus impediri libertatem, cum utroque modo fraudanti creditorores, id est et consilio manumittantis et ipsa re, eo quod bona non suffectora sunt creditoribus.

2. The law is the same also when a slave is instituted heir, although his freedom be not expressly given him; for our constitution, in a new spirit of humanity, decides not only with regard to an insolvent master, but generally, that the mere institution of a slave implies the grant of liberty. For it is highly improbable, that a testator, although he has omitted an express gift of freedom, should have wished that the person he has selected as heir should remain a slave, and that he himself should have no heir.

3. A person manumits in fraud of creditors, who is insolvent at the time that he manumits, or becomes so by the manumission itself. It has, however, been settled that unless the manumittor intended to commit a fraud, the gift of liberty is not invalidated, although his goods are insufficient for the payment of his creditors; for men often hope their circumstances are better than they really are. The gift of liberty is then invalidated only when creditors are defrauded, both by the intention of the manumittor, and in reality; that is to say, by the insufficiency of the effects to meet their claims.

D. xl. 9, 10; xlii. 8. 15.

Fraudis interpretatio semper in jure civili non ex eventu duntaxat, sed ex consilio quoque desideratur. (D. 1. 17. 79.) Gaius informs us (i. 47) that peregrini were prevented from enfranchising slaves in fraud of creditors, though the other provisions of the lege Aelia Sentia did not affect them.
4. Eadem lege Ælia Sentia domino minoris annis viginti non aliter manumittere permittitur, quam si vindicta apud consilium justa causa manumissionis adprobata fuerit manumissi.

5. Juste autem manumissionis causa sunt, veluti si quis patrem aut matrem aut filium filiamve aut fratrem sororemve naturales aut pedagogum, nutricem, educatorem aut alumnum alumnamve aut collectaneum manumittat, aut servum procuratoris habendi gratia, aut ancillam matrimonii causa, dum tamem inre sex menses uxor ducatur, nisi justa causa impediat, et qui manumitteri procuratoris habendi gratia, ne minor septem et decem annis manumittatur.

4. By the same lex Ælia Sentia, again, a master, under the age of twenty years, cannot manumit, unless by vindicta, and unless this proceeding in regard to the person manumitted has been approved of by the council on some legitimate ground.

5. Legitimate grounds for manumission are such as these; that the person to be manumitted is father or mother to the manumittor, his son or daughter, his brother or sister, his preceptor, his nurse, his foster-father, his foster-child of either sex, or his foster-brother; that the person is a slave whom he wishes to make his procurator, or female slave whom he intends to marry, provided the marriage be performed within six months, unless prevented by some lawful cause; and provided that the slave who is to be made a procurator, be not manumitted under the age of seventeen years.

This consilium was held on certain days at Rome, and in the provinces sat during a session, on the last day of which cases such as those referred to in the text were determined. (Gal. i. 20.)

The most common case of a person emancipating his father and mother, and other near relations, would be when a slave was made heir. Theophilus (paraphr. on this paragraph) gives as an instance of a person enfranchising his brother, the case of a man having a child by a slave and then a son by a legal marriage. The former would be the slave of the latter.

If the marriage was in any way impossible, the minor would not be allowed to enfranchise his female slave; and it was requisite that it should be he himself who intended to marry her.

A procurator (i.e. agent) below the age of seventeen could not represent his principal in any action (D. iii. 1. 1. 3), and it is this probably that makes Justinian here require that the slave should be seventeen years of age in order to be emancipated by a minor.

6. Semel autem causa adprobata, sive vera sive falsa sit, non retratatur.

6. The approval of a ground of manumission once given, whether the reasons on which it is based be true or false, cannot be retracted.

7. Cum ergo certus modus manumittendi minoribus viginti annis dominis per legem Æliam Sentiam constitutus sit, eveniendus, ut, qui quatuordecim annos etatis explicerit, licet testamentum facere possit et in eo heredem sibi instituere legataque reliquere possit, tamen, si ad huc minor sit annis viginti, liber-
tatem servo dare non poterat. Quod non erat ferendum, si is, cui toto- rum bonorum in testamento dispositio data erat, uni servo libertatem dare non permittebatur. Quare nos si- mili ter ei quemadmodum aliae res ita et servos suos in ultima vo- luntate disponere, quemadmodum voluerit, permittimus, ut et liberta- tem eiis possit prestatre. Sed cum libertas inestimabilis est et propter hoc ante vicea summum statum annuum antiquitas libertatem servo dari prohibebat; ideo nos, mediam quo- dammodo viam eligentes, non aliter minori viginti annis libertatem in testamento dare servum suo conce- dimus, nisi septimum et decimum an- num inpleverit et octavum decimi- num setigerit. Cum enim anti- quitas huicmodi statum et pro alii postulare concessit, cur non etiam sui judicii stabilitas ita eos adjuvare credatur, ut et ad libertates danda servis suis possint prove- nire?

The *lex Aelia Sentia* required the manumission given by a minor to be given by the form of *vindicta*. This was held to ex- clude the minor from giving it by testament. Manumission was something more than the disposal of a piece of property; it was the creation of a citizen, and thus might consistently be denied to minors whose power of disposing of property was unfettered. Justinian, nine years after the Institutes were published, abolished the distinction he establishes in the text, and allowed the minor to give liberty by testament at any time when he could make a testament at all, by a Novel (119. 2), containing the words *sanctus ut licentia pateat minoribus in ipso tempore, in quo eis de reliqua eorum statu disponere permittitur, etiam servos suos in ultimis voluntatis manumittere*.

**Trit. VII. DE LEGE FURIA CANINIA SUBLATA.**

Lege Furia Caninia certus modus constitutus erat in servis testamento manumittenda. Quam quasi liberta- tibus impedientem et quodammodo invidiam tollendam esse censimus, cum satisfuerat inhumanum, vivos quidem licentiam habere totam suam familiae libertate donare, nisi alia causa impediat libertati, morientibus autem hujusmodi licentiam adimere.

The *lex Furia Caninia* imposed a limit on the number of slaves who could be manumitted by testament; but we have thought right to abolish this law as invidiously placing obsta- cles in the way of liberty. It seemed very unreasonable to allow persons, in their lifetime, to manumit all their slaves, if there is no special reason to prevent them, and yet to deprive the dying of the like power.

Gal. i. 42–46; C. vii. 8.
The *lex Furia Caninia* was made in the year A.D. 8, four years after the *lex Aelia Sentia*. (Suet. Aug. 40.) Its object was to prevent the manumission of crowds of slaves enfranchised in order to gratify the vanity of testators, who wished their funeral train to be swollen with these witnesses to their liberality. It provided that the owner of two slaves might enfranchise both; of from two to ten, half; of from ten to thirty, one-third; of from thirty to one hundred, one-fourth; and of a larger number, one-fifth; but in no case was the number enfranchised to exceed one hundred. The slaves to be manumitted were required to be designated by name. The citizenship was so worthless in the days of Justinian, that it mattered little how many slaves were made free; but in the days of Augustus, the distinction made between the living and the dying master, which Justinian calls *satis inhumanum*, was far from unreasonable. A master might well be trusted not to impoverish himself by reckless manumission during his life, and yet be denied the power of gratifying his vanity at the expense of his heir.

Trt. VIII. DE HIS, QUI SUI VEL ALIENI JURIS SUNT.

Sequitur de jure personarum alia divisio. Nam quaedam personae sui juris sunt, quaedam alieno jure subjectae sunt: rursus earum, quae alieno jure subjectae sunt, aliae in potestate parentum, aliae in potestate dominorum sunt. Videamus itaque de his, quae alieno jure subjectae sunt: nam si cognoverimus, quae ipsis personae sint, simul intelligamus, quae sui juris sunt. Ac prius displiciamus de his, qui in potestate dominorum sunt.

We now come to another division relative to the rights of persons; for some persons are *sui juris*, some are subject to the power of others. Of those, again, who are subject to others, some are in the power of ascendants, others in that of masters. Let us, then, treat of those who are subject to others; for, when we have ascertained who these are, we shall at the same time discover who are *sui juris*. And first let us consider those who are in the power of masters.

GAL i. 48. 51.

Justinian now passes to the division of persons as members of a family. The head of a Roman family exercised supreme authority over his wife, his children, his children’s children, and his slaves. (See Introd. sec. 40.) He was their owner as well as their master. He alone was *sui juris*, and all the other members of the family were *alieni juris*, for they belonged to him. The whole group, that is, the head and those in his power, were the *familia*. The head was the *paterfamilias*, a term not expressive of paternity (D. l. 16. 195. 2), but merely signifying a person who was not under the power of another, and who, consequently, might have others under his power. An unmarried woman whose father was dead, was said to be a *materfamilias*, a term which, in this sense, is only the feminine form of *paterfamilias*. She was *sui juris*, and might have slaves, though of course she could have
no power over persons freeborn. For if she married, her children were in her husband's power, not in hers. (See Introd. sec. 40.)

The word *familia* was used in so many different senses, that it may be as well to collect them here, before entering on the subject of family relations. *Familia* is used to mean,—1. All persons of the blood of the same ancestor; 2. The head of the family and all those in his power whether slaves or free; 3. All connected by agnation (see Introd. sec. 44); 4. The slaves of one man; 5. The property of a *paterfamilias*, of whatever sort. The word is fully explained in a fragment of Ulpian. (D. i. 16. 195.)

Gaius, from whom much of this section is borrowed, says,—

*nuntius earum personarum quo alieno juri subjecte sunt, alias in potestate, alius in manu, alius in mancipio sunt* (i. 49). The persons *in manu* were those wives who passed through the particular forms of marriage which placed a wife in the position of a daughter to her own husband; that is, the religious ceremony of *conjuratio*, the fictitious sale *coemptio*, and *usu*, or cohabitation unbroken by an absence of three nights in the year. (See Introd. sec. 46.) Persons *in mancipio* were those sold by the head of their family, or by themselves, with the form of *mancipatio*. (See GAI. i. 116–123, and Introd. sec. 42.) They were said to be *servorum loco* (not *servi*) with reference to the purchaser, but as to other persons they were free. Such sales were merely fictitious, except in the early days of Rome. The subscription *in manu* had ceased before the time of Justinian, and he did away with the last traces of that in *mancipio*. (See Tit. 12. 6.)

1. In potestate itaque dominorum sunt servi. Quae quidem potestas juris gentium est: nam apud omnes perverse gentes animadvertere possumus, dominis in servos vites necissique potestatem esse, et quodcumque per servum adquiritur, id domino adquiritur.

   1. Slaves are in the power of masters, a power derived from the law of nations: for among all nations it may be remarked that masters have the power of life and death over their slaves, and that everything acquired by the slave is acquired for the master.

   GAL. i. 52.

The power of the master over his slaves was spoken of as the *dominica potestas*. The origin of this power has been already ascribed to the *jus gentium*. (Tit. 3. 2.)

2. Sed hoc tempore nullis hominibus, qui sub imperio nostro sunt, licet sine causa legibus cognita et supra modum in servos suos servire. Nam ex constitutione divi Pii Antonini qui sine causa servum suum occiderit, non minus puniri jubetur, quam qui servum alium occiderit. Sed et major aspersiones domi- norum ejusdem principis constitutio coercetur. Nam consultus a quibusdam presidibus provinciarum de his servis, qui ad sedem sacra vel ad statuas principum

2. But at the present day no persons under our rule may use violence towards their slaves, without a reason recognised by the law, or even to an extreme extent. For, by a constitution of the Emperor Antoninus Pius, he who without any reason kills his own slave, is to be punished equally with one who has killed the slave of another. The excessive severity of masters is also restrained by another constitution of the same emperor. For, when consulted by certain governors of provinces on the subject of slaves, who fled for
refuge either to temples, or the statues of the emperors, he decided that if the severity of masters should appear excessive, they might be compelled to make sale of their slaves upon equitable terms, so that the masters might receive the value; and this was a very wise decision, as it concerns the public good that no one should misuse his own property. The following are the terms of this rescript of Antoninus, which was sent to Aelius Marcianus. 'The power of masters over their slaves ought to be preserved unimpaired, nor ought any man to be deprived of his right. But it is for the interest of all masters themselves, that relief prayed on good grounds against cruelty, the denial of sustenance, or any other intolerable injury, should not be refused. Examine, therefore, into the complaints of the slaves who have fled from the house of Julius Sabinus, and taken refuge at the statue of the emperor; and, if you find that they have been too harshly treated, or wantonly disgraced, order them to be sold, so that they may not fall again under the power of their master; and, if Sabinus attempt to evade my constitution, I would have him know, that I shall severely punish his disobedience.'

GAI. i. 58; D. i. 6. 2.

The lex Cornelia de Sicariis, passed by Sylla, B.C. 81, made killing the slave of another person punishable as homicide, with death or exile (D. ix. 2. 23. 9); and the text tells us that the provisions of this law were extended by the Emperor Antoninus Pius to the case of a master killing his own slave. The lex Petronia (D. xlviii. 8. 11. 2), passed in the time of one of the early emperors, forbade masters to expose their slaves to contests with wild beasts. Hadrian required the sanction of a magistrate in all cases before death was inflicted. (SPART. in Hadr. cap. 18; D. i. 6. 2.) Constantine only permitted moderate corporal chastisement to be inflicted, and Justinian in the Code retains his enactment. (C. ix. 14.)

Justinian does not notice the corresponding changes which the clemency of later times worked in the control of the master over the slave's property; according to the usage of these times this property, called peculium, belonged in fact, though not in law, to the slave, and he often purchased his liberty with it. (TACIT. ANN. xiv. 42; D. xv. 1. 53.)
TIT. IX. DE PATRIA POTESTATE.

In potestate nostra sunt liberi. Our children, begotten in lawful nostris, quos ex justis nuptiis pro- marriage, are in our power. creaverimus.

GAL. i. 55.

The patria potestas differed originally little, if at all, from the dominica potestas. If the sense of ownership was not so complete in the former, it was probably limited more by natural feeling than by law. The father could sell, expose, or put to death his children. (Twelve Tables, No. 4; see Intro. sec. 8.) Time, however, ameliorated the position of the child, and all that was left was a power to inflict moderate chastisement (C. viii. 47. 31), and to sell at the hour of birth in cases of extreme necessity. (C. iv. 43. 1.) Constantine condemned the father who killed his child to the punishment of a parricide. (C. ix. 17. 1.) The sale of a child was in general fictitious, and only formed the mode by which the child was released from the father’s power.

Like that of the slave, the child’s property was only a peculium, belonging strictly to the father; and whatever the son in potestate acquired was acquired for the father, although the son could not make his father’s position worse, and the father was not liable for the debts and engagements of the son. But under the early emperors a change was made, and the son had complete ownership in property acquired in war (castrense peculium); Constantine made a further exception of property acquired in employments about the court (quasi-castrense peculium) (see Bk. ii. 9, and Intro. sec. 41); and Justinian only permitted the father to have the usufruct during his life of everything coming to the son in any way except from the father himself. (Bk. ii. Tit. 9. 1.)

The meaning of justic nuptiae will appear in the next Title.

Neither age nor marriage terminated the power of a father over his son. As we learn from Tit. 12. 4, the filiusfamilias might rise to the highest public dignities, even that of consul, and yet he would remain in the power of his father. If a daughter married in manu, she passed from her father’s power into that of her husband. The modes in which the patria potestas was ended are treated of in Tit. 12 of this Book.

1. Nuptiae sunt autem matrimo- 1. Marriage, or matrimony, is a nium est viri et mulieris conjunctio, joining together of a man and woman, individuum consuetudinem vitae continuens. carrying with it a mode of life in which they are inseparable.

D. xxiii. 2. 1.

Nuptiae is properly the ceremonies attending the formation of the legal tie, and matrimoniun is the tie itself; but the jurists use the two terms quite indifferently, as, for instance, Modestinus says, ‘nuptiae sunt conjunctio maris et feminae.’ (D. xxiii. 2. 1.) The individuum consuetudo vitae implied a community of rank
and position, and of sacred and human law, *divini et humani juris communicatio* (D. xxiii. 2. 1), but not necessarily of property. Marriage gave neither party any right over the property of the other, except when the wife passed *in manum*, and then all that she had belonged to the husband. For the meaning of *individua* compare Tacitus, *Ann.* vi. 10, ‘apud Capreas *individui*’ (never parted).

2. *Jus autem potestatis, quod in liberos habemus, proprium est civium Romanorum; nulli enim alii sunt homines, qui talem in liberos habeant potestatem, qualem nos habemus.*

2. The power which we have over our children is peculiar to the citizens of Rome; for no other people have a power over their children, such as we have over ours.

GAI. i. 55.

Gaius mentions the Galatae as being reported to have had a similar institution. (See also *Galatians* iv. 1.)

3. *Quiigitur ex te et uxore tua nascitur, in tua potestate est: item qui ex filio tuo et uxore ejus nascitur, id est nepos tuus et neptis, sequae in tua sunt potestate, et pro-nepos et pro-neptis et deinceps ceteri. Qui tamen ex filia tua nascitur, in tua potestate non est, sed in patris ejus.*

3. The child born to you and your wife is in your power. And so is the child born to your son of his wife, that is, your grandson or granddaughter; so are your great-grandchildren, and all your other descendants. But a child born of your daughter is not in your power, but in the power of its own father.

If a woman, although she was not in the power of her husband, had children, they were not in her power; and hence, as she could have no descendants in her power, it was said, *mulier familiae suae et caput et finis est*, i.e. her family ended with herself. (D. l. 16. 195. 5.)

TIT. X. DE NUNTIIS.

Justas autem nuptias inter se cives Romani contrahunt, qui secundum precepta legum coeunt, masculi quidem puberes, feminae autem viripotentas, sine patres familiae sint sive filiifamilias, dum tamen filii-familias et consensum habeant parentum, quorum in potestate sunt. Nam hoc fieri debere et civilia et naturalis ratio suadet in tantum, ut iussem parentis precedere debeat. Unde quesitum est, an furiosi filia nubere aut furiosi filius uxorem dueere possit? Cumque super filio variabatur, nostra processit decidio, qua permissum est ad exemplum filie furiosi filium quoque posset et sine patris interveni matrimonium sibi copulare secundum datum ex constitutione modum.

Roman citizens form the tie of lawful marriage with each other when they are united according to law, the males having attained the age of puberty, and the females a marriageable age, whether they are *patres familiae* or *filii familiae*: but, if the latter, they must first obtain the consent of their ascendants, in whose power they are. For both natural reason and the law require this consent; so mucho a, indeed, that it ought to precede the marriage. Hence the question has arisen, whether the daughter of a madman could be married, or his son marry. And as opinions were divided as to the son, we decided that as the daughter of a madman might, so may the son of a madman marry without the intervention of the father, according to the mode established by our constitution.

C. v. 4. 25.

In the earliest times of Roman law there were three modes of forming the tie of marriage: first, *conrarreatio*, a religious cere-
many, in which none but those to whom the *jus sacram* was open could take part; secondly, *comptio*, a fictitious sale, in which the wife was sold to the husband; and lastly, *usus*, i.e. cohabitation with the intention of forming a marriage. (Gai. i. 110–114.) All three modes had the same effect on the position of the wife. She always passed in *manum viri*. (See Introd. sec. 46.) This incident of marriage was attached to the marriage by mere cohabitation and lapse of time, on the analogy of the ownership which was acquired in a thing by uninterrupted possession. It was, however, open to the wife to 'break the use;' to prevent, that is, her husband gaining complete power over her by lapse of time: the law of the Twelve Tables declared that, if the wife absented herself from her husband for three nights in the year, the *usus* should be interrupted, and she should remain in her own *familia*, and not pass into that of her husband. This was considered so much more advantageous to the wife, as by passing into the *manus* she occupied the position of a daughter in the power of her husband, and all her property belonged to him, that, even in the latter days of the republic, almost all marriages were formed without the wife passing into the *manus* of her husband. In the time of Justinian she never did so, and the whole distinction of the effect of different modes of marriage had been long obsolete. The *nuptiae* were equally *justae* whether the wife passed in *manum* or not. A wife who did not pass in *manum* and who was not emancipated remained in the power of her father, and so she remained, except in regard to the sacred rites of her husband's family, when the marriage was by *confarreatio* under a law passed in the time of Tiberius. (Gai. i. 136.) The wife who passed in *manum* was termed a *materfamilias*; the wife not in *manu* was distinguished as *matrona* until *matrona* came to be used for all married women. (Cic. Top. c. 3; Aul. Gell. Noct. Attic. 18. 6.)

At no time did these different modes of being married form part of the real tie of marriage; they only decided, when the tie of marriage was formed, what should be the position of the wife. Neither were the religious ceremonies nor the nuptial rites anything more than accessories of that which created the binding relation between the parties. The tie itself was constituted by the consent of the parties—by their intention to become man and wife—being expressed and manifested; and the mode in which it was necessary the manifestation should take place was that the woman should pass into her husband's possession. A man and woman were not married because they lived together, unless they had the intention to be married. *Nuptias non concubitus sed consensus facit.* (D. xxxv. 1. 15.) Neither was the mere expression of a consent sufficient to constitute a marriage. There must be an actual or constructive passing of the woman into the possession of the man. The ordinary sign of this was that she was received into the husband's house, *in domum deduci*; but this was only the usual and most patent sign, and any other clear indication was accepted. If,
for example, the parties were both personally present and formally consented, the woman was taken to have placed herself, or been placed if she was in manu, in the possession of the man (C. v. 17. 11), and the marriage tie was formed; while, on the other hand, a marriage could not be effected by a mere written consent between persons not present together, as by letter (D. xxiii. 2. 5), without the woman passing into the man’s possession by some separate distinct act, such as being received into his house.

In order that the marriage might have the effect of justae nuptiae, it was necessary that three conditions should be fulfilled. 1. There must be the consent of the parties duly manifested; 2. The parties must be pueri, i.e. the man must be fourteen and the woman twelve years of age; and 3. They must have the conubium, or legal power of contracting marriage, which may be regarded under three heads:—1. Under the old law both parties were required to be citizens, or to have had so much of citizenship given them as would enable them to form justae nuptiae. Various changes were made on this head, which will be noticed under section 11 of this Title. 2. They must not stand within the prohibited degrees of relationship; what these were is discussed in the following paragraphs of this Title. 3. If under the power of any one, they must have obtained that person’s consent. The husband was obliged, even though in his grandfather’s power, to obtain his father’s consent also (D. xxiii. 2. 16. 1); otherwise the grandfather could have eventually increased the number of the father’s family without consulting him (D. i. 7. 7), which it was against the spirit of the law to allow, as no one could have a new suus heres forced on him by agnation against his will. (See Tit. 11. 7.)

The same reason had caused the doubt adverted to in the text, whether, even if the father was incapable of giving his consent, the son could introduce new members into his father’s family. This did not apply to the daughter, who could not introduce new members into her father’s family. Justinian, in the Code, prescribed the mode in which marriage might be validly made either by the son or daughter of a madman. The son or daughter of the madman was to submit the proposed marriage to be approved, and the gift to the wife and the dos to be fixed, by the prefectus urbi at Constantinople, by the preses or bishop of the city in the provinces, in the presence of the curator of the madman and his principal relations. Marcus Aurelius had previously provided for the case of children of imbecile persons, dementes. (C. v. 4. 25.)

Where the rights of the paterfamilias were not in question, as when the son was emancipated, it was not necessary to have the father’s consent. (D. xxiii. 2. 25.)

If the persons, whose consent was necessary, did not give it, the marriage was absolutely void, and therefore no subsequent consent could ratify it. Thus Justinian says here that the consent, jussum (a word denoting the authority of the paterfamilias), must precede the marriage. It was not, however, necessary that the consent
should be expressly given. If the *paterfamilias* knew of the marriage and did not oppose it, his assent was presumed (C. v. 4. 5); and if he was absent or a captive for three years, his children might form a marriage which he could not afterwards disapprove of. (D. xxiii. 2. 9. 10). If both or either of the parties were *immoreberes* at the time of the marriage, the marriage, though then invalid, became valid by their living together with the intention of being married after puberty was attained (D. xxiii. 2. 4.)

1. Ergo non omnes nobis uxores duceere licet: nam quarundam nuptis abstinendum est. Inter eae enim personas, quae parentum liberorumve locum inter se optinent, nuptiae contrahis non possunt, veluti inter patrem et filiam vel avum et nephtem vel matrem et filiam vel aviam et nepotem et usque ad infinitum: et si talis personae inter se coierunt, nefariss atque inesitas nuptias contrahisse dicuntur. Et hae adeo iu sunt, ut, quamvis per adoptionem parentum liberorumve loco sibi esse ceciperint, non possint inter se matrimonio jungi, in tantum, ut etiam dissoluta adoptione idem juris maneat: itaque eam, quae tibi per adoptionem filia aut nephtis esse ceciperit, non poteris uxorem ducere, quamvis eam emancipaveris.

1. We may not marry every woman without distinction: for with some, marriage is forbidden. Marriage cannot be contracted between persons standing to each other in the relation of ascendant and descendant, as between a father and daughter, a grandfather and his granddaughter, a mother and her son, a grandmother and her grandson; and so on, *ad infinitum*. And, if such persons unite together, they only contract a criminal and incestuous marriage; so much so, that ascendants and descendants, who are only so by adoption, cannot intermarry; and even after the adoption is dissolved the prohibition remains. You cannot therefore, marry a woman who has been either your daughter or granddaughter by adoption, although you may have emancipated her.

GAI. i. 58, 59.

When two persons were related by being *agnati* to each other, they were exactly in the same relative position, so far as regarded the power of marrying, as if they had been related in the same degree by blood. If the tie of *agnatio* was dissolved by emancipation, the tie of blood, if any, would of course remain, and be a bar to marriage; but if there was no tie of blood, that is, if one of the parties had entered the family by adoption, then, if the emancipated person had, while the *agnatio* subsisted, occupied the position of ascendant or descendant to the other person, marriage was forbidden, but if that of a collateral, it was allowed.

2. Inter eas quoque personas, quae ex transverso gradu cognationis junguntur, est quaedam similis observatio, sed non tanta. Sane enim inter fratrem sororemque nuptiae prohibite sunt, sive ab sodem patre ademque matre nati fuerint, sive ex alterutro eorum. Sed si qua per adoptionem soror tibi esse ceciperit, quamdiu quidem constat adoptio, sane inter se et eam nuptiae consistere non possunt: cum vero per emancipationem adoptio dissoluta sit, pote-

2. There are also restrictions, though not so extensive, on marriage between collateral relations. A brother and sister are forbidden to marry, whether they are the children of the same father and mother, or of one of the two only. And, if a woman becomes your sister by adoption, so long as the adoption subsists, you certainly cannot marry her; but if the adoption is destroyed by emancipation, you may marry her; as you may also, if you yourself are emancipated. Hence it foli
ris eam uxorem ducere: sed et si tu emancipatus fueris, nihil est impedimento nuptiis. Et ideo constat, si quis generum adoptare velit, debere eum ante filiam suam emancipare: et si quis velit nurum adoptare, debere eum ante filium emancipare.

GAL. i. 60, 61; D. xxiii. 2. 17. 1.

To adopt a son-in-law would be to make him brother by agnation of his own wife. The bar did not invalidate the previous marriage, but operated to restrain the adoption, until the daughter had been emancipated.


8. A man may not marry the daughter of a brother or a sister, nor the granddaughter, although she is in the fourth degree. For when we may not marry the daughter of any person, neither may we marry the grand-daughter. But there does not appear to be any impediment to marrying the daughter of a woman whom your father has adopted; for she is not connected with you, either by natural or civil law.

D. xxiii. 2. 12. 4.

In the direct line every degree represents a generation. The son is in the first degree with respect to his father; the grandson in the second with respect to his grandfather. In the collateral line the generations are taken first up to, and then down from, the common ancestors. For instance, first cousins are in the fourth degree. From either cousin to his father is one degree, from the father to the grandfather is another, from the grandfather to the father of the other cousin is a third, and from that father to that cousin is a fourth.

The marriage of a man with his brother's daughter had been legalised in favour of Claudius and Agrippina (Suet. in Claud. 26; GAL. i. 62); but prohibited by Constantine (Cod. Theod. i. 2). Marriage with a sister's daughter was never allowed.

The children of a lawful marriage never followed the family of the mother, and therefore, though she was adopted, remained as they were before. But of course a daughter could not have married an adopted son's son.

4. Duorum autem fratrum vel sororum liberi vel fratris et sororis jungi possunt.

4. The children of two brothers or sisters, or of a brother and sister, may marry together.

D. xxiii. 2. 8.

The marriage of first cousins, forbidden by preceding emperors, had again been legalised by Arcadius and Honorius. (C. v. 4. 19.)

5. Item amitam, licet adoptivam, ut uxorrem ducere non licet, item ma-

5. So, too, a man may not marry his paternal aunt, even though she is
terteram, quia parentem loco habetur. Qua ratione verum est, magnum quoque amitam et mater-
teram magnum prohiberi uxorem duceere.

so only by adoption; nor his maternal
aunt; because they are regarded as
being in the place of ascendants. For
the same reason, no person may marry
his great-aunt, either paternal or ma-
ternal.

GAL. i. 62; D. xxiii. 2. 17. 2.

It was, of course, only possible to be in the same family with
an adopted aunt on the father’s side. A mother’s sister by adop-
tion would be in the family to which the mother belonged by
birth, whereas the nephew would be in the family of the father,
and therefore adoptivam is added to amitam only, not to mater-
teram.

Every person in the first degree from a common ancestor was
considered, so far as regarded marriage, in the position of that
ancestor. Thus an aunt, being in the first degree from the grand-
father, the common ancestor, was looked upon as standing in the
place of that grandfather (parentis loco habetur), and could not
therefore marry her nephew. A cousin would be in the second
degree from the common ancestor, and therefore proximity would
not be a bar to the union.

6. Adfinitatis quoque venera-
tione quamdam nuptiis abster-
nere neceesse est. Ut ecce privignam
aut nurum uxorem duceere non licet,
quia utraque filiae loco sunt. Quod
scilicet ita accipi debet, si fuit
nurus aut privigna: nam si adhuc
nurus est, id est si adhuc nupta
est filio tuo, alia ratione uxorem
eam duceere non poteris, quia eadem
dobus nupta esse non potest: item
si adhuc privigna tua est, id est si
mater ejus tibi nupta est, ideo eam
uxorem duceere non poteris, quia
dneas uxor cur tempore habere
non licet.

6. There are, too, other marriages
from which we must abstain, from
regard to the ties created by marriage;
for example, a man may not marry his
wife’s daughter, or his son’s wife, for
they are both in the place of daughters
to him; but this must be understood
to mean those who have been our step-
dauitehr or daughters-in-law; for if
a woman is still your daughter-in-law,
that is, if she is still married to your
son, you cannot marry her for another
reason, as she cannot be the wife of
two persons at once. And if your step-
dauiter is still your stepdaughter,
that is, if her mother is still married
to you, you cannot marry her, because
a person cannot have two wives at the
same time.

GAL. i. 68.

Affinitas is the tie created by marriage between each person of
the married pair and the kindred of the other.

7. Soerum quoque et noweram
prohibiit usum duceere, quia
matris loco sunt. Quod et ipsum
dissolventem addimis et adhuc procedit:
aliaqui si adhuc noverca est, id
est si adhuc patri tuo nupta est,
communem jurj impeditur tibi nubere,
quia eadem doebus nupta esse non
potest: item si adhuc soerus est, id
est si adhuc filia ejus tibi nupta est,

7. Again, a man is forbidden to
marry his wife’s mother, and his father’s
wife, because they hold the place of
mothers to him; a prohibition which
can only operate when the affinity is
dissolved; for if your stepmother is
still your steppmother, that is, if she is
still married to your father, she would
be prohibited from marrying you by
the common rule of law, which forbids
ideo impeduntur nuptiae, quia duas uxorres habere non potes.

a woman to have two husbands at the same time. So if your wife's mother is still your wife's mother, that is, if her daughter is still married to you, you cannot marry her, because you cannot have two wives at the same time.

GAL. i. 63.

The Institutes do not notice the marriage of a brother and sister-in-law. It was permitted up to the time of Constantine, who forbade it. (Cod. Theod. i. 2.) The prohibition was renewed by Valentinian, Theodosius, and Arcadius. (C. v. 5. 5.)

8. Mariti tamen filius ex alia uxor et uxoris filia ex alio marito, vel contra, matrimonium recte contrahunt, licet habeant fratrem sororemve ex matrimonio postea contracto natos.

8. The son of a husband by a former wife, and the daughter of a wife by a former husband, or the daughter of a husband by a former wife, and the son of a wife by a former husband, may lawfully contract marriage, even though they have a brother or sister born of the second marriage.

9. Si uxor tua post divorcium ex alio filiam proioresvert, haec non est quidem privigna tua, sed Julianus hujusmodi nuptiis abstinere debere ait: nam nec sponsam filii nurum esse nec patris sponsam novercam esse, rectius tamen et jure facturos eos, qui hujusmodi nuptiis se abstinerint.

9. The daughter of a divorced wife by a second husband is not your step-daughter; and yet Julian says we ought to abstain from such a marriage. For the woman betrothed to your son is not your daughter-in-law; nor is the woman betrothed to you your son's stepmother; and yet it is more decent and more in accordance with law to abstain from such marriages.

D. xxiii. 2. 12. 1, et seq.

The sponsalia constituted in no way a binding tie. They were, as far as law went, mutual promises to contract a tie. Sponsalia sunt sponsio et repromissio nuptiarum futurarum. (D. xxiii. 1. 1.) All that was necessary was, that the parties, and their respective patresfamilias, should consent, and that the betrothed should have attained the age of seven years. Either party wishing to renounce the engagement, which, by law, was always permissible, could do so by announcing the wish in these words—conditione tua non utor, and forfeiting the arrhae, i.e. things given as earnest or security that the promise should be kept, if any had been given. Hence it could only be custom founded on a respect for boni mores that prevented a father marrying his son's betrothed, or a son his father's.

10. Illud certum est, serviles quoque cognationes impedimento esse nuptiis, si forte pater et filia aut frater et soror manumissi fuerint.

10. It is certain that the relationships of slaves are an impediment to marriage, if the father and daughter, or brother and sister, as the case may be, have been enfranchised.

D. xxiii. 2. 14. 2.

The union of slaves, contubernium, was not recognised in law as a marriage, but still the law did not permit natural ties to be
violated in the case of slaves, any more than in the case of the issue of concubinage, or that of illicit commerce. (C. v. 4. 4.) Of course a manumission must have taken place, or there could be no question of nuptiae; but if slaves were freed, then, although competent to contract a marriage, they were bound by the ties of blood, and could not marry any one connected with them by close natural relationship.

11. Sunt et aliae personae, quaes proprie diversas rationes nuptiarum contrahere probantur, quas in libros digestoriorum seu pandectarum ex veteri jure collectarum enumerari permisimus.

11. There are other persons also between whom marriage is prohibited for different reasons, which we have permitted to be enumerated in the books of the Digests or Pandects, collected from the old law.

D. xxiii. 2. 44. pr. and 1.

The reasons referred to are not, like the preceding, founded on nearness of relationship or other tie, but on public or political grounds. The patres and plebs could not intermarry till the lex Cunuleia. (See Introd. sec. 9.) Nor the freeborn and freedmen till the lex Julia et Papia Poppea. (D. xxiii. 2. 23.) This law prohibited the marriage of senators with freedwomen, but allowed that of other freeborn, forbidding at the same time all freeborn to marry actresses or women of openly bad character. (D. xxiii. 2. 41.) Constantine extended the prohibition as regarded persons of high rank to marrying freewomen of the lowest class, humiles abjecte personae. (C. v. 27. 1.) This was repealed by Justinian. (Nov. 117. 6.) The guardian could not marry his ward before she was twenty-six years of age, unless betrothed or given to him by her father. (D. xxiii. 2. 66.) The governor of a province could not, while he held his office, marry a native of that province (D. xxiii. 2. 33. 57), lest he should abuse his authority. The ravisher could not marry the woman he violated. (C. ix. 13. 2.) Nor the adulterer his accomplice. (Nov. 134.) Nor a Jew a Christian. (C. i. 9. 6.)

While the distinction between Latini (colonii) and cives remained in force, a citizen had not connubium, and therefore could not contract justa nuptiae, with a Latina or a peregrina unless he received permission from the emperor to contract justa nuptiae with such a person, a permission which Gais tells us was often accorded to veterans. (Gai. i. 57; Ulp. Reg. v. 4.) But the unauthorised union of a citizen with a Latina or peregrina was recognised as matrimonia, though not as justa nuptiae. The wife was termed in such a case injusta uxor. None of the rules of law as to patria potestas and dos applied to such a union, but the breach of the tie would be looked on as adultery. (D. xlviii. 5. 13. pr. 1.)

12. Si adversus eam, quae diximus, aliqui coeisint, nec vir nec uxor nec nuptiae nec matrimonium nec dos intellegitur. Itaque ii, qui ex

12. If persons unite themselves in contravention of the rules thus laid down, there is no husband or wife, no nuptial, no marriage, nor marriage
eo coitu nascentur, in potestate patris non sunt, sed tales sunt, quantum ad patrem potestatem pertinet, quales sunt ii, quos mater vulgo concepit. Nam nec hi patrem habere intelleguntur, cum his etiam incertas est: unde solent filii spuri spuri appellari, vel a Graeco voce quasi οὐρανός concepti, vel quasi sine patre filii. Sequitur ergo, ut et dissoluto tali coitu nec dotis actioni locus sit. Qui autem prohibitas nuptias coeunt, et alias penas patiuntur, quæ sacris constitutionibus continentur.

Under the head of *stuprum* the Romans included every union of the sexes forbidden by morality. Different punishments awaited the guilty according to the degree of crime implied in the union. (Cod. v. 5. 4.) But the law recognised and regulated in concubinage (*concubinatus*) a permanent cohabitation, though without the sanction of marriage, between parties to whose marriage there was no legal obstacle. In every case where such an obstacle existed, unless the obstacle was one merely founded on public policy, such as that of being governor of a province, who was not permitted to marry a native of that province, the law inflicted a punishment on parties cohabiting in defiance of law. During the later Empire, the chief incident of the Roman *concubinatus*, which was so far restricted that a man could not have two concubines at once, or a wife and a concubine, was, that the children could be legitimised, and so placed on a footing with the offspring of a legal marriage. (See next section.) Between the formation of such a union, and the contracting of a legal marriage, there seems to have been no difference except what rested in the intention of the parties. If two persons lived together, it was the intention with which they did so that decided whether the union was concubinage or marriage. *Concubinum ex sola animi destinatione estimari oportet.* (D. xxv. 7. 4.) If there was no affectio maritalis, no intention to treat the woman as a wife, she was not a wife. Of course, practically, the question of consent was seldom, if ever, left doubtful. Generally speaking, an instrument fixing the amount settled respectively by the husband and wife, was drawn up, and the consent was publicly given in the presence of friends. And as concubinage was a dishonourable state, the presumption in favour of marriage, when the woman was of honest parentage and of good character, was very strong. To the union of concubinage none of the incidents of marriage attached. No *dos* could be asked for, no *donatio* was made by the man: the children were not in the power of the father.
In a legal marriage, without *conventio in manum*, the marriage portion of the wife (*dos*) belonged to the husband during the continuance of the marriage. In early times his power over the *dos* was unrestricted, but afterwards successive limitations of this power were introduced. (See Bk. ii. Tit. 7. 3; Tit. 8. pr.) The settlement on the wife by the husband (*donatio propter nuptias*) belonged, during the marriage, to the wife, but was managed by the husband. (See Bk. ii. Tit. 7. 3.) Divorce was always permitted if either party ceased to wish to preserve the tie of marriage, which was only looked on as a contract resting on mutual consent. A woman *in manu* could not divorce herself from her husband, while a woman, not *in manu* but in the *potestas* of her father, might be divorced from her husband by her father, but Marcus Aurelius forbade the father to exercise his power except for some grave reasons. (Cod. v. 17. 5.) Unless, however, both parties consented to a divorce, heavy penalties were attached to its being insisted on by one alone, unless any of the grounds for divorce established by law, such as adultery or criminal conduct (Cod. v. 17. 8), could be shown to exist; and, by the *lex Julia de adulteriis*, the fact of repudiation had to be established by the presence of seven citizens as witnesses, and a *libellus repudii*. After the divorce either party might, after a fixed interval, marry again, until, at a late period of Roman law, this power of remarriage was curtailed by the Theodosian code. (Cod. Th. iii. 16. 2.)

18. Aliquando autem evenit, ut liberi quidem statim, ut nati sunt, in potestate parentum non fiant, potestas autem redigantur in potestate. Qualis est is, qui, dum naturalis fuerat, potestas curis datus potestasi patris subicitur. Nec non is, qui a muliere libera procreatus, cujus matrimonium minime legibus interdictum fuerat, sed ad quam pater consuetudinem habuerat, potestas ex nostra constitutione dotalibus instrumentis compositis, in potestate patris efficitur: quod et alii si ex sodem matrimonio fuerint procreati, similiter nostra constitutio praebuit.

18. It sometimes happens that children who at their birth were not in the power of their father, are brought under it afterwards. Such is the case of a natural son, who is given to the *curia*, and then becomes subject to his father's power. Again, a child born of a free woman, with whom marriage was not prohibited by any law, but with whom the father only cohabited, will likewise become subject to the power of his father if at any time afterwards dotal instruments are drawn up according to the provisions of our constitution. And this constitution carries with it the same result as to any other children who may be subsequently born of the same marriage.

*Gal.* i. 65; C. v. 27. 10.

By legitimation the offspring of concubinage were placed in the position of *liberi legitimi*, and this was effected in three ways: 1. By oblation to the *curia*; 2. By the subsequent marriage of the parents; and 3. By a rescript of the emperor, a mode introduced by Justinian in the 74th Novel. The *curia* was the class from which, in provincial towns, the magistrates were eligible. To be a member was a distinction, but an onerous one, from the expenses and burdens attached to the position. In order to prevent
the order decaying through unwillingness to incur the expenses attending it, Theodosius and Valentinian permitted citizens, whether themselves members of the curia or not, to present their children born in concubinage to, and make them members of the order (Cod. v. 27. 3), by which they became legitimate, and the heirs of their father. This mode of legitimation, which could, of course, only be adopted when the parents were rich, did not, however, make the children complete members of the father's family. They became his legitimate children, but gained no new relationship or right of succession to any other member of his family. (C. v. 27. 9.)

Constantine first established that natural children should be made legitimate by the subsequent marriage of their parents. Justinian required that at the moment of conception the parents should have been capable of a legal marriage; that an instrument settling the dos (instrumentum dotale), or, at least, attesting the marriage (instrumentum nuptiale), should be drawn up, and that the children should ratify the legitimation, for no one was made legitimate against his will. (Nov. 89. 11.)

If the mother was dead or had disappeared, and the marriage was thus impossible, Justinian enacted that the natural children (if there was no legitimate one) might, by an imperial rescript, be placed in the position they would have held if the marriage had taken place; and this rescript might be given to the children after the father's death, if the father, by his testament, expressed his wish to that effect. (Nov. 89. 9. 10.)

The readings of the last sentence of the text are very various, and Huschke inserts non before fuerint procreati; but the meaning of the passage would then be so obscure that it seems necessary to retain the reading adopted in most texts.

TIT. XI. DE ADOPTIONIBUS.

Non solum tamen naturales liberi secundum ea, quae diximus, in as we have said, in our power, but potestate nostra sunt, verum etiam those also whom we adopt. ui, quos adoptamus.

GAL. i. 97.

Before the time of Justinian, the effect of adoption (see Introd. sec. 42) was to place the person adopted exactly in the position he would have held had he been born a son of the person adopting him. All the property of the adoptive son belonged to his adoptive father. The adoptive son was heir to his adoptive father, if intestate, bore his name (retaining, however, the name of his own genus with the change of -us into -anus, as Octavius, Octavianus), and shared the sacred rites of the family he entered.

Naturales liberi is here opposed to adoptivi, not, as in the last Title, to legitiimi.
Adoption is always attached in ancient Roman law to so important an alteration in families as adoption. (See Introd. sec. 42.) The sanction of the curia was probably necessary to its validity, when the family of a member of the curia was affected. If the person adopted was sui juris, his entry into a new family (arrogatio) was jealously watched, as the pontifices would never allow it where there was any likelihood of the sacred rites of the family he quitted becoming extinct by his departure from it. The form of gaining the consent of the curia was even continued when the curia were only represented by thirty lectors, until the rescript of the emperor was substituted as a means of effecting arrogations.

What were the forms of arrogation, when neither the person arrogated nor the person arrogating belonged to the body of the curia, we have no certain knowledge; but we may guess that arrogation was effected by a fictitious suit, in which the person arrogated was claimed as the child of the arrogator, and let judgment go by default.

If the person adopted was under the power of another, the person under whose power he was had to release him from that power, which he did by selling him (mancipatio) three several times, which destroyed his own patria potestas (see Introd. sec. 42), and then giving him up to the adopting parent by a fictitious process of law, called 'in jure cessio,' in which he was claimed and acknowledged as the child of the person who adopted him, and pronounced to be so by the magistrate before whom the proceeding was held (imperio magistratus). The word adoptio was common to both processes, both to arrogatio, said by Gaius to be derived from rego, because the consent of the person arrogating, of the person arrogated, and of the populus, was asked (Gai. i. 99), and to adoptio in its more limited sense of the adoption of a person not sui juris. For the ceremonies previously required for the adoption of a person alieni juris, Justinian substituted the simple proceeding of executing, in presence of a magistrate, a deed, declaring the fact of the adoption—the parties to the adoption, that is, the person giving, the person given, and the person receiving, being personally present to give their consent. But it was sufficient if the consent of the party adopted was expressed by
his not declaring his dissent—non contradicente. (C. viii. 48. 11; Tit. 12. 8.)

2. Sed hoc ex nostra constitutione, cum filiusfamilias a patre naturalis extraneae persona in adoptionem datur, jura potestatis naturalis patris minime dissolvuntur nec quidquam ad patrem adoptivum transit nec in potestate ejus est, licet ab intestato jura successionis ei a nobis tributa sunt. Si vero pater naturalis non extraneo, sed avo filii sui materno, vel si ipse pater naturalis fuerit emancipatus, etiam paterno, vel proavo similis modo paterno vel materno filium suum deredit in adoptionem: in hoc case quia in unam personam concurrent et naturalia et adoptionis jura, manet stabile jus patris adoptivi, et naturali vinculo copulatum et legitimo adoptionis modo constictum, ut et in familia et in potestate huysusmodi patris adoptivi sit.

2. But now, by our constitution, when a filiusfamilias is given in adoption by his natural father to a stranger, the power of the natural father is not dissolved; no right passes to the adoptive father, nor is the adopted son in his power, although we allow such son the right of succession to his adoptive father dying intestate. But if a natural father should give his son in adoption, not to a stranger, but to the son's maternal grandfather; or, supposing the natural father has been emancipated, if he gives the son in adoption to the son's paternal grandfather, or to the son's paternal great-grandfather; or if the natural father gives the son in adoption to the son's maternal grandfather, then in these cases, as the rights of nature and adoption concur in the same person, the power of the adoptive father, knit by natural ties and strengthened by a legal form of adoption, is preserved undiminished, so that the adopted son is both in the family, and in the power, of his adoptive father.

C. viii. 48. 10.

The change made by Justinian in the law of adoption (C. viii. 48. 10) completely altered its character. It used sometimes to happen under the old law, that a son lost the succession to his own father by being adopted, and to his adoptive father by a subsequent emancipation. Justinian wished to remedy this effectually. He therefore provided that the son given in adoption to a stranger, that is, any one not an ascendant, should be in the same position to his own father as before, but gain by adoption the succession to his adoptive father, if the adoptive father died intestate. The adoptive father was not, however, bound, like the natural father (Bk. ii. Tit. 18), to leave him a share of his property, if he made a will. In this kind of adoption, which commentators have termed the adoptio minus plena, the adoptive son still remained in the family of his natural father; and the only change which adoption caused was, that he acquired a right of succession to his adoptive father, if intestate. (Bk. iii. Tit. 1. 14.)

When the person to whom the adoptive son was given, was one of his own ascendants, then the old law was permitted to regulate the effects of the adoption, and the adoption in this case was what the commentators term adoptio plena. The adoptive son entered the family of the ascendant, who became his adoptive father. A grandson was not naturally in the same family with his maternal grandfather, and could only enter the family of his
maternal grandfather by being adopted. If he had been born after
his father had been emancipated, he would not be in the same
family with his paternal grandfather, who might therefore wish to
adopt him. It was even possible that he might be adopted by his
own father; for if born before his father was emancipated, his
grandfather might have emancipated his father without emancipat-
ing him, and then might afterwards have given him in adoption to
his father.

3. Cum antem impubes per prin-
cipale rescriptum adrogatur, causa
cognita adrogatio permititur et
exquiritur causa adrogationis, an
honesta sit expediendum pupillo, et
cum quibusdam conditionibus ad-
rogatio fit, id est ut caveat adro-
gator personae publicae, hoc est
tablante, si intra pubertatem pu-
pillus decesserit, restituturum se
bona illis, qui, si adoptio facta non
esseat, ad successionem ejus venturi
tessent. Item non ait emancipare
eos potest adrogator, nisi causa
cognita digni emancipatione fuerint
et tune sua bona eis reddat. Sed
et si decedens pater eum exhereda-
verit vel vivus sine justa causa eum
emancipaverit, jubetur quartam par-
tem ei suorum bonorum relinquere,
videlicet prater bona, que ad patrem
adoptivum transitulit et quorum com-
modum ei adquisivit postea.

8. When any one, under the age of
puberty, is arrogated by imperial re-
script, the arrogation is only allowed
when inquiry has been made into the
circumstances of the case. It is asked,
what is the motive leading to the arro-
gation, and whether the arrogation is
honourable and expedient for the
pupil. And the arrogation is always
made under certain conditions: the
arrogator is obliged to give security to
a public person, that is, a notary, that
if the pupil should die within the age
of puberty, he will restore all the pro-
erty to those who would have suc-
cceeded him if no adoption had been
made. Nor, again, can the arrogator
emancipate the person arrogated, un-
less, on examination into the case, it
appears that the latter is worthy of
emancipation; and then the arro-
gator must restore the property belong-
ing to the person he emancipated.
Also, if the arrogator, on his death-
bed, has disinherited his arrogated son,
or, during his life, has emancipated
him without just cause, he is obliged
to give up to him the fourth part of all
his goods, besides what the son brought
to him the time of arrogation, or has
acquired for him afterwards.

Gal. i. 102; D. i. 7. 18; D. xxxviii. 5. 18.

Formerly neither women nor children under the age of puberty
could be arrogated. Arrogation was first permitted in the case of
the latter by Antoninus Pius (Ulp. Reg. viii. 5), but only after strict
inquiry had been made into the circumstances of the case. When
arrogation by imperial rescript was introduced, women also might
be arrogated. (D. i. 7. 21.) Besides the general inquiry which
took place in every case of adoption, as to the ages of the parties,
and the possible injustice to other members of the family, to which
the introduction of a new member might give rise, in the case of
an impubes inquiry was made whether the character and circum-
stances of the proposed arrogator were such as to make it probable
that the arrogation would be beneficial to the person arrogated.
Further, certain regulations were made, designed to protect the
property of the impubes, which were briefly as follows:—1. If the
arrogated son died before puberty, the arrogator had to restore the property of the son to that son’s natural heirs. 2. If the arrogated son was disinherited or was emancipated without good reason before puberty, the arrogated son received back all his own property, and also received one-fourth of the property of the arrogator, called the quarta D. Pii, or quarta Antonina, as having been first required by that emperor. 3. If the son was emancipated before puberty for a good reason, the son received his own property from the arrogator, but nothing more. 4. Lastly, if the arrogated son, on attaining puberty, wished to rescind the arrogation, he was at liberty to do so, if he could show it was prejudicial to him. Under Justinian arrogated persons and persons adopted by ascendants were treated as cognati in the succession to the natural father (Bk. iii. Tit. 5. 3); and, in the intestate succession to the arrogated son, the arrogator was postponed to the children and brothers and sisters of the arrogated son (Bk. iii. Tit. 10. 2), and the arrogator had only the usufruct of the property of the arrogated son while the arrogated son was living.

There is some little doubt when arrogation was first made per rescriptum principale. However, Ulpian (Reg. viii. 5) expresses himself too plainly to admit of a doubt that in his time arrogation was made per populum (i.e. by the curia represented by lictors), and not by imperial licence. He further adds, that arrogation was only made at Rome (Reg. viii. 4), but, of course, when the system of permitting it by imperial rescript was adopted, place could have nothing to do with arrogation.

The tabularii here spoken of were public notaries, who kept public registers (tabulae), on which formal acts were recorded.

4. Minorem natum non posse majorem adoptare placet: adoptio enim naturam imitatur, et pro monstro est, ut major sit filius quam pater. Debet itaque is, qui sibi per arrogationem vel adoptionem filium facit, plena pubertate, id est decem et octo annis precedere.

D. i. 7. 15. 8; D. i. 7. 16; D. i. 7. 40. 1.

As long as the required number of years intervened, there was no further positive rule as to age; but it being in the discretion of the emperor to allow arrogation or not, there was generally a disposition to refuse it unless the person who wished to adopt was of such an age, or in such physical circumstances, as to make it improbable he should have children of his own. (D. i. 7. 15.) But unmarried persons might adopt. (D. i. 7. 30.)

The legal age of puberty in males was fourteen; but eighteen was the age at which the body was considered to be fully developed in all cases, plena pubertas.

5. Licet autem et in locum nepotis vel nepitis vel in locum prone- 5. But a person may adopt another as grandson or granddaughter, great-
potis vel proneptis vel deinceps adoptare, quamvis filium quis non habeat.

It would have seemed, without express enactment, that a person, to have a grandson in his power, must have or have had a son, as the sons of his daughter would not be in his power. But, as we know, the maternal grandfather might adopt. With respect to the degrees of marriage, it sometimes made an important difference whether a person was adopted as a son or grandson. The natural (i.e. non-adoptive) granddaughter, for instance, of the person adopting would be cousin or niece of the person adopted, according as he was adopted as a grandson or son, and might marry him in the one case, and not in the other.

6. Et tam filium alienum quis in locum nepotis potest adoptare, quam nepotem in locum filii.

7. Sed si quis nepotis loco adoptet, vel quasi ex eo filio, quem habet jam adoptatum, vel quasi ex illo, quem naturalis in sua potestate habet: in eo caus et filius consentire debet, ne ei invito suus heres adgnascatur. Sed ex contrario si avus ex filio nepotem dat in adoptionem, non est necesse filium consentire.

6. A man may adopt the son of another as his grandson, and the grandson of another as his son.

7. If a man adopts a grandson to be the son of a son already adopted, or of a natural son in his power, the consent of this son ought first to be obtained, that he may not have a suus heres given him against his will. But, on the contrary, if a grandfather gives in adoption his grandson by a son, the consent of the son is not necessary.

D. i. 7. 6. 10, 11; D. xxiii. i. 16. 1.

A grandson could be adopted either generally, when he was supposed to be the issue of a deceased son, and so was sui juris at the death of the grandfather; or, specially as the son of a particular son, in which case he came under that son's power when the grandfather died. The grandfather could at his pleasure diminish, but could not add to, the number of his son's family: because otherwise the son would have had a suus heres (see Intro. sec. 77) forced on him against his will, to take a share of his property.

8. In plurimis autem causis assimilatur is, qui adoptatus vel adoptatus est, si, qui ex legitimo matrimonio natus est. Et ideo si quis per imperatorem sive apud praetorem vel apud presem provincie non extraneum adoptaverit, potest eundem alii in adoptionem dare.

8. He who is either adopted or arrogated is assimilated, in many points, to a son born in lawful marriage; and therefore, if any one adopts by imperial rescript, or if he adopts before the praetor or the pretor of a province, any one who is not a stranger, he can afterwards give in adoption to another the person whom he has adopted.

Gal. i. 105.

The text says that the adoptive son is assimilated to the natural in plurimis causis, and not altogether; because, among other differences, if the adoptive son left his adoptive family, he ceased to have any relationship whatever to its members; but the
natural son was always *cognatus* to his own blood relations; although, by emancipation or adoption, he might cease to be *agnatus* to them.

Under Justinian's legislation the person adopting a stranger had no *patris potestas* over him at all, and therefore could not exercise such a power as that of giving his adoptive son in adoption to another person. If the adoption was made by imperial rescript, if, that is, it was an arrogation that took place, the arrogator had the *patris potestas* in all cases.

When once the tie of adoption was dissolved, all the relations created by it were entirely at an end, except that marriage was forbidden between the person adopting and the person adopted. (See Tit. 10. 1.) *In omni fere jure, finita patris adoptivi potestate, nihilum ex pristino jure retinetur vestigium.* (D. i. 7. 13.) But the tie could never again be renewed between the same persons. (D. i. 7. 37. 1.)

9. Sed et illud utriusque adoptionis commune est, quod et hi, qui generare non possunt, quales sunt spadones, adoptare possunt, castrati autem non possunt.

9. It is a rule common to both kinds of adoption, that persons, although incapable of procreating, as, for instance, impotent persons, may, but those who are castrated, cannot, adopt.

**GAI. i. 108.**

The distinction was drawn because it was considered as never perfectly certain that the former (*spadones*) would not at some time or other have children of their own.

10. Feminae quoque adoptare non possunt, quia nec naturales liberos in potestate sua habent: sed ex indulgentia principis ad solatium iberorum amissorum adoptare possunt.

10. Women, also, cannot adopt; for they have not even their own children in their power; but by the indulgence of the emperor, as a comfort for the loss of their own children, they are allowed to adopt.

**GAI. i. 104; C. viii. 48. 5.**

Women could not adopt, because the meaning of adoption was that the person adopted passed into the *patris potestas* of the person adopting. The adoption mentioned in the text (which was permitted by a constitution of Diocletian and Maximian, C. viii. 48. 5), only placed the adopted children in the same relation to the woman as her own children would have held. She gained nothing like *patris potestas* over them.

11. Illud proprium est illius adoptionis, quae per sacrum orasmum fit, quod is, qui liberos in potestate habet, si se adrogandum dederit, non solum ipseo potestati adrogatoris subicetur, sed etiam liberi ejus in ejusdem fuit potestate tamquam nepotes. Sic enim et divus Augustus non ante Tiberium adoptavit, quam is Germanicum adoptavit: ut protinus ado-

11. Adoption by the rescript of the emperor has this peculiarity. If a person, having children under his power, should give himself in arrogation, not only does he submit himself to the power of the arrogator, but his children are also in the arrogator's power, being considered his grandchildren. It was for this reason that Augustus did not adopt Tiberius until Tiberius
ptone facta incipiat Germanicus Augusti nepos esse.

had adopted Germanicus; so that directly the adoption was made, Germanicus became the grandson of Augustus.

GAL. i. 107.

This is said to be an incident of arrogation only, because when a person not sui juris was adopted, his children were not in his power, and so he could not transfer them to the power of his adoptive father; into which they only came after the death of the person in whose power their own natural father was.

All the property of the person arrogated became, before Justinian's time, the property of the arrogator. (See Bk. iii. Tit. 10.) The adoptive son, as he was previously in the power of his natural father, had no property to pass.

12. Apud Catonem bene scriptum refert antiquitas, servi si a domino adoptati sint, ex hoc ipso posse liberari. Unde et nos eruditi in nostra constitutione etiam sum servum quem dominus, actis intelligentibus, filium suum nominaverit, liberum esse constitui mus, licet hoc ad jus filii accipiendum ei non sufficit.

12. Cato, as we learn from the ancients, has with good reason written, that slaves, when adopted by their masters, are thereby made free. In accordance with which opinion, we have decided by one of our constitutions, that a slave to whom his master by a solemn deed gives the title of son is thereby made free, although he does not acquire thereby the rights of a son.

C. vii. 6. 10.

It is doubtful whether slaves could be adopted, so as to become members of the family of the person adopting them. Aulus Gellius (Noct. Attic. v. 19) says that the majority of the ancient jurists, including Sabinus, held that they could. Theophilus says Cato was of the contrary opinion. They certainly became freedmen, and never ingenui, by adoption; even a freedman never became ingenius by adoption (D. i. 7. 46), and he could only be adopted by his patron (D. i. 7. 15), and on a good ground, such as the patron having no children. (C. viii. 48.)

Trt. XII. QUIBUS MODIS JUS POTESTATIS SOLVITUR.

Videamus nunc, quibus modis ii, qui alieno jure subjecti sunt, eo jure liberantur. Et quidem servi quem admodum potestate liberantur, ex his intellegere possimus, quae dei servis manumittendis superius exposuimus. Hi vero, qui in potestate parentis sunt, mortuo eo sui juris sunt. Sed hoc distinctionem recipit. Nam mortuo patre sane omnimodo filii filiave sui juris efficiuntur. Mortuo vero avo non omnimodo nepotes nepotesque sui juris sunt, sed etsi si post

Let us now inquire in what ways persons in the power of others are freed from it. How slaves are freed from the power of their masters may be learnt from what we have already said with regard to manumission. Those who are in the power of an ascendant become sui juris at his death; a rule, however, which admits of a distinction. For when a father dies, his sons and daughters become undoubtedly sui juris; but when a grandfather dies, his grandchildren do not
mortem avi in potestatem patris sui recausuri non sunt: itaque, si mori- 
ente suo pater eorum et vivit et in 
potestate patris sui est, tunc post 
obitum avi in potestate patris sui 
fiunt: si vero is, quo tempore avus 
mortitur, aut jam mortuus est aut 
exit de potestate patris, tunc hi, 
quia in potestatem ejus cadere non 
possunt, sui juris fiunt.

necessarily become sui juris, but only 
if on the grandfather's death they do 
not fall under the power of their father.
Therefore, if their father is alive at 
the death of their grandfather, and 
was in his power, then, on the grand-
father's death, they become subject to 
the power of their father. But, if at 
the time of the grandfather's death 
their father is either dead, or has al-
ready passed out of the grandfather's 
power by emancipation, then, as they 
cannot fall under the power of their 
father, they become sui juris.

**Gal. i. 124–127.**

The modes in which the patria potestas was ended were—
1. The death of the parent; 2. The parent or son suffering loss of 
freedom or of citizenship; 3. The son attaining certain dignities; 
4. Emancipation. All these modes are treated of in this Title.

1. Cum autem is, qui ob aliquod 
maleficium in insulam deportatur, 
civitatem amittit, sequitur ut, quia 
eo modo ex numero civitum Roma-
norum tollitur, perinde assi mortuo 
eo desinant liberi in potestate ejus 
esse. Pari ratione et si, qui in 
potestate parentis sit, in insulam 
deportatus fuerit, desinit in pote-
state parentis esse. Sed si ex indul-
gentia principali restitutus fuerint, per 
omnia pristinum statum recipiunt.

**Gal. i. 128.**

The patria potestas belonging exclusively to citizens, and 
being necessarily exercised over citizens, when a parent or son lost 
the rights of citizenship, or, as it was termed, underwent a media 
capitis deminutio (see Tit. 16. 2), the patria potestas was necessarily 
at an end. (Ulp. Reg. x. 3.) The punishment of deportatio in 
insulae consisted in the condemned being confined within certain 
local bounds, whether really those of an island, or of some 
precribed space of the mainland, and being considered as civilly 
dead, deportatus pro mortuo habetur (D. xxxvii. 4. 10. 8), and 
looked on as peregrinus, not as a civis. (Ulp. Reg. x. 3.) If the 
condemned was recalled, and by the pardon of the emperor all the 
effects of his punishment were done away, he was said to be resti-
tutus in integrum: he then resumed all his civil rights, and was 
placed as exactly as possible in the position which he would have 
held had he never been deportatus. (Cod. ix. 51. 1.)

The subject of capitis deminutio is resumed in Title 16 in 
connection with the position of agnati with regard to tutorships.

2. Relegati autem patres in 
sulam in potestate sua liberos reti- 
2. A father who is merely relegated 
to an island, still retains his children.
The *relegatus* was merely forbidden to leave a certain spot, and his civil *status* was in no way altered. (See Ovid, *Trist.* v. 11.)


3. When a man becomes a 'slave of punishment,' he ceases to have his sons in his power. Persons become 'slaves of punishment' who are condemned to the mines, or exposed to wild beasts.

D. xlviii. 19. 17. 19.

A slave had no legal power over his children; in whatever way, therefore, a father became a slave, he lost his power over his children. When a person was sentenced to work in the mines, or to contend with wild beasts in the arena, punishments only inflicted for very great crimes, he became, by the mere operation of his sentence, a slave. But as there was no master whose slave he could be considered, it was said that he became the slave of the punishment (*servus poenae*).

4. *Filium familiae si militaverit, vel si senatus vel consilium fuerit factus, manet in patris potestate. Militia enim vel consularia dignitas patris potestate filium non liberat. Sed ex constitutione nostra summa patriciatus dignitas illico ab imperialis codicilibis presstitis a patria potestate liberat. Quis enim parentem patrem quidem posse per emancipationis modum sua potestatis nexibus filium relaxare, imperatoriam autem celsitudinem non valere eum, quem sibi patrem elegit, ab aliena eximere potestate?

4. A son, though he becomes a soldier, a senator, or a consul, still remains in the power of his father, from which neither military service nor consular dignity can free him. But by our constitution the supreme dignity of the patriciate frees the son from the power of his father immediately on the grant of the imperial patent. For how can it be tolerated that a father should be able to emancipate his son from the tie of his power, and that the majesty of the emperor should not be able to release from the power of another, one whom he had chosen to be a father of the state?

D. i. 7. 8; C. xii. 8. 5.

Under the old Roman law no child was released from a father's power, by having any dignity or office, except that of a *flamen dialis*, or a vestal virgin. Persons holding either of these offices, without undergoing any *capitis deminutio*, or ceasing to be members of their father's family, became *sui juris*. Justinian conferred the privilege on those enjoying the dignity of the patriciate, and at a later period of his legislation enlarged the number of dignities to which this incident was attached; and the child was freed from the power of his father by being made a bishop, a consul, questor of the palace, praetorian prefect, or master of infantry or cavalry; and, in general, all those whose dignity exempted them from the burdens of the curia were freed from the power of their father.
(Nov. 31; C. x. 31. 66.) When under Justinian's legislation a child was released by attaining a dignity, he still, as in the older law, remained a member of his father's family, and enjoyed all his rights of succession and agnation. (Nov. 81. 2.)

Constantine changed the meaning of *patricius*, by making it a title of the highest honour conferred on persons who enjoyed the chief place in the emperor's esteem. The power of making *patricii* was, in general, used very sparingly by the emperors, and hence the title became an object of ambition even to foreign princes.

5. Si ab hostibus captus fuerit parens, quamvis servus hostium fiat, tamen pendet jus liberorum propter jus postliminii: quia hi, qui ab hostibus capti sunt, si reversi fuerint, omnis pristina jura recipiunt. Idcirco reversus et liberos habebit in potestate, quia postliminii fingit eum, qui captus est, semper in civitate fuisset: si vero ibi desesserit, exinde, ex quo captus est pater, filius sui juris fuisset videtur. Ipsa quoque filius neposve si ab hostibus captus fuerit, similiter dicimus propter jus postliminii jus quoque potestatis parentis in suspensu esse. Dictum est autem postliminii a *limine* et post, et eum, qui ab hostibus captus in fines nostros postea pervenit, postliminio reversum recte dicimus. Nam limina sicut in domibus fines quaedam faciunt, sic et imperii fines limen esse veteres voluerunt. Hinc et hinc dictus est quasi fines quidam et terminus. Ab eo postliminium dictum, quia sodem limine revertebatur, quo amissus erat. Sed et qui victis hostibus recuperatur, postliminium rediisse existimatur.

Gal. i. 129; D. xlix. 15. 29. 3; D. xlix. 15. 26.

By the *jus postliminii*, property taken in war, and retaken from the enemy, was restored to the original owners (see Bk. ii. Tit. 1. 17); and captives, on their return to their own country, were re-established in all their former rights. When the captive returned, all the time of his captivity was, in the eye of the law, blotted out, and he was exactly in the position he would have held if he had not been taken captive. (D. xlix. 15. 21. 6.) The manner of his return was quite immaterial. *Nihil interest quo- modo captivus reversus est.* (D. xlix. 15. 26.) When the father
returned, he resumed all his rights over his property, and his *patris potestas* over his children; when a child returned, he regained his rights of succession and agnation, and at the same time he fell again under the *patris potestas* of his father. (D. xlix. 15. 14.) If the captive did not return from captivity, the law considered him to have died at the moment of his captivity commencing, a point important with regard to testaments (see Bk. ii. Tit. 12. 5); and also as making children *sui juris*, and giving them all property acquired by them, from the time of the parent’s captivity. Gaius says that in his time this point in favour of the children was not established (Gai. i. 129); but, at any rate, it was so when Ulpian wrote. (D. xlix. 15. 18.)

6. *Præterea emancipatione quaque desinunt liberi in potestate parentum esse.* Sed ea emancipatio antea quidem vel per antiquam legis observationem procedebat, qua per imaginarias venditiones et intercedentes manumissiones celebrabatur, vel ex imperiali rescripto. Nostra autem providentia et hoc in melius per constitutionem reformavimus, ut, fictione pristina expellas, recta via apud competentes iudices vel magistratus parentes intrent et filios suos vel filias vel nepotes vel nepotes ac deinceps sua manu dimitterent. Et tunc ex edicto pretoris in hujus filii vel filiae, nepotis vel nepitis bonis, qui vel quo a parente manumissus vel manumissa fuerit, *eadem jura prestantur parenti, quae tribuuntur patrono in bonis libertis:* et *præterea si impubes sit filius vel filia vel ceteri, ipse paren ex manumissione tutelam ejus nunciscitur.*

6. Children, also, cease to be under the power of their descendants by emancipation. Formerly emancipation was effected, either by adopting the process of the ancient law, consisting of imaginary sales, each followed by a manumission, or by imperial rescript; but we, in our wisdom, have introduced a reform on this point by one of our constitutions. The old fictitious process is now done away with, and descendants may now appear directly before a proper judge or magistrate, and free from their power their children, or grandchildren, or other descendants. And then, according to the pretorian edict, the descendant has the same rights over the goods of those whom he emancipates, as the patron has over the goods of his freedman. And further, if the children emancipated, whether sons or daughters or other descendants, are within the age of puberty, the descendant, by the emancipation, becomes their tutor.

Gai. i. 182, 184; D. xxxvii. 12. 1; D. xxvi. 4. 3. 10; C. viii. 49. 5, 6.

We have no trace of any other form of giving freedom, in early times, than that of emancipation. In the law of the Twelve Tables we find it laid down, *Si pater filium ter venumdüit (sells), filium a patre liber esto.* The father might sell his son, and he would then be in the *mancipium* of the purchaser; but when the purchaser set him free, the son would fall again under his father’s power. This might happen over and over again; but the Twelve Tables, whether making a new enactment, or sanctioning an old custom, declared that after a third sale the father’s power was extinguished for ever. This may perhaps have been originally intended as a kind of check on the father abusing his power of selling his son, and have been afterwards used as a means of giving freedom by a fictitious sale; or it may have been expressly enacted in the Twelve Tables to extinguish all doubts whether the custom of freeing from a father’s power by three sales was valid.
In the form the fictitious sale took in the times of historical certainty, the father three times sold his son to a fictitious purchaser, who, between the first and the second sale, and also between the second and the third, manumitted the son, i.e. discharged him from his power as a master which he had acquired by the sale. After the third sale, the son was in the mancipium of the fictitious purchaser, and if this purchaser had manumitted him, he would have been the son's patron. But as the father generally wished to be the patron of his son, the relation giving him, among other things, the right of succeeding to the son if intestate and childless, the purchaser, instead of manumitting him, resold (remancipavit) him to the father, who then himself manumitted him, and became his patron. In cases where the fictitious purchaser manumitted the third time, he was considered as a trustee for the father of all the rights of patronage. Originally, an express contract was made, contracta jiducia, to bind the purchaser to remanicipate or to manumit, reserving the rights of patronage to the father, as the case might be; but in later times the purchaser was considered bound by an implied contract, and the pretorian edict, as we learn from the text, secured to the father in all cases the rights of patronage.

As the law of the Twelve Tables spoke only of a son, it was considered by a strict interpretation of the term, 'son,' that one sale instead of three was sufficient in the case of a daughter or grandchild. (Gal. i. 134, 135 b.)

Anastasius (A.D. 503) introduced a new mode of freeing the child from the power of the father. The emperor issued, in cases where he thought it proper, a rescript authorising the emancipation; and this rescript being registered by a magistrate, the consent of the child, if of age, being declared, and the final permission of the emperor being given, the process was complete. (C. viii. 49. 5.)

Justinian, in giving the greatest possible facility to emancipation, preserved all the effects which the process had had under the old system of fictitious sales. Both under his system and that of Anastasius, a child could be emancipated in his absence, which was not possible in the times when the old forms of manumission were strictly observed.

7. Admonendi autem sumus, liberum esse arbitrimum ei, qui filium et ex eo nepotem vel nepetem in potestate habebit, filium quidem de potestate dimittire, nepotem vero vel nepetem retinere: et ex diverso filium quidem in potestate retinere, nepotem vero vel nepetem manumittire (eadem et de pronepote vel pronepte dicta esse intellegantur) vel omnes sui juris efficere.

7. It is also to be observed, that a person having in his power a son, and by that son a grandson or granddaughter, may emancipate his son, and retain in his power his grandson or granddaughter; or, conversely, he may emancipate his grandson or granddaughter, and retain his son in his power; and the same may be understood as said of a great-grandson, or a great-granddaughter: or he may make them all sui iuris.

Gal. i. 188.
8. Sed et si pater filium, quem in potestate habet, avo vel proavo naturali secundum nostras constituciones super his habitas in adoptionem dederit, id est si hoc ipsum, actis intervenientibus, apud competentes judicem manifestavit, presente eo, qui adoptatur, et non contradicente nec non eo, qui adoptat, solvitur quidem jus potestatis patriis naturalis, transit autem in hujusmodi parentem adoptivum, in cuius persona adoptionem plenissimam esse antea diximus.

C. viii. 47. 11.

The adoptive father could not acquire any patria potestas by fictitious sales; he could only extinguish that of the natural father. In order to gain it himself, he had recourse to another fictitious process, called in jure censis. He claimed the child as his before a magistrate, and the natural father notwithstanding the claim, the child was given into the patria potestas of the adoptive father. For the change made by Justinian in the law of adoption, see Tit. 11. 1, 2.

9. Ilud autem scire oportet, quod, si nurus tua ex filio tuo conceperit et filium postea emancipaveris vel in adoptionem dederis praegnante nuru tua, nihil minus quod ex ea nascitur, in potestate tua nascitur: quod si post emancipationem vel adoptionem fuerit conceptum, patria sui emancipati vel avii adoptivi potestatis subicitur: et quod neque naturales liberi neque adoptivi ullo pæne modo possunt cogere parentem de potestate sua eos dimittere.

GAI. i. 185, 187; D. i. 7. 31, 33.

The rights of a child were always determined by reference to the moment of conception, not of birth, when he was born in justo matrimonio, because he then followed the condition of his father. But when he followed the condition of his mother, as he did when he was born out of justum matrimonium, reference was had to the time of his birth (GAI. i. 89), or, in the later law, to the time of his conception, of his birth, or to any intermediate time, as might be most favourable to him. (See Tit. 4. pr.)

The exceptional cases alluded to in the words neque ullo pæne modo only occurred where the father attempted to make a base use of his power over his children, or abandoned them (C. xi. 40. 6; viii. 52. 2); or when a person, arrogated under the age of puberty, on attaining that age, compelled his adoptive father to emancipate him. (D. i. 7. 33.)
Trt. XIII. DE TUTELIS.

Transeamus nunc ad aliam divisionem. Nam ex his personis, quae in potestate non sunt, quaedam vel in tutela sunt, vel in curatione, quaedam neutro jure tenentur. Videamus igitur de his, quae in tutela vel in curatione sunt: ita enim intelligentem ceteras personas, quae neutro jure tenentur. As prius dispensamus de his, quae in tutela sunt.

Let us now proceed to another division. Of those who are not in the power of an ascendant, some are under a tutor, some under a curator, some under neither. Let us treat, then, of those persons who are under a tutor or curator; for we shall thus ascertain who are they who are not subject to either. And first of persons under a tutor.

GAI. i. 142, 148.

This is rather a subdivision of persons *sui juris* than another division of persons generally. There were some persons who were exempt from the *patricia potestas*, and yet required constant protection and assistance. When this arose from youth, or, in the old law of Rome, from the incapacity supposed always to attach to females (*propter animi levitatem*, GAI. i. 144), the protector was called a *tutor*; when it arose from mental incapacity, he was called a *curator*. The two offices greatly resembled each other; but there was one leading distinction between them. The *tutor* was said to be given to the person (Tit. 15. 4); he not only administered the property of the pupil, but he also supplied what was wanting to complete the pupil's legal character. The *curator* was said to be given to the property: his duty was exclusively to see that the person under his care did not waste his goods. (See Introd. sec. 43.)

1. Est autem tutela, ut Servius definit, *jus ac potestas in capite libero ad tuendum eum, qui propter statem se defendere nequit, jure civili data ac permissa.*

D. xxvi. 1. 1.

By a free person is meant here one *sui juris*. The power of a tutor (*potestas*) was either given (*data*) by the civil law, when it devolved on the next of kin, or allowed (*permissa*) by that law, when it was conferred by testament.

2. Tutores autem sunt, qui eam vim ac potestatem habent, exque re ipsa nomen ceperunt. Itaque appellantur tutores quasi titores aequae defensores, sicut ejudem dicuntur, qui sedes tuentur.

2. Tutors are those who have this authority and power, and they take their name from the nature of their office; for they are called tutors, as being protectors (*tutores*) and defenders; just as those who have the care of the sacred edifices are called *aditui*. 
3. Permission is also given to tutors, if the children have not attained the age of puberty and are under their power. And this without any distinction in the case of all sons and daughters. But grandfathers can only give tutors to their grandchildren when these will not fall under the power of their father on the death of the grandfather. Hence, if your son is in your power at the time of your death, your grandchildren by that son cannot have a tutor appointed by your testament, although they were in your power; because, at your decease, they will fall under the power of their father.

Gal. i. 144, 146.

The law of the Twelve Tables said, 'Ut i LEGASSIT super pecunia tutelae suae rei, ita jus esto.' None but the head of the family could appoint a tutor by testament, and for none but children, or descendants in his power, who were included in the term sua res. Further, he could only appoint a tutor for those who, on his death, became sui juris, and were under age.

4. Cum antem in compluribus aliis causis postumui pro jam natis habentur, et in hac causa placuit non minus postumis quam jam natis testamento tutores dari posse, si modo in ea causa sint, ut, si vivis parentibus nascentur, sui et in potestate sorum fierent.

4. Posthumous children, as in many other respects, so also in this respect, are considered as already born before the death of their fathers; and tutors may be given by testament to posthumous children, as well as to children already born, provided that the posthumous children, had they been born in the lifetime of their ascendant, would have been sui heredes, and in their ascendant's power.

Gal. i. 147.

It was a maxim of Roman law that nothing could be given by testament to an uncertain person, and a posthumous child was looked on in this light, so much so that he could not be heir, nor take a legacy, nor have a tutor appointed by will; afterwards this was so far modified that as regarded the chief of his family he was looked on as if born in the father's lifetime (pro jam nato habebatur); that is, the ascendant might make him heir, disinherit him, give him a legacy, or appoint a tutor for him.

It was not until the time of Justinian that the posthumous child of a stranger was capable of taking under a testament. (See note on Bk. ii. Tit. 13. 1.) The words in compluribus causis are extracted from Gaius; Justinian left no point of difference between the posthumous child and the child born in its father's lifetime. (C. vi. 48.) The proper meaning of posthumus is 'born after the death of a person.' Under special legislation it received the artificial sense of 'born after the date of a testament.' (Bk. ii. Tit. 13. 2.)
By the term *sui heredes* were meant those persons who, on the death of the head of the family, having no one above them in the line of ascent, became *sui juris*, and were the necessary heirs of the deceased, if intestate. (See Introduct. sec. 77.)

5. Sed si emancipato filio tutor a patre testamento datus fuerit, confermandus est ex sententia præsidia omnimodo, id est sine inquisitione.

5. But, if a father gives a tutor by testament to his emancipated son, the appointment must be confirmed by the sentence of the *præses* in all cases, that is, without inquiry.

D. xxvi. 3. 1.

The emancipated child, not being in the power of his father, could not, strictly speaking, be subject to the father’s directions as to his tutor; but a magistrate had power to carry out an appointment of a tutor in a testament if there was only this technical objection to be surmounted. The wishes of a father were considered so sure an indication to the magistrate of the fittest person to be tutor, that they were always carried out without examining into the suitability of the appointment (*sine inquisitione*), unless some change in the position of the tutor since the making of the testament made him obviously unfit for the office. (D. xxvi. 8. 9.)

A father could appoint by testament a tutor for his illegitimate children if he left them property; and the mother, the patron, and indeed a stranger who instituted as heir an infant *sui juris*, might appoint a tutor by testament, and the magistrate carried out the appointment, but in these cases not until he had examined all the circumstances of the case. (D. xxvi. 2. 4. and 3. 4.) The husband might also by testament appoint a tutor to his wife *in manu*, or give her the option of fixing on a tutor. (Gai. i. 148–154.)

Trt. XIV. QUI DARI TUTORES TESTAMENTO POSSUNT.

Dari autem potest tutor non solum paternías, sed etiam appointed tutor, but also a *filiusfamilias*.

The office of tutor was looked on as in some respects a public one, as the tutor supplied what was wanting to the *persona* of a citizen; and a *filiusfamilias* was always capable of holding any public office. (D. i. 6. 9.)

Any one could be made a tutor by testament with whom there was the *testamenti factio* (D. xxvi. 2. 21), or, in other words, any one who had the rights of citizenship sufficiently to enable him to go through the peculiar forms of Roman law.

Women could not be appointed tutors according to the old law, but the emperors would confirm the power of a mother named by testament tutor of her children. (D. xxvi. 1. 18.)

1. A man may also by testament appoint as a tutor his own slave, at the same time giving him his liberty. But it must be observed that if a slave is appointed tutor without an express gift of liberty, he is still held to receive by implication a direct freedom, and thus can legally be tutor. If, however, it is by mistake, and from the testator supposing him to be free, that he is appointed tutor, the decision would be different. The appointment of a slave belonging to another person as tutor is ineffectual, if unconditional; but is valid when made with this condition, 'when he shall be free.' If, however, any one appoints his own slave with such a condition, the appointment is void.

D. xxvi. 2. 32. 2.

A slave was incapable of holding any legal office. It was therefore necessary to enfranchise him in order that he might become a tutor. If the appointment was made without express enfranchisement, it was the opinion of Paul (D. xxvi. 2. 32) that the appointment implied enfranchisement, and this as if given by the testator himself (directa), and not entrusted to his heir to give (fideicommissaria). Valerian and Gallian, however, decided subsequently by a rescript (C. vii. 4. 9), that it was only a libertas fideicommissaria which such an appointment carried with it. Justinian here restores the authority of the former opinion.

The appointment of the slave of another carried with it the libertas fideicommissaria, that is, it was incumbent on the heir to purchase and emancipate the slave, who could then discharge the office of tutor. (D. xxvi. 2. 10. 4.) If the heir was not able to purchase the slave, then the slave could not act as tutor until he gained his freedom in some other way. Even if the testator had not used the words cum liber erit, or some corresponding expression, he was presumed to have intended to use them, unless a contrary intention appeared. (D. xxvi. 2. 10. 4; Cod. vii. 4. 9.) If a testator said of his own slave that he was to be tutor when free, this showed that the testator, who had the power to enfranchise him, did not choose to exercise it; and as he thus voluntarily made his own appointment void, the law would not help him.

2. Furiousus vel minor viginti quinque annis tutor testamento datus tutor erit, cum compositus mentis aut major viginti quinque annis fuerit factus.

2. If a madman or a person under the age of twenty-five years is by testament appointed tutor, the one is to begin to act when he becomes of sound mind, and the other when he has completed his twenty-fifth year.

D. xxvi. 1. 11; xxvi. 2. 32. 2.

Meanwhile the magistrate would appoint another tutor. (See Tit. 20.)
8. Ad certum tempus vel ex certo tempore vel sub condicione vel ante hereditas institutionem posse dari tutorem non dubitatur. 8. There is no doubt that a tutor may be appointed either until a certain time, or from a certain time, or conditionally, or before the institution of an heir.

The old law regarded the naming of persons to take as heirs under the testament, as the base of the testament, and passed over every declaration of the testator’s wishes placed before this as out of due order and entirely void. The Proculians (GAI. ii. 231) thought this ought not to be extended to the appointment of a tutor, and Justinian did away with the doctrine altogether. (See note on Bk. ii. Tit. 14. pr.)

4. Certe autem rei vel causa tutor dari non potest, quia personae, non causa vel rei datur. 4. A tutor cannot be appointed for a particular thing or business, as it is to a person, and not for a business or a thing, that a tutor is appointed.


The tutor had to take charge of the whole interests of the pupil, and complete his persona, and therefore to appoint him to take charge of his interest in any one matter only was inconsistent with the nature of his office, and such an appointment was void. (D. xxvi. 2. 13.) If, however, the property of the pupil was situated in provinces far apart from each other, a separate tutor might be appointed to take care of his interests in each province. (D. xxvi. 2. 15.)


5. If any one appoints a tutor to his sons or daughters, he is held also to appoint him as tutor to his posthumous children; because, under the appellation of son or daughter, a posthumous son or daughter is included. But if there are grandchildren, are they included in the appointment of a tutor to sons? We answer that under an appointment to children, grandchildren are included, but not under an appointment to sons; for son and grandson are quite distinct words. But, if a testator appoints a tutor to those who are posthumous, the term obviously includes all posthumous children, whether sons or grandsons.

Tit. XV. DE LEGITIMA ADGNATORUM TUTELA.

Quibus autem testamento tutor datus non sit, his ex lege duodecim tabularum agnati sunt tutores, qui vocantur legitimi. They to whom no tutor has been appointed by testament, have their agnati as tutors, by the law of the Twelve Tables, and such tutors are called ‘legal tutors.’

GAI. i. 155; D. xxvi. 4. 1.
Tutores legitimi means tutors appointed by a law, that is, by the law of the Twelve Tables, or according to some inference from its provisions, as in the case of patrons. (See Tit. 17.) 'Legal' must be here understood as equivalent to 'by virtue of a law.'

1. Sunt autem adgnati per virilis sexus cognationem conjuncti, quasi a patre cognati, veluti frater eodem patre natus, fratres filius neposve ex eo, item patruus et patru filius neposve ex eo. At qui per feminini sexus personas cognatione junguntur, non sunt adgnati, sed alias naturali jure cognati. Itaque amite tue filius non est tibi adgnatus, sed cognatus (et invicem se Ilicit tu illi eodem jure conjugeris), quia qui nascuntur, patris, non matris familiae sequuntur.

1. Aagnati are those who are related to each other through males, that is related through the father, as, for instance, a brother by the same father, or the son of such a brother, or the son of such a son, or, again, a father's brother, or a father's brother's son, or the son of such a son. But those who are related to us through females are not aagnati, but merely cgnati by natural relationship. Thus the son of a father's sister is related to you not by gnation, but by cognation, and you are also related to him by cognition; as children belong to the family of their father, and not to that of their mother.

GAL. 1. 158.

The law gave the rights of relationship, such as inheritance and appointment as tutors, to the aagnati only. All persons, related by ties of blood, were cgnati to each other. Within this larger circle the members of any one family were aagnati to each other. (See Introd. sec. 44, 45.) A family, in this sense, consisted of all persons related to each other, by having a common ancestor, in whose power, if he was alive, they would all be. A brother and sister, for instance, were aagnati, and a nephew and aunt, by the father's side. For if the grandfather were alive all would be in his power. But the tie was dissolved by the sister or aunt marrying in manum (see Introd. sec. 46); and as the children of females would be in the power of the husband, they could never be aagnati to their mother's aagnati, except by adoption; and hence it is here said that aagnati are related through males only. By the 118th Novel Justinian abolished this distinction between aagnati and cgnati, and the nearest in blood was thenceforth the tutor legitimus. (Nov. 118. 4, 5.)

2. Quod antem lex ab intestato vocet ad tutelam adgnatos, non hanc habet significationem, si omnino non fuerit testamentum is, qui poterat tutores dare, sed si quantum ad tutelam pertinent, intestatus descesserit. Quod tune quoque accidere intellegitur, cum is, qui datus est tutor, vivo testatore descesserit.

2. The law calling the aagnati to be tutors in case of intestacy does not refer merely to the case of a person who might have appointed a tutor, dying without having made any testament at all, but also to that of a person dying intestate only so far as regards the appointment of a tutor, and this includes the case of a tutor nominated by testament dying in the lifetime of the testator.

D. xxvi. 4. 6.
It was necessary to state expressly that the testament was
good as far as it went, and that the law remedied its deficiency by
making the agnati tutors, because it was a maxim of Roman law
that a man could not die partly testate and partly intestate. (See
note on Bk. ii. Tit. 14. 9.)

8. Sed adgnationis quidem jus
omnibus modis capitis deminutio
era plurumque perimitur: nam adgnatio
juris est nomen. Cognitionis vero
jus non omnibus modis commutatur,
quia civilis ratio civilia quidem jura
corrumpere potest, naturalia vero
non utique.

8. The right of agnation is ordi-
narily taken away universally by capitis
deminutio, for agnation is a term of
civil law; but the right of cognition
is not lost in every case by capitis
deminutio, for although civil law may
destroy civil rights, it cannot destroy
natural rights.

GAL. i. 158.

The tie of agnation being created by law, could also be dis-
solved by it: not so that of cognition, which was a tie of nature.
But the law could take away the legal rights attaching to the
natural tie; and this it did in the case of the maxima and of
the media capitis deminutio. (See next Title, 6.)

A constitution of Theodosius and Arcadius provided that the
mother, if she has not remarried, and undertakes not to remarry,
may have the tutela of her children given her. (C. v. 35. 2.) And
Justinian, by the 118th Novel, extended this to the grandmother,
as well as the mother, if there was no testamentary tutor.

TIT. XVI. DE CAPITIS MINUTIONE.

Est autem capitis deminutio pro-
ris status commutatio, eaque tribus
modis accidit; nam aut maxima est
capitis deminutio aut minor, quam
quidam medium vocat, aut minima.

Capitis deminutio is a change of
status, which may happen in three
ways: for it may be the greatest capitis
deminutio, or the less, also called the
middle, or the least.

GAL. i. 159.

The status of a Roman citizen was composed of three elements:
Tria sunt quae habemus: libertatem, civitatem, familiam (D. iv.
5. 11). The citizen was free, he had his position as a civis, he
had his position in a family. Caput, originally signifying the
mention made of the citizen in the registers of the census, meant
the sum of the legal capacities of a persona, the possession
of which gave him his status; and if a citizen changed his status,
that is, if he lost his liberty or his civic rights, or changed his
family position by adoption or emancipation, he underwent what
was termed a capitis deminutio, this capitis deminutio being termed
maxima, media, or minima, according to which of the three ele-
ments of status it was that was primarily affected.

1. Maxima est capitis deminutio,
cum aliquis simul et civitatem et
libertatem amittit. Quod accidit in
his, qui servi pene efficiuntur atro-
citate sententiae, vel liberti ut in-

1. The greatest capitis deminutio is,
when a man loses both his citizenship
and his liberty; as they do who by a
terrible sentence are made 'the slaves
of punishment;' or freedmen, con-
2. Minor sive media est capitis deminutio, cum civitas quidem amititur, libertas vero retinetur. Quod accidit ei, cui aqua et igni interdictum fuerit, vel ei, qui in insulam deportatus est.

2. The less or middle capitis diminutio is, when a man loses his citizenship, but retains his liberty; as is the case when any one is forbidden the use of fire and water, or is deported to an island.

GAI. i. 161.

In this kind of capitis diminutio, as well as in the preceding, the position in the familia was lost, its rights belonging only to citizens. In this lesser kind, freedom is preserved; but the person who undergoes the change of status becomes a stranger, peregrinus fit. (ULP. REG. 10. 3.) It was a maxim of Roman law, that no one could cease to be a citizen against his will. Civitatem nemo unquam ullo populi iussu amittit invitus. (CIC. PRO DOM. 29.) The condemned was therefore denied the necessaries of life, until he was driven to withdraw himself from the city. Id autem ut esset faciendum, non ademptione civitatis, sed tecti, et aquae et ignis interdictione faciebant. (CIC. PRO DOM. 30.) The aquae et ignis interdictio thus became a form by which a sentence of perpetual banishment was inflicted. The deportatio in insulam superseded this form. (D. xlviii. 29. 2.) The person who was banished was confined to certain limits, out of which he could not stir without rendering himself punishable with death. This must be kept distinct from simple relegatio, which was also an exile within prescribed limits, but did not in any way affect the status. (D. xlviii. 22. 7. See Tit. 12. 1 and 2.)

3. Minima capitis diminutio est, cum et civitas et libertas retinetur, sed status hominis commutatur. Quod accidit in his, qui, cum sui juris fuerunt, coeperunt alieno juri subjecti esse, vel contra.

3. The least capitis diminutio is, when a person's status is changed without forfeiture either of citizenship or liberty; as when a person sui juris becomes subject to the power of another, or a person alieni juris becomes sui juris.

GAI. i. 162.

The status was changed (commutatur) by the change of family position; but the person who underwent this form of capitis diminutio had still after it all the three elements of status. Whether the minima capitis diminutio involved a degradation or merely a change has been much debated by commentators. Savigny (see Poste's Gaius, p. 128) was of opinion that capitis diminutio always involved a degradation. The French commentators take the other view, that there was merely a change implied, and they
have, perhaps, if not the better arguments, the clearer authorities on their side. Thus Ulpian says the *minima capitis diminutio* takes place *salvo statu*. (D. xxxviii. 17. 1. 8.) What is said in the Digest of change of family by arrogation and emancipation must be extended to adoption. (D. iv. 5. 3.) In old times, the wife who passed *in manum viri*, or the freeman who was given *in mancipio*, underwent this *minima capitis diminutio*. (GAI. i. 162.)

After the words *vel contra*, at the end of this paragraph, some texts have the following words: *veluti si filiusfamilias a patre emancipatus fuerit, est capite diminutus*. The addition is probably owing to some writer having perceived that it was only in the case of emancipation that it was true that when a person became *sui juris* he was *capite minutus*. There was no change of family when a son became *sui juris* on the death of his father.

The person who underwent the *minima capitis diminutio* was, in the eyes of the law, a new person. He could not, therefore, until the praetor permitted an action against him, be sued for debts previously contracted. (D. iv. 5. 2.) And we shall see, in the Second Book, that in the old law a usufruct was extinguished by the *minima capitis diminutio* of the usufructuary. (Bk. ii. Tit. 4. 3.) The *capite minutus* also, as we shall see in the Third Book (Tit. 1. 9 and 10. 1), forfeited his place in intestate succession, except so far as he was helped by the praetor, or by legislation.

4. Servus autem manumissus capite non minuitur, quia nullum caput habuit. 4. A slave who is manumitted is not said to be *capite minutus*, as he has no "caput."

D. iv. 5. 3. 2.

5. Quibus autem dignitas magis quam status permutatur, capite non minuuntur: et ideo senatu motos capite non minui constat. 5. Those whose dignity rather than their status is changed, do not undergo a *capitis diminutio*, and so persons removed from the senatorial dignity undergo none.

D. i. 9. 3.

Even *infamia*, during the Empire at any rate, did not produce a *capitis diminutio*. (D. i. 16. 103.)

6. Quod autem dictum est, manere cognitionis jus et post capitis diminutio, hoc ita est, si minima capitis diminutio interveniat: manet enim cognatio. Nam si maxima capitis diminutio incurrat, jus quoque cognationis perit, ut puta servitute aliejuis cognati, et ne quidem, si manumissus fuerit, recipit cognitionem. Sed et si in insulam deportatus quis sit, cognatio solvitur. 6. In saying that the right of cognition remains in spite of a *capitis diminutio*, we were speaking only of the least *diminutio*, after which the cognition subsists. For, by the greater *diminutio*, as, for example, if one of the *cognati* becomes a slave, the right of cognition is wholly destroyed, so as not to be recovered even by manumission. So, too, the right of cognition is put an end to by deportation to an island.

D. xxxviii. 8. 5. 7.
See Tit. 15. 1. A change of the civil family by adoption or arrogation never dissolved the natural tie of cognatio, or destroyed its attendant civil rights; but these were destroyed by a sentence which involved the loss of the civilitas. And if the civilitas was once lost and then regained, the restored, or rather new, civis was in all respects the founder of a new family, excepting when he was restitutus in integrum, that is, restored by the emperor to the same position that he had formerly held. (See Tit. 12. 1.)

7. Cum autem ad agnatos tutela pertineat, non simul ad omnes pertinet, sed ad eos tantum, qui proximiore gradu sint, vel, si ejusdem graduus sint, ad omnes.

7. The right to be tutor, which belongs to the agnati, does not belong to all at the same time, but to the nearest in degree only; or if there are many in the same degree, then to all in that degree.

GAL. i. 164.

The principle of the law was, that those persons should have the burden of the tutelage who had the hope of the succession. (Tit. 17. pr.) The nearest in degree of the agnati were therefore the tutors in case of intestacy. The nearest in degree might, however, happen to be a woman or an infant, and then, although this person was the next in succession to the inheritance, it was necessary to go a step further off to find the tutor. (D. xxvi. 4. 1. 1.)

Tritt. XVII. DE LEGITIMA PATRONORUM TUTELA.

Ex eadem lege duodecim tabularum libertorum et libertarum tutela ad patronos liberosque eorum pertinet, quae et ipsa legitima tutela vocatur: non quia nominatur ea lege de hac tutela cavetur, sed quia perinde accepta est per interpretationem, atque si verbis legis introducta esset. Eo enim ipso, quod hereditates libertorum libertarumque, si intestati decessissent, jussarent lex ad patronos liberosque eorum pertinere, crediderunt veteres, voluisse legem etiam tutelas ad eos pertinere, cum et agnatos, quos ad hereditatem vocat, eosdem et tutores esse jussit et quia plerumque, ubi successionis est emolumentum, ibi et tutela onus esse debet. Ideo autem diximus plerumque, quia, si a femina impubes manumittatur, ipsae ad hereditatem vocatur, cum alius est tutor.

By the same law of the Twelve Tables, the tutelage of freedmen and freedwomen belongs to their patrons, and to the children of their patrons; and this tutelage, too, is called legal tutelage: not that the law contains any express provision on the subject, but because it has been as firmly established by interpretation, as if it had been introduced by the express words of the law. For as the law had ordered that patrons and their children should succeed to the inheritance of their freedmen or freedwomen who should die intestate, the ancients were of opinion that the intent of the law was that the tutelage also belonged to them; seeing that the law, which calls agnati to the inheritance, also appoints them to be tutors, because in most cases, where the advantage of the succession is, there also ought to be the burden of the tutelage. We say 'in most cases,' because, if a person below the age of puberty is manumitted by a female, she is called to the inheritance while another person is tutor.

GAL. i. 165; D. xxvi. 4. 1. 1. 8.
The law gave the patron the right of succession to the inheritance of the freedman; and as the right of succession was connected with the tutelage in the case of the *agnati*, it seemed natural to connect the two in the case of the patron.

**Trt. XVIII. DE LEGITIMA PARENTUM TUTELA.**

Exemplo patronorum recepta est et alia tutela, quae et ipsa legitima vocatur. Nam si quis filium aut filiam, nepotem aut neptem ex filio et deinceps impuberes emancipaverit, legitimus eorum tutor erit.

In imitation of the tutelage of patrons, there is, too, another kind which also is said to be legal: for if any one emancipates, below the age of puberty, a son, or a daughter, or a grandson, or a granddaughter, being the issue of a son, or any other descendant, he is their legal tutor.

**GAI. i. 175.**

This has already been stated in Title 12. 6. (See note to that paragraph.)

**Trt. XIX. DE FIDUCIARIA TUTELA.**

Est et alia tutela, quae fiduciaria appellatur. Nam si parens filium vel filiam, nepotem vel neptem et deinceps impuberes manumiserit, legitimam nanciscitur eorum tutelam: quo defuncto, si liberi virillis sexus extant, fiduciarii tutores filiorum suorum vel fratris vel sororis et ceterorum efficientur. Atqui patrono legitimo tutore mortuo, liberi quoque ejus legitimi sunt tutores: quoniam filius quidem defuncti, si non esset a vivo patre emancipatus, post obitum ejus sui juris efficereetur nec in fratum potestatem recideret ideoque nec in tutelam, libertus autem si servus mansisset, utique eodem jure apud liberos domini post mortem ejus futurus esset. Ita tamen ii ad tutelam vocantur, si perfecte statis sint. Quod nostra constitutione generaliter in omnibus tutelis et curationibus observari praecipit.

There is another kind of tutelage called fiduciary; for if an ascendant emancipates, below the age of puberty, a son or a daughter, a grandson or a granddaughter, or any other descendant, he is their legal tutor; but if, at his death, he leaves male children, they become the fiduciary tutors of their own sons, or brother, or sister, or other descendants of the deceased. But when a patron, who is a legal tutor, dies, his children also become legal tutors; the reason of this distinction being that a son, who has not been emancipated in his father's lifetime, becomes *sui juris* at the death of his father, and does not fall under power of his brothers, nor, therefore, under their tutelage; while the freedman, had he remained a slave, would also have been, after the death of his master, the slave of his master's children. These persons, however, are not called to be tutors unless of full age, a rule which by our constitution applies generally to all tutors and curators.

**D. xxvi. 4. 3, 4; C. v. 80. 5.**

When it is said that the sons become the fiduciary tutors of their own sons, reference is made to the case of the grandsons having been emancipated by the grandfather.

The person who emancipated the child succeeded to all the
rights of a patron over the child; if, as was usual (see Tit. 12. 6, note), it was the father, then, as being the patron, he was included in the terms of the law of the Twelve Tables, and was a tutor legitimus (Gal. i. 172; D. xxvi. 4. 3-10); if it was not, he was a tutor fiduciarium (Gal. i. 166), a tutor bound to the father by a trust. In the case of a slave, the children of a patron succeeded to the rights of patronage; but this did not extend to the case of emancipated children: the children not emancipated were not the patrons of those who were. They were not tutors, therefore, by the law of the Twelve Tables, and the word fiduciarium is borrowed from its more proper usage to express their position, and is in this case merely opposed to legiti mi. (D. xxvi. 4. 4.) The reason given in the text for their being only tutores fiduciarii, viz., that the emancipated infant would have been sui juris if he had not been emancipated, is manifestly an imperfect one. For it would not be necessarily true when a grandfather emancipated his grandson; supposing his father were living and in the power of the grandfather, the grandson would not on the grand- father's death become sui juris, if he were not emancipated. If the father of the emancipated child left no other children above the age of puberty, the nearest agnatus, as, for instance, the father's brother, was the tutor, and he, too, was called the tutor fiduciarium. (Theoph. Paraph.)

The perfecta aetas was the age of twenty-five years.

Trt. XX. DE ATILIANO TUTORE VEL EO, QUI EX LEGE JULIA ET TITIA DABATUR.

Si cui nullus omnino tutor fuerat, ei dabatur in urbe quidem Roma a prae torem urbano et majore parte tribunorum plebis tutor ex lege Atilia, in provinciis vero a presidibus provinciarum ex lege Julia et Titia.

If any one had no tutor at all, one used to be given him, in the city of Rome by the praetor urbanus, and a majority of the tribunes of the plebs, under the lex Atilia; in the provinces, by the praesides under the lex Julia et Titia. Gal. i. 185.

The date of the lex Atilia is unknown, but it must have been in existence in the year of the city 557, when Livy (xxxix. 9) says of a liberta, 'Post pat roni mortem, quia in nullius manu erat, tutor a tribunis et praetore petito.' And as the necessity for some means of appointing a tutor, where one was not appointed by testament or law, must have been early felt, the lex Atilia, or one similar to it, must probably have existed long before the time of which Livy speaks. The date of the lex Julia et Titia was probably 723 a.u.c. As there were ten tribunes, the majority would be at least six.

The term tutor dativus is used by Justinian (Cod. i. 3. 52) to express a tutor given by the magistrate; this term being used by Gaius (i. 154) to express tutors given by testament.

1. Sed et si testamento tutor sub condicione aut die certo datus fuerat, 1. Again, if a testamentary tutor had been appointed conditionally, or
If the wishes of the testator were declared to any extent respecting the appointment of a tutor, this entirely excluded the tutores legitimi, and every deficiency in the declaration was remedied by the interposition of the magistrate. (D. xxvi. 2. 11.)

No testament took effect until an heir entered on the inheritance. (See Intro. sec. 76.) If it was known that a testament existed appointing a tutor, this excluded the aequati from being tutors; but the tutor under the testament did not commence his tutela until the testament took effect. Meantime a tutor appointed by the magistrate took care of the pupil.

2. Ab hostibus quoque tutore capto, ex his legibus tutor petebatur, qui desinebat esse tutor, si is, qui captus erat, in civitatem reversus fuerat: nam reversus recipiebat tutelam jure postliminii.

2. If, again, a tutor was taken prisoner by the enemy, application could be made, under the same laws, for another tutor, whose office ceased when the first tutor returned from captivity; for on his return he resumed the tutelage by the jus postliminii.

For an account of the jus postliminii, see Title 12. 5.

3. Sed ex his legibus pupilis tutores desierunt dari, posteaquam primo consules pupilis utriusque sexus tutores ex inquisitione dare coeperunt, deinde praetores ex constitutionibus. Nam supra scriptis legibus neque de cautione a tutoribus exigenda rem salvam pupilis fere, neque de compellendis tutoribus ad tutelae administrationem quidquam cavetur.

3. But tutors have ceased to be appointed under these laws, since they have been appointed to pupils of either sex, first by the consuls, after inquiry into the case, and subsequently by the praetors under imperial constitutions. For the above-mentioned laws required no security from the tutors for the safety of the pupils' property, nor did they contain any provisions to compel them to discharge the duties of the office.

The power to appoint tutors was given by Claudius to the consuls (Suet. in Claud. 23), and transferred by Antoninus Pius (Jul. Capit. in Vit. M. Anton. 10) to the praetors.

4. Sed hoc jure utimur, ut Romae quidem prefectus urbis vel praetor

4. Under our present system tutors are appointed at Rome by the prefect
secundum suam jurisdictionem, in provincis antem presides ex inquìsitione tutores crearent, vel magistratus jusu presidium, si non sint magna pupilli facultates.

of the city, or the pretor, according to his jurisdiction, and, in the provinces, by the praesides, after inquiry; or by an inferior magistrate, at the command of the praeses, if the property of the pupil is only small.

D. xxvi. 5. 1.

The praefectus urbis was, from the time of Augustus, an officer who had the superintendence of the city and its police, and power to decide on both civil and criminal cases, his civil jurisdiction extending one hundred miles from the city, his criminal jurisdiction evidently extending over the whole of Italy. (D. i. 12.) As he was considered the direct representative of the emperor, much that previously belonged to the praetor urbanus fell gradually into his hands. The praefectus urbis appointed tutors in cases where pupils of higher rank and larger fortune were concerned; the praetor, when the pupils were of humbler station and smaller fortune; and this it is which is referred to in the words secundum suam jurisdictionem.

In the provinces the praeses appointed; but until Justinian altered the law (see next paragraph), not only could municipal magistrates not appoint without the authority of the praeses, but no one could be authorised by the praeses unless he was a magistrate. (D. xxvi. 5. 8.)

5. Nos autem per constitutionem nostram et huismodi difficultates hominum rescantes nee expectata jussione presidium, dispoesimus, si facultas pupilli vel adulti usque ad quingentos solidos valeat, defensores civitatum (una cum ejusdem civitatis religiosisissimo antiquisite vel apud alias publicas personas) vel magistratus, vel juridicum Alexandrinæ civitatis tutores vel curatores creare, legitima cautela secundum ejusdem constitutionis normam prestanda, videlicet eorum periculo, qui eam accipiant.

5. But by one of our constitutions, to do away with the difficulties to which these provisions as to different persons gave rise, and to avoid the necessity of waiting for the order of the praeses, we have enacted, that if the property of the pupil or minor does not exceed five hundred solidi, tutors or curators shall be appointed by the defensores of the city (acting in conjunction with the holy bishop, or before other public persons), or by the magistrates, or, in the city of Alexandria, by the judge; but legal security must be given according to the terms of the same constitution, that is to say, at the risk of those who accept it.

C. i. 4. 80.

The constitution of Justinian provided that, where the fortune of the person requiring a tutor or curator did not amount to more than 500 solidi (the aureus, 1l. 1s. 6d. of English money, after the time of Alexander Severus was called a solidus), a local magistrate, without the authorisation of the praeses, could appoint, not making a formal examination into the position and character of the tutor or curator (inquisitio), but merely taking a money security for the faithful performance of his duties.

Si facultas pupilli, &c. This is an ambiguous translation of the clause in the Code: εἰτερ ἀχρι πεντακοσίων χρυσῶν καὶ μόνον τὰ τῆς περιουσίας εἰς τῶν με&alpha
The *defensor* was a magistrate appointed for two years out of the *decuriones* of a city. His principal business was to act as a check on the *praeses*, and he had besides a limited civil and criminal jurisdiction.

6. Impuberes autem in tutela esse naturali jure conveniens est, ut is, qui perfecte etatis non sit, alterius tutela regatur.

6. It is agreeable to the law of nature, that persons under the age of puberty should be under tutelage, so that persons of tender years may be under the government of another.

**GAI. i. 189.**

Gaius, in his Institutes, after the words extracted from him in the text, proceeds to contrast with the tutelage of minors, which is an institution natural and necessary in all communities, the tutelage of women, which he considers founded on no reasonable basis. The original reason of this tutelage was probably the incapability of women to share in the proceedings of the *curia*, and their being supposed unfit to go through solemn forms. In default of a testamentary tutor appointed by the father of the woman if she was in his power, or by the husband if she was in *manu*—and it may be mentioned that the husband could by testament either appoint a tutor to his wife in *manu*, or give her the option of choosing one (GAI. i. 148 et seq.)—the nearest *agnatus* was the tutor, women being either *alieni juris*, or else under a tutor all their lives; the tutor being allowed in certain cases to transfer his office (GAI. i. 168), and the woman being allowed to demand a substituted tutor in place of one absent. (GAI. i. 173.) The *lex Atilia* and the *lex Julia et Titia* applied to women. (ULP. Reg. 11. 18.) The *lex Papia Poppea* exempted from tutelage women who had three children (GAI. i. 145), and a *lex Claudia* (A.D. 45) suppressed the tutelage of the *agnati* altogether in the case of women of free birth, leaving only the tutelage of ascendants and patrons. (GAI. i. 157.) This modified tutelage of women existed in the time of Ulpian (Reg. 11. 8), but had fallen into desuetude in the time of Justinian. While the tutelage of women lasted, the woman above puberty (see GAI. i. 190 et seq.) managed her own affairs, and the tutor was only called in to give his *auctoritas* on occasions of moment, the praetor interposing to force a tutor to give his authority when necessary, but the praetor would not adopt this course where the tutor was an ascendant or patron, unless some very strong reason existed.

7. Cum igitur pupillorum pupillarumque tutores negotia gerunt, post pubertatem tutela judicio rationem reddunt.

7. As tutors administer the affairs of their pupils, they may be compelled to account, by the *actio tutela*, when their pupils arrive at puberty.

**GAI. i. 191.**

The modes by which the faithful discharge of his duty by a tutor was insured are given in the 24th Title.

**TR. XXI. DE AUCTORITATE TUTORUM.**

Auctoritas autem tutoris in quibusdam causis necessaria pupillis est, In some cases it is necessary that the tutor should authorise the acts of
in quibusdam non est necessaria. Ut ece si quid dari sibi stipulatur, non est necessaria tutoris auctoritas: quod si alius pupilli promittant, necessaria est: namque placuit, meliorem quidem suam condicicionem licere ei facere etiam sine tutoris auctoritate, deteriorem vero non aliter quam tutore auctore. Unde in his causis, ex quibus mutus obligations nascuntur, in emptionibus venditionibus, locutionibus conductioibus, mandatis, depositis, si tutoris auctoritas non interveniat, ipsi quidem, qui cum his contrahunt, obligantur, at invicem pupilli non obligantur.

the pupil, in others not. When, for instance, the pupil stipulates for something to be given him, the authorisation of the tutor is not requisite; but if the pupil makes the promise, it is requisite; for the rule is, that pupils may make their condition better, even without the authorisation of their tutor, but not worse unless with the tutor's authorisation. And therefore in all cases of reciprocal obligation, as in contracts of buying, selling, letting, hiring, bailment deposit, if the tutor does not authorise the pupil to enter into the contract, the person who contracts with the pupil is bound, but the pupil is not bound.

D. xix. 1. 18. 29.

The duties of the tutor were twofold: to administer the affairs of the pupil, and to interpose what was termed his authority. It is to the second head of his functions that this Title refers.

There were many things in which the Roman law, in its stricter times, did not allow one person to represent another. Much that to us seems only to belong to private life was bound up with political and public duties and rights. (See Intro. sec. 43.) The law could not contemplate one beneath the age of puberty acting as if he was a member of the curia, or any one else coming forward to fill for him his place in the list of citizens. No one could bring actions of strict law in another name, or go through, for another, the fictitious process of in jure cesso, or through the forms of manumission and adoption, or perform for another any of those acts to which a solemn ceremony was attached, such as mancipation or stipulation. (D. xl. 2. 24; D. xlvi. 4. 13. 10.) It was necessary that a minor should himself go through the forms and repeat the words requisite for the validity of such transactions; but it was also necessary that the tutor should be present and give his sanction. The auctoritas of the tutor was the complement (auctoritas is derived from augeo) to the symbolical forms through which the child went. (See Intro. sec. 43.) It represented the intention or the mental act on which those forms ultimately rested. If the child could not speak (infans from fari), no such forms could be used; if he could speak, but could scarcely understand the import of what he said, or, in technical language, if, being still infant, proximus, he had as yet little or no intellectus (Gal. iii. 109), the tutor could but very rarely, by interposing his sanction, give legal validity to words uttered without understanding. It was only when the act would confer a very great and very clear benefit on the child, that this was allowed; and although the tutor was, to a certain extent, permitted to act for an infant, it was not until a very late period of Roman law that a constitution of Theodosius and Valentinian, a.d. 426 (C. vi. 30. 18. 2), permitted a tutor to enter on an inheritance in the name of an infant. (D. xxix. 2. 9.)
But when the child had entered on his eighth year, and was now *pubertati proximus* or approaching thereto, he was considered to have *intellectus*, but *not judiciwm* (THEOPH. Paraph. on Bk. iii. 19. 9); that is, he understood the meaning of the form, but could not decide for himself whether it was to his advantage to go through the act or not. This want of judgment the tutor supplied; and in every case where the tutor gave his sanction, the act was legally valid. Supposing, however, a pupil acted without the *auctoritas* of the tutor, what was the consequence? In the case of contracts the pupil acting without authorisation took every benefit, but sustained no injury from the contract; because while his tender years shielded him, the person with whom he contracted, having by the agreement made a formal expression of his will, must abide the event. But when it is said that a pupil took every benefit of the contract, it must not be understood that he could continue to enjoy at pleasure the advantages of another's property without giving anything for the enjoyment. The original owner might reclaim the property; and if a profit was being derived from its possession might take that profit to himself. (D. xxvi. 8. 5. 1.) Only he could never make the pupil restore or refund anything that was once gone; and while a pupil could always disclaim an executory contract made to his disadvantage, he could always, through the intervention of his tutor, enforce one that promised to benefit him. (Bk. ii. Tit. 8. 2.) In other cases, however, the act of the pupil without authorisation was altogether invalid, because there was a risk involved; and although it might practically happen that the act would have been advantageous to the pupil, the law guarded him against the risk by making his act invalid. What these cases were is learned from the next paragraph.

1. *Neque tamen hereditatem adire neque bonorum possessionem petere neque hereditatem ex fideicommissa suscipere aliter possunt nisi tutoris auctoritate, quamvis lucrosa sit neque ulum damnum habeat.*

1. Pupils, however, cannot, without the authorisation of the tutor, enter on an inheritance, demand the possession of goods, or take an inheritance given by a *fideicommissum*, even though to do so would be to their gain, and could involve them in no risk.

D. xxvi. 8. 9. 11.

The *hereditas* was the legal succession to the property of the deceased, the *bonorum possessori* here spoken of was an interest in the property of a deceased person, accorded by the praetor (Bk. iii. Tit. 9), and the *hereditas ex fideicommisso* was a succession received through the intervention of a trustee appointed by the testator. (See Introd. sec. 76.)

2. *Tutfr autem statim in ipso negotio presens debet auctor fieri, si hoc pupillo prodesse existimaverit. Post tempus vero aut per*

2. A tutor who wishes to authorise any act, which he esteems advantageous to his pupil, should do so as once while the business is going on,
epistulam interposita auctoritas nihil agit.

and in person, for his authorisation is of no effect if given afterwards or by letter.

D. xxvi. 8. 9. 5.

3. Si inter tutorem pupillumve judicium agendum sit, quia ipsa tutor in rem suam auctor esse non potest, non pretorius tutor, ut olim, constituit, sed curator in locum ejus datur, quo interveniente judicium peragitur et eo peracto cura-
tor esse desinit.

8. When a suit is to be commenced between a tutor and his pupil, as the tutor cannot give authority with regard to his own cause, a curator, and not, as formerly, a pretorian tutor, is ap-pointed, with whose intervention the suit is carried on, and who ceases to be curator when the suit is deter-
mined.

GAL. i. 184.

Although the person who assisted the pupil in an action in which the tutor was concerned did exactly what the tutor did for the pupil in any other action, and thus, as having to authorise the proceedings, might be spoken of as a tutor (ULP. Reg. 11. 24), yet, as he was given for a particular purpose, which tutors were not (see Tit. 14. 4.), it was very natural that he should, in preference, receive the name of cura-
tor.

Subsequently the 72nd Novel (cap. 2) provided that, if the pupil became at any time the debtor of the tutor, another tutor should be added to protect the pupil.

Tit. XXII. QUIBUS MODIS TUTELA FINITUR.

Pupilli pupillaeque cum puberes esse ceperint, tutela liberantur. Pubertatem autem veteres quidem non solum ex annis, sed etiam ex habitu corpore in masculis estimari volebant. Nostra autem majestas dignum esse castitatem temporum nostrorum bene putavit, quod in feminis et antiquis impudicum esse visum est, id est inspectionem habi-
tudinis corporis, hoc etiam in mascu-
culos extendere. Et ideo sancta con-
stitutio promulgata, rubicetatem in masculis post quartum decimum annum completum illico initium accipere disposuimus, antiquitatis normam in femininis personis bene positam suo ordine ralinquentes, ut post duodecimum annum completum viripotentes esse credantur.

Pupils, both male and female, are freed from tutelage when they attain the age of puberty. The ancients judged of puberty in males, not only by their years, but also by the develop-
ment of their bodies. But we, from a wish to conform to the purity of the present times, have thought it proper, that what seemed, even to the ancients, to be indecent towards females, namely, the inspection of the body, should be thought no less so towards males; and, therefore, by our sacred constitution we have enacted, that puberty in males should be con-sidered to commence immediately on the completion of their fourteenth year; while, as to females, we have preserved the wise rule adopted by the ancients, by which they are esteemed fit for marriage on the completion of their twelfth year.

GAL. i. 196; C. v. 60. 8.

We learn from Gaius and Ulpian (Reg. 11. 28) that the Pro-
culians were in favour of a particular age being fixed as that of puberty; the Sabinians wished to let it be decided by nature.
Justinian here decides in favour of the former. All agreed, however, that the age could in no case be taken as later than eighteen years.

1. Item finitum tutela, si adrogati sint adhuc impuberes vel deportati: item si in servitutem pupillus redigatur, ut ingratus a patrono, vel ab hostibus fuerit captus.

1. Tutelage is also determined, if the pupil, before attaining the age of puberty, is either arrogated, or suffers deportation, or is reduced to slavery as guilty of ingratitude on the demand of his patron, or if he becomes a captive.

D. xxvi. 1. 14.

The *pubertati proximus* was considered liable to criminal punishment (Bk. iv. Tit. 1. 18; C. ix. 47. 7), and he might be made a slave for ingratitude towards his patron. If he returned from captivity, the tutelage would recommence. (See Tit. 20. 2.)

2. Sed et si usque ad certam conditionem datus sit testamento, aequa evenit, ut desinat esse tutor existente condicione.

2. Again, if a person is appointed by testament to be tutor until a condition is accomplished, he ceases to be tutor on the accomplishment of the condition.

D. xxvi. 1. 14. 5.

3. Simili modo finitum tutela morte vel tutorum vel pupillorum.

3. Tutelage ends also by the death of the tutor, or of the pupil.

D. xxvii. 8. 4.

4. Sed et capitis diminutione tutoris, per quam libertas vel civitas ejus ammittatur, omnis tutela perit. Minima autem capitis diminutione tutoris, veluti si se in adoptionem dederit, legitima tantum tutela perit, cetera non perseverant. Sed pupillii et pupillae capitis diminutio, licet minima sit, omnes tutelas tollit.

4. When, again, a tutor, by a *capitis diminutio*, loses his liberty or his citizenship, his tutelage is wholly at an end. But if he undergoes only the least *capitis diminutio*, as when a tutor gives himself in adoption, then only legal tutelage is ended, and not the other kinds; but any *capitis diminutio* of the pupil, even the least, always puts an end to the tutelage.

D. iv. 5. 7; D. xxvi. 4. 2.

The *tutela legitima* belonged to the nearest of the *agnati* in right of his position in the family; but a tutor appointed by testament or by any special means had a charge committed to him personally, and his change of family could not alter this.

The *minima dominatio capitis* suffered by the pupil would make him under the power of the arrogator; and as he would be no longer *sui juris*, he could no longer have a tutor.

5. Preterea qui ad certum tempus testamento dantur tutores, finito eo, deponent tutelam.

5. A tutor, again, who is appointed by testament to hold office during a certain time, lays down his office when the time is expired.


6. Desinunt autem esse tutores, qui vel removentur a tutela ob id, quod suspecti visi sunt, vel ex justa causa sese excusant et onus admi-

6. They also cease to be tutors who are removed from their office on suspicion, or who excuse themselves on good grounds from the burden of
At the end of the tutelage the pupil could bring an action to make the tutor account (actio tutelae directa); the tutor could bring one to procure indemnification for all losses he had sustained (actio tutelae contraria). (Bk. iii. Tit. 27. 2.) In each case the action could be brought by and against their respective heirs. In the same way there was an action for similar purposes against and in behalf of a curator (actio utilis, curationis causa directa vel contraria), which could be brought only when the curatorship ceased.

Trt. XXIII. DE CURATORIBUS.

Males arrived at the age of puberty, and females of a marriageable age, receive curators, until they have completed their twenty-fifth year; for, although they have attained the age of puberty, they are still of an age which makes them unfit to protect their own interests.

The law of the Twelve Tables provided for the appointment of curators in the case of madmen and prodigals, but did not make any provision for the protection of young persons who had attained the age of puberty. The first enactment on the subject, of which we have any knowledge, is the lex Platoria, or, as it is often written, Lectoria, passed before the time of Plautus (Pseud. act i. sc. 3: Lex me perdit quinavicensaria! metuunt credere annos), which, fixing the time of the perfecta aetas at twenty-five years, provided that any one overreaching a person under that age should be liable to a criminal prosecution and to infamy (Cic. de Nat. Deor. 3. 30; de Off. 3. 15); and, possibly, it permitted the appointment of curators in cases where a good reason for the appointment was given. The lex Platoria, however, applied only to cases of fraud. The praeator subsequently provided a remedy, which was a great protection to persons under twenty-five years who came before him, by directing, in all cases where they had been prejudiced, a restitutio in integrum; that is, that the applicant should be placed exactly in the position in which he would have been had not the dealings to his prejudice taken place. The minor had not to prove fraud. Finally, Marcus Aurelius ordered that curators should be given in all cases, without inquiry, on the application of the pubes. This seems the most probable and consistent account of the matter, which has been the subject of much dispute among commentators. The chief authority is Julius Capitolinus, in Vita M. Aurel. Anton. cap. 10, who says: De curatoribus vero, quum ante non nisi ex lege Lectoria vel propter
lasciviam vel propter dementiam darentur, ita statuit \[M. Antoninus\], ut omnes adulti curatorem accipierent non redditius causis.

1. Dantur antem curatores ab iiisdem magistratibus, a quibus et tutores. Sed curator testamento non datur, sed datus confirmatur decreto pretoris vel praesidis.

1. Curators are appointed by the same magistrates who appoint tutors. A curator cannot be appointed by testament, but if appointed he may be confirmed in his office by a decree of the praetor or the praeses.

2. Item inviti adolescentes curatores non accipiant preterquam in litem: curator enim et ad certam causam dari potest.

2. No adolescent is obliged to receive a curator against his will, unless in case of a law-suit, for a curator may be appointed for a particular special purpose.

A person who had attained the age of puberty was not obliged to have a curator; but, practically, he was almost sure, if he had much property, to apply for one, as it was part of his tutor's duty to urge him to do so (D. xxvi. 7. 5. 5), and he could not, at the age of fourteen, be fit to manage his own affairs. There were two other cases, besides that mentioned in the text, in which a curator was given against the will of the adolescent for whom he was appointed. When a debtor wished to pay a debt owed to the adolescent (D. iv. 4. 7. 2), or the tutor to settle his accounts with him (C. v. 31. 7), a curator was appointed to watch the interests of the adolescent, and thus to make the payment and settlement indisputably valid; for if the adolescent was left to himself, and suffered any damage, the praetor would order a restitutio in integrum. The curator, once appointed, held his office until the adolescent attained the age of twenty-five, and the minor could not alienate, and perhaps could not contract, without the sanction of his curator; but if an adolescent who had a curator was thought capable of managing his affairs, he might, by the special grant of the emperor, have a dispensation (venia aetatis) from waiting for the full age; but it was requisite, to obtain this, that a man should be twenty, and a woman eighteen years of age. (D. iv. 4. 3; C. ii. 45.)

8. Furiosi quoque et prodigi, licet majores viginti quinque annis sint, tamen in curatione sunt adiutorum ex lege duodecim tabularum. Sed solent Rome prefectus urbis vel

8. Madmen and prodigals, although past the age of twenty-five, are yet placed under the curatorship of their agnati by the law of the Twelve Tables. But, ordinarily, curators are appointed
prætor et in provinciis præsides ex inquisitione eis dare curatores. for them, at Rome by the prefect of the city or the prætor, in the provinces by the præsides, after inquiry into the circumstances has been made.

D. xxvii. 10. 1.

The words of the law of the Twelve Tables with regard to the furiosus were: Si furiosus est, agnatorum gentiliumque in eo pecuniaque ejus potestas esto. (Cic. de Invent. ii. 50.) The prodigus was first interdicted by the magistrate; and this, Ulpian says, was recognised by custom even before the date of the Twelve Tables: Lege XII. Tabularum prodigo interdicitur honorum suorum administração; quod moribus ab initio interdictum est. (D. xxvii. 10. 1. pr.) He was then placed under the curatorship of the agnate. Hence Horace says:

Interdicto huic omne adimat jus
Prætor, et ad sanos abeat tutela propinquos.

Sat. ii. 3. 218.

While, however, the prodigus was interdicted, the furiosus was not, and what he did was valid if he was not mad at the particular time when he did it. The form of the interdiction of the prodigus is given by Paul: Quando tibi bona paterna avitaque nequitia tua disperdis, liberosque tuos ad egestatem perducis, ob eam rem tibi aere commercioque interdico. (Sent. iii. 4. a. 7.) The agnates were, however, the curatores legitimi of the prodigus, under the law of the Twelve Tables, only when the goods he was wasting had come to him as the successor ab intestato of an ascendant. (Ulp. Reg. xii. 3.) But the prætor extended the interdiction of prodigi to all cases where there was a prodigal waste of goods, just as he extended the curatorship of furiosi to other forms of madness or incapacity (see next paragraph); and the magistrate appointed the curator in all cases which came under either head of this extension of the law by the prætor. The text further tells us that, although the legal curatorship of the agnate was still recognised in the cases of furiosi and prodigi wasting goods under an intestate succession to an ascendant, yet in practice the magistrate generally appointed; and even before this practice grew up, the magistrate, if he thought an agnate having the legal right to be curator unfit, would give the practical administration of the property to some one else. (D. xxvii. 10. 13.)

4. Sed et mente captis et surdis et mutis et qui morbo perpetuo laborant, quia rebus suis superesse non possunt, curatores dandi sunt.

4. Persons who are of unsound mind, or who are deaf, dumb, or subject to any incurable malady, since they are unable to manage their own affairs, must be placed under curators.

D. xxvii. 10. 2.

The word furiosi, that is, the mad as opposed to the imbecile, in the law of the Twelve Tables, was taken strictly, and there was no legal curator for any one suffering under any other form of mental malady.

The reason why the blind are not included is given by Paul:
Caeco curatore non potest, quia ipse sibi procuratorem instituere potest. (Sent. iv. 12. 9.)

5. Interdum autem et pupilli curatores accipiunt, ut puta si legitimus tutor non sit idoneus, quia habenti tutorem tutor dari non potest. Item si testamento datus tutor vel a pretore vel a preside idoneus non sit ad administrationem nec tamen fraudulentem negotia administrat, solet ei curator adjuncti. Item in locum tutorum, qui non in perpetuum, sed ad tempus a tutela excusantur, solent curatores dari.

5. Sometimes even pupils receive curators; as, for instance, when the legal tutor is unfit for the office; for a person who already has a tutor cannot have another given him; again, if a tutor appointed by testament, or by the pretor or praeses, is unfit to administer the affairs of his pupil, although there is nothing fraudulent in the way he administers them, it is usual to appoint a curator to act conjointly with him. It is also usual to assign curators in the place of tutors excused for a time only, and not permanently.

D. xxvi. 1. 18; D. xxvi. 2. 27; D. xxvi. 5. 15 and 16.

6. Quodsi tutor adversa valeatudine vel alia necessitate impeditur, quo minus negotia pupilli administrare possit, et pupillus vel abeit vel infans sit, quem velit, actorem periculo ipsius pretor vel qui provincie praeerit, decreto constituet.

6. If a tutor is prevented by illness or otherwise from administering the affairs of his pupil, and his pupil is absent, or an infant, then the pretor or praeses of the province will, at the tutor's risk, appoint by decree some one to be the agent of the pupil on the nomination of the tutor.

D. xxvi. 7. 24.

This agent is to be distinguished from a curator. He is merely a person who acts under the tutor, and for whom the tutor is responsible. If the pupil was present, and past the age of infancy, he, with the authorisation of the tutor, could appoint the agent, and there would be no necessity for the confirmation of a magistrate; hence the words et pupillus vel absit vel infans sit.

The uncertain duration of mental incapacity made the person entrusted with the care of one suffering under it be termed a curator, not a tutor; otherwise the sufferer might be as incapable of going through legal forms as an infant. An adolescent and a prolixus could go through all the forms of law, and therefore there was no necessity, in their case, for the curator having an auctoritas. If they went through the prescribed forms, they were legally bound, whether the curator consented or not; but unless the curator consented, the pretor would always interpose and relieve them from any consequences that might be prejudicial; and so they were not really bound, unless with the curator's consent.

Trt. XXIV. DE SATISDATIONE TUTORUM VEL CURATORUM.

Ne tamen pupillorum pupillarumve et eorum, qui quaeque in curatione sunt, negotia a tutoribus curatibusve consumantur vel deminiuantur, curat pretor, ut et tutores et curatores eo nomine satiasedent.

To prevent the property of pupils and persons placed under curators being wasted or destroyed by tutors or curators, the pretor sees that tutors and curators give security against such conduct. But this is not always
Sed hoc non est perpetuum: nam tutores testamento dati satisfacere non cognatur, quia fides eorum et diligentia ab ipso testatore probata est; item exquisitione tutores vel curatores dati satisfactione non onerantur, quia idonei electi sunt.

necessary; a testamentary tutor is not compelled to give security, as his fidelity and diligence have been recognised by the testator. And tutors and curators appointed upon inquiry are not obliged to give security, because they have been chosen as being proper persons.

GAL. i. 199, 200.

A patron and a father, when tutors, were ordinarily, though not as a matter of right, exempt from the necessity of giving caution. (D. xxvi. 4. 5. 1.) This necessity, therefore, only fell on tutores or curatores legitimi, and those appointed by inferior magistrates; those appointed by higher magistrates being only appointed after inquiry, which rendered the giving security needless. (See Tit. 20. 4.) The persons who became sureties (for the security demanded was always the guarantee of third persons) went through the form of fidejussio. (See Bk. iii. Tit. 20.) The pupil or the person requiring a curator asked the surety whether he guaranteed the safety of the property, Fide jubesne rem salvam fore? And he answered, Fide jubeo. If the pupil or minor could not go through the ceremony, his slave, or, if he had no slave, or his means did not suffice to buy one, a public slave, went through the form for him; and, when the rule that one free person could not represent another was relaxed, a free person might go through the form for him. (D. xlvi. 6. 2.)

Besides the guarantee taken for the fidelity of the tutor and curator, and the general liability of the whole of the tutor’s or curator’s property to make good any losses incurred through their neglect, a constitution of Constantine having subjected their property to a tacit hypothec in favour of the pupil or minor (C. v. 37. 20), those entrusted to their care had a further protection in the necessity under which the tutor and curator were to make an inventory of all the property of the pupil or the person requiring a curator (D. xxvi. 7. 3. 2), and after the publication of the 78th Novel, by the tutor or curator being obliged to pledge himself by oath that he would act as a ‘bonus paterfamilias’ would act. (Nov. 78, cap. 7.)

1. Sed et si ex testamento vel inquisitione duo pluresve dati fuerint, potest unus offerre satis de indemnitate pupillii vel adolescentis et contutori vel concuratoris praefertur, ut solus administrat, vel ut contutor satis offerens preponatur ei et ipse solus administrat. Itaque per se non potest petere satis a contutore suo, sed offerre debet, ut electionem det contutori suo, utrum velit satis accipere an satis dare. Quodsi nemo eorum satis offerat, si quidem adscriptum fuerit a testatore, quis gerat, ille

1. If two or more are appointed by testament, or by a magistrate, after inquiry, as tutors or curators, any of them, by offering security for the indemnification of the pupil or adolescent, may be preferred to his co-tutor or co-curator, so that he may either alone administer the property, or may oblige his co-tutor or co-curator to give security, if he wishes to obtain the preference and become the sole administrator. Thus he cannot directly demand security from his co- tutor or co-curator; he must offer it himself, and so give his co-tutor or
gerere debet: quodsi non fuerit adscriptum, quem major pars elegerit, ipse gerere debet, ut edicto pretoris cavetur. Sin autem ipsi tutores dissenserint circa eligendum eum vel eos, qui gerere debent, pretor partes suas interponere debet. Idem et in pluribus ex inquisitione datis probandum est, id est ut major pars eligere possit, per quem administration fieret.

co-curator the choice to receive or to give security. If no tutor offers security, then the one, if any, appointed by the testator to manage the property shall manage it; but if no tutor is so appointed, then the administration will fall to him whom a majority of the tutors shall choose, as is provided by the pretorian edict. If the tutors disagree in their choice, the pretor must interpose. And in the same way, when several are appointed after inquiry by a magistrate, the majority of those appointed is to determine which of them shall administer.

D. xxvi. 2. 17. 19. 1; D. xxvi. 7. 8. 1. 7, 8, 9.

As it was generally most convenient that one tutor alone should act, although all continued responsible (D. xxvi. 7. 3. 2. 6), it was necessary that the tutor who did act, tutor onerarius (opposed to tutores honorarii, those who did not act), should give security to the co-tutors. If he did not, he could be compelled, by the means described in the text, either to do so or to allow some other co-tutor to take his place. Sometimes the tutelage was apportioned by the magistrate among the different tutors, and each had a separate duty to perform, for which he alone was responsible. (D. xxvi. 7. 3. 9.)

2. Sciemendum autem est, non solum tutores vel curatorum pupillis et adultis ceterisque personis ex administratione teneri, sed etiam in eos, qui satisfactionem accipient, subsidiariam actionem esse, quae ultimum eis praesidium possit affere. Subsidiaria autem actio datur in eos, qui vel omnino a tutoribus vel curatoribus satisfacere non curaverint, aut non idoneae passi essent caveri. Quae quidem tam ex prudentium responsibus quam ex constitutionibus imperialibus et in heredes eorum extenditur.

2. It should be observed that it is not only tutors and curators who are responsible for their administration to pupils, minors, and the other persons we have mentioned, but, as a last safeguard, a subsidiary action may be brought against the magistrate who has accepted the security as sufficient. The subsidiary action may be brought against a magistrate who has wholly omitted to take security, or has taken insufficient security; and the liability to this action, according to the responses of the jurisprudents, as well as the imperial constitutions, extends also to the heirs of the magistrate.

D. xxvii. 8. 1. 11, 12. 4. 6.

The heirs of the magistrate were only liable where the negligence of the magistrate had been very great. (D. xxvii. 8. 6.)

Adultus, in its strict legal sense, meant one who has reached the age of puberty but not the perfecta aetas.

3. Quibus constitutionibus et illud exprimitur, ut, nisi caveant tutores vel curatores, pignoribus captis coercerentur.

3. The same constitutions also expressly enact, that tutors and curators who do not give security, may be compelled to do so by seizure of their goods as pledges.

C. v. 85. 2.

The magistrate would order a portion of their property to be seized, and retained until they gave security (Theophil. Paraphr.)
4. Neque autem praefectus urbis neque praetor neque praeses provincie neque quis alius, cui tutores dandi jus est, hac actione tenebatur: sed hi tantummodo, qui satisfationem exigere solent.

4. Neither the prefect of the city, nor the praetor, nor the praeses of a province, nor any one else to whom the appointment of tutors belongs, will be liable to this action, but only those whose ordinary duty it is to exact security.

D. xxvii. 8. 1. 1.

The words of the text, which are borrowed from Ulpian, do not quite accurately describe the law under Justinian, as the municipal magistrates, whose business it was to take security, could in some cases appoint tutors (Tit. 20. 5), and they were always liable to this action.

Tit. XXV. DE EXCUSATIONIBUS TUTORUM VEL CURATORUM.


Tutors and curators are excused on different grounds; most frequently on account of the number of their children, whether in their power or emancipated. For any one who at Rome has three children living, in Italy four, or in the provinces five, may be excused from being tutor or curator as from other offices, for the office of both a tutor and a curator is considered a public one. Adopted children will not avail the adopter; though given in adoption, they are reckoned in favour of their natural father. Grandchildren by a son may be reckoned in the number, so as to take the place of their father, but not grandchildren by a daughter. It is only those children who are living that can be reckoned to excuse any one from being tutor or curator, and not those who are dead. It has been questioned, however, 'whether those who have perished in war may not be reckoned; and it has been decided, that those who die in battle may, but they only, for glory renders those immortal who have fallen for their country.

D. xxvii. 1. 2. 2, &c.; D. xxvii. 1. 18.

It was considered a matter of public policy that tutors or curators should act when their assistance was necessary, and therefore those who were appointed were obliged to accept the office, unless they could establish any valid reason for being excused. This Title gives a number of grounds on which a person appointed tutor or curator was excused from holding the office. These grounds of excuse may be classed with tolerable accuracy under four heads. Tutors and curators were excused as—1. Having
rendered a service to the public, or being engaged in the discharge of some public duty (pr. and paragraphs 1, 2, 3, 14, 15); 2. Being in a position adverse to the pupil or adult (paragraphs 4, 9, 11, 12, 19); 3. Being incompetent to sustain the burden of the office (paragraphs 6, 7, 8, 13); 4. Filling or having filled similar offices (5, 18).

It was the *lex Papia Poppaea* that first introduced exemption on the ground of the number of the children.

Grandchildren by the daughter were not reckoned, as, otherwise, they would have been reckoned by two different persons, their maternal grandfather and their father or paternal grandfather.

1. Item divus Marcus in semestribus rescrispit, eum, qui res fisici administrat, a tutela vel cura, quamdiu administrat, excusari posse.

1. The Emperor Marcus declared by rescript in his *Semestria*, that a person engaged in administering the property of the *fiscus* is excused from being tutor or curator while his administration lasts.

D. xxvii. 1. 41.

Augustus and Tiberius held a council of senators every six months for the discussion of affairs (*Suet. Aug. 35*); and we gather from the text that the practice was also adopted by Marcus Aurelius, who published the records of the councils under the name of *Semestria*.

2. Item qui rei publicae causa absunt, a tutela et cura excusantur. Sed et si fuerunt tutores vel curatores, deinde rei publicae causa abesse coeperunt, a tutela et cura excusantur, quatenus rei publicae causa absunt, et interea curator loco eorum datur. Qui si reversi fuerint, recipiunt onus tutelae, nec anni habent vacationem, ut Papinius responsorum libro quinto scripsit; nam hoc spatium habent ad novas tutelas vocati.

2. Persons absent on the service of the state are excused from being tutors or curators; and if those who have already been appointed either as tutors or curators should afterwards be absent on the public service, they are excused during their absence on such service, and meanwhile a curator is appointed in their place. On their return, they must again take upon them the burden of tutelage; and, according to Papinius’s opinion, expressed in the fifth book of his answers, are not entitled to the privilege of a year’s dispensation, which is only allowed them when they are called to a new tutelage.

D. xxvii. 1. 10. pr. and 2.

The meaning of the text is that, if they had commenced holding the office of tutor before their absence, they were obliged to resume it immediately on their return. If, when they returned, a new tutelage was imposed on them, they might delay for a year to enter on its duties.

3. Et qui potestatem aliquam habent, excusare se possunt, ut divus Marcus rescrispit, sed sequam tutelam deserere non possunt.

8. By a rescript of the Emperor Marcus, all persons invested with any public authority may excuse themselves; but they cannot abandon the office of tutor, which they have already undertaken.

D. xxvii. 1. 17. 5.
Qui potestatem aliquam habent: i.e. all magistrates, including municipal magistrates. Potestas is here probably contrasted with dignitas, which was not a ground of excuse. (D. xxvii. 6. 15. 2.)

4. Item propter litem, quam cum pupillo vel adulto tutor vel curator habet, excusare se nemo potest: nisi forte de omnibus bonis vel hereditate controversia sit.

4. No tutor or curator can excuse himself by alleging a law-suit with the pupil or minor; unless the suit embraces the whole of his property, or is for an inheritance.

D. xxvii. 1. 21. pr.

Justinian afterwards, in the 72nd Novel (c. 1), decided that no creditor or debtor of the pupil or minor should be allowed to become tutor or curator.

5. Item tria onera tutelae non affectate vel curae prestant vacionem, quamdiu administratur: ut tamen plurimum pupilloorum tutela vel cura eorundem bonorum, veluti fratrum, pro una computetur.

5. Three tutelages or curatorships, if unsolicited, serve as an excuse from filling any other such office while the holder continues to discharge the duties. But the tutelage of several pupils, or the curatorship of property belonging at once to several persons, as where the pupils or minors are brothers, is reckoned as one only.

D. xxvii. 1. 8. 15. 15.

6. Sed et propter paupertatem excusationem tribui tam divi fratres quam per se divus Marcus rescrpsit, si quis imperem se oneri injuncto possit docere.

6. Poverty also is a sufficient excuse, when it can be proved to be such as to render a man incapable of the burden imposed upon him, according to the rescripts given both by the imperial brothers together, and by the Emperor Marcus singly.

D. xxvii. 1. 7.

Marcus Aurelius Antoninus and Lucius Verus were the divi fratres.

7. Item propter adversam vale-tudinem, propter quam nec suis quidem negotiis interesse potest, excusatio locum habet.

7. Ill-health, also, if it prevents a man from attending to his own affairs, affords a ground of excuse.

8. Similiter eum, qui litteras nescire, excusandum esse, divus Pius rescrpsit: quamvis et imperiti litterarum possunt ad administrationem negotiorum sufficere.

8. So, too, a person who could not read was to be excused, according to the rescript of the Emperor Antoninus Pius; yet persons who cannot read may have business capabilities.

D. xxvii. 1. 6. 19.

The magistrate would have to decide whether the property was so small, and the position of the pupil or minor so humble, that this ignorance would be no bar.

9. Item si propter inimicitiam aliquem testamento tuorem pater dederit, hoc ipsum praestat si excusationem: sicut per contrarium non excusantur, qui se tutelam patri

9. If it is through enmity that the father appoints by testament any one as tutor, this circumstance itself will afford a sufficient excuse; just as, on the other hand, they who have pro-
pupillorum administratures pro-
miserunt.

10. Non esse autem admitten-
dam excusationem eujus, qui hoc solo utitur, quod ignotus patri pupil-
lorum sit, divi fratres rescripserunt.

11. Inimicitiae, quas quis cum patre pupillorum vel adultorum exercuit, si capitales fuerunt nec reconciliatio intervenit, a tutela solo-
lent excitare.

12. Item si quis status contro-
versiam a pupillorum patre passus est, excusatur a tutela.

That is, if the deceased has attempted to show that the person appointed tutor was a slave.

13. Item major septuaginta annis
a tutela vel cura se potest excitare. Minores autem viginti et quinque annis olim quidem excusabantur: a
nostra autem constituitione prohiben-

tur ad tutelam vel curam adspirare, adeo ut nec excusatione opus fiat. Qua
constituzione cavitetur, ut nec
pupillus ad legitimam tutelam voe-
tur nec adultus: cum erat incivile, eos, qui alieno auxilio in rebus suis
administrandis egere noscentur et
sub aliis reguntur, aliorum tutelam
vel curam subire.

14. Idem et in milite observan-
dum est, ut nec volens ad tutelae
munus admittatur.

15. Item Rome grammatici, rhe-
tores et medici et qui in patria sua
id exercent et intra numerum sunt,
a tutela vel cura habent vacationem.

10. That the tutor was unknown to the father of a pupil is not of itself to be admitted as a sufficient excuse, as is decided by a rescript of the imperial brothers.

11. Enmity against the father of the pupil or minor, if it is of a deadly character, and no reconciliation has taken place, is usually considered as an excuse from being tutor.

12. So, too, he whose status has been called in question by the father of the pupil, is excused from the office of tutor.

13. Persons above seventy years of age may be excused from being tutors or curators. Persons under the age of twenty-five were formerly excused, but, by our constitution, they are now pro-
hibited from aspiring to these offices, so that excuses are become unneces-
sary. This constitution provides that neither pupils nor minors shall be called to a legal tutelage. For it is absurd that persons who are themselves gov-
erned, and are known to need assist-
ance in the administration of their own
affairs, should become the tutors or curators of others.

14. The same rule holds good also as to military persons. They cannot, even though they wish it, be admitted to the office of tutor or curator.

15. Grammarians, rhetoricians, and physicians at Rome, and those also who exercise such professions in their own country, and are within the num-
ber authorised, are exempted from being tutors or curators.

It was Antoninus Pius who fixed the number which each city was to have. (D. xxvii. 1. 6. 2.) The largest provincial city was not allowed to have more than ten physicians, five grammarians, and five rhetoricians.
Philosophers were also excepted (D. xxvii. 1. 6. 5); jurisprudents who were members of the council of the emperor (xxvii. 1. 30); and all clerici (C. i. 3. 52).

16. Qui autem se vult excusare, si plures habeat excusationes et de quibusdam non probaverit, alius uti intra tempora non prohibetur. Qui excusare se volunt, non appellant: sed intra dies quinquaginta continuos, ex quo cogoverunt, excusare se debent (cujuscumque generis sunt, id est qualitercumque dati fuerint tutores), si intra centesimum lapidem sunt ab eo loco, ubi tutores dati sunt: si vero ultra centesimum habitant, dixerit ratione facta viginti millium diurnorum et amplius triginta dies. Quod tamen, ut Scevola dicebat, sic debet computari, ne minus sint quam quinquaginta dies.

16. If a person wishes to excuse himself, and has several excuses, even supposing some are not admitted, there is nothing to prevent him employing others, provided he does so within the prescribed time. Those who wish to excuse themselves are not to appeal, but whatever kind of tutors they may be, that is, however they may have been appointed, must offer their excuses within the fifty days next after they have known of their appointment, if they are within a hundred miles of the place where they were appointed. If they are at a greater distance, they are allowed a day for every twenty miles, and thirty days besides; but in calculating the time, as Scevola pointed out, a minimum of fifty days must always be allowed.

D. xxvii. 1. 21. 18.

If he lived anywhere within four hundred miles, he would, reckoning a day for each twenty miles, and thirty days besides, fall short of fifty days, and therefore the rule was laid down as stated in the concluding sentence of the text. If he did not excuse himself within the appointed time, he could not afterwards escape the charge.

Dies continuai are opposed to dies utiles, the days on which legal business could be done; dies continuai meaning the successive days, of whatever kind.

The ordinary rule was that persons called to a public office had, in order not to serve, to appeal to a higher magistrate than the one appointing them.

17. Datus autem tutor ad universum patrimonium datus esse creditur.

17. The tutor who is appointed is considered as appointed for the whole patrimony.

D. xxvii. 1. 21. 2.

The tutor was appointed for the whole patrimony; but if it was situated in very different parts, he might apply to have other tutors appointed to act in the different localities. (D. xxvii. 1. 21. 2.)

18. Qui tutelam alicujus gescit, invitus curator ejusdem fieri non compellitur, in tantum ut, licet pater, qui testamento tutorem dederit, adexit, se eundem curatorem dare, tamen invitum sum

18. A person who has discharged the office of tutor is not compelled against his will to become the curator of the same person; so much so, that although the father, after appointing a tutor by testament, adds that he also
curam suscipere non cogendum, divi Severus et Antoninus rescripserunt.
appoints the same person to be curator, the person so appointed, if unwilling, cannot be compelled to take the office of curator; so it has been decided by the rescript of the Emperors Severus and Antoninus.

It is Antoninus Caracalla who is here meant.

19. Iudem rescripserunt, maritum uxorì sue curatorem datum excussare se posse, licet se immisceat.
19. The same emperors have decided by rescript, that a husband appointed as curator to his wife may excuse himself from the office, although he intermeddles with her affairs.

D. xxvii. 1. 1. 5.

The husband not only might excuse himself from the curatorship of his wife, but in the time of Justinian he could not fill the office (C. v. 34. 2); neither could the wife's curator marry her (C. v. 6).

It was the general rule that a tutor or curator who intermeddled with the affairs of the pupil or adult renounced the right of offering excuses.

20. Si quis autem falsis allegationibus excussionem tutele meruit, non est liberatus onere tutele.
20. If any one has succeeded by false allegations in getting himself excused from the office of tutor, he is not discharged from the burden of the office.

D. xxiii. 2. 60. pr.

TIT. XXVI. DE SUSPECTIS TUTORIBUS ET CURATORIBUS.

Sciendum est suspecti crimen e lege duodecim tabularum descendere.
It is to be observed that the right of accusing a suspected tutor or curator is derived from the law of the Twelve Tables.

D. xxvi. 10. 1. 2.

1. Datum est autem jus removendi suspectos tutores Romae pretori et in provinciis presidibus carum et legato proconsulis.
1. The right of removing suspected tutors belongs at Rome to the praetor; in the provinces to the praesides, or to the legate of the proconsul.

D. xxvi. 10. 1. 3, 4.

2. We have shown what magistrates may take cognisance of suspected persons: let us now inquire, what persons may become suspected. All tutors may become so, whether testamentary or others; thus even a legal tutor may be accused. But what is the case with a patron? He, too, may be accused; but we must remember, that his reputation must be spared, although he be removed as suspected.

D. xxvi. 10. 1. 5.
The descendants could not bring an action to which infamy attached against an ascendant. They and the libertus could only call for the interference of the law to protect their property, not to punish the tutor with infamy. (D. xxvii. 15.5.) And in the case of all legal tutors it was customary, except in very bad cases, not to remove them, but to join a curator with them. (D. xxvi. 10. 9.) By famæ purændum is meant that the grounds of the decision for their removal were not to be expressed.

3. Consequent est, ut videamus, qui possint suspectos postulare. Et scedendum est, quasi publicam esse hanc actionem, hoc est omnibus patere. Quin immo et mulieres admit-tuntur ex rescripto divorum Severi et Antonini, sed has solae, que pie-tatis necessitidine ductae ad hoc procedunt, ut puta mater: nutrix quoque et avia possunt, potest et soror: sed et si qua mulier fuerit, cuius pretor propensam in Pietatem mentem intellectur non sexus ver-cundiam egredientem, sed pietate productam non contireni injuriam pupillorum, admissit eam ad accu-sationem.

8. Let us now inquire, by whom suspected persons may be accused. Now an accusation of this sort is in a measure public, that is, it is open to all. Nay, by a rescript of the Emperors Severus and Antoninus, even women are admitted to be accusers; but only those who are irresistibly induced to do so through feelings of affection; as a mother, a nurse, or a grandmother, or a sister, who may all become accusers. But the pretor will admit any woman to make the accusation, in whom he recognises a character that, bent on the fulfilment of duty and not overstepping the modesty of the sex, but animated by dutiful affection, cannot endure that the pupil should suffer harm.

D. xxvi. 10. 1, 6, 7.

The action is called quasi publica, because on the one hand it had the private object of securing the pupil's interests, and on the other had, like public actions, criminal consequences, and might be brought by a person not interested in the private result.

Women, as a general rule, could not institute public actions. (D. xlviii. 2. 1.)


5. Suspectus est autem, et qui non ex fide tutelam gerit, licet solvendo est, ut Julianus quoque scripsit. Sed et antequam incipiat gerere tutelam tutor, posse eum quasi sus-pектum removere, idem Julianus scripsit et secundum eum constitutum est.

4. No person below the age of pu-berty can bring an accusation against his tutor as suspected; but those who have attained that age may, under the advice of their near relations, accuse their curators. Such is the decision given in a rescript of the Emperors Severus and Antoninus.

D. xxvi. 10. 7. pr.

5. A tutor is suspected who does not faithfully execute his trust, although perfectly solvent, as Julian writes, who also thinks that even before he enters on his office, a tutor may be removed as suspected; and a constitution has been made in accord-ance with this opinion.

D. xxvi. 10. 8.

Ulpian says that a tutor could not be suspectus before he entered
on his office, and that if there was any reason to think him an improper person beforehand, the magistrate would forbid him to assume the administration. (D. xxvi. 10. 3. 5 and 12.) Justinian decides in opposition to this.

6. Suspectus autem remotus, si quidem ob dolum, famosus est: si ob culpam, non sequitur.

C. v. 40. 9; D. xxvi. 10. 8. 18.

For the meaning of the word infamia see Introd. sec. 48.

7. Si quis autem suspectus postulatur, quoad cognitio finitur, interdicitur ei administratio, ut Papiniano visum est.


8. Sed si suspecti cognitio suspensa fuerit posteaque tutor vel curator decesserit, extinguitur cognitio suspecti.

The action to force the tutor or curator to give in his accounts would be brought against the heirs of the tutor or curator. But the suspecti cognitio could not, as its object was to remove the tutor or curator, not to recover money from him. The crimen suspecti could only be brought against a person actually tutor or curator, and was at an end if the office came to an end, not only by death, but in any way. (D. xxvi. 10. 11.)

9. Si quis tutor copiam sui non faciatur, ut alimenta pupillo decernatur, cavitur epistula divorum Severi et Antonini, ut in possessionem bonorum ejus pellitullus mittatur; et quae mora deteriora futura sunt, dato curatore distrahia jubeatur. Ergo ut suspicet et meriti poterit, qui non prestat alimenta.

D. xxvi. 10. 7. 2 and 10. 8. 14.

The praetor generally determined the amount to be annually expended on the maintenance and education of the pupil (the word alimenta must be taken very widely), when it was not determined by the testament of the father. The tutor had therefore to attend before the magistrate to state what amount the fortune of the pupil would bear; and if he wilfully neglected to do this, and absented himself, he was treated like a defaulting debtor absenting himself, and the pupil was put in possession of his goods.
10. Sed si quis presens negat, propter inopiam alimenta posse discerni, si hoc per mendacium dicat, remittendum eum esse ad prefectum urbis puniendum placuit, sicut ille remittitur, qui data pecunia ministerium tutelae redemit.

10. But if the tutor appears, and alleges that maintenance cannot be decreed in consequence of the smallness of the pupil’s estate; then, if he says this falsely, he shall be handed over to the prefect of the city, to be punished, just as a person is handed over who has purchased a tutelage by bribery.

D. xxvi. 10. 8. 15.

The praetor had no criminal jurisdiction, and therefore persons were sent for punishment to the prefectus urbis. (D. i. 12. 1.) In the provinces the præses could punish, as well as remove, the tutor.

11. Libertus quoque, si fraudulenter gessisse tutelam filiorum vel nepotum patroni probetur, ad prefectum urbis remittitur puniendus.

11. Also a freedman, who is proved to have been guilty of fraud, when acting as tutor to the son or grandson of his patron, is handed over to the prefect of the city to be punished.

D. xxvi. 10. 2.

12. Novissime sciendum est, eos, qui fraudulenter tutelam vel curam administrant, etiam si satis offerant, removendos a tutela, quia satisdatio propositum tutoris malevolum non mutat, sed diutius grassandi in re familiari facultatem praestat.

12. Lastly, it must be known that they who are guilty of fraud in their administration, must be removed, although they offer sufficient security. For giving security makes no change in the dishonest intentions of the tutor, but only procures him a longer opportunity of injuring the estate.

D. xxvi. 10. 5. 6.

A person is considered thus open to suspicion whose general character and conduct warrant the suspicion. But a zealous and honest man, as we learn in the next paragraph, is not to be removed on suspicion because he is poor.

13. Suspectum enim eum putamus, qui moribus talis est, ut suspectus sit: enim vero tutor vel curator, quamvis pauper est, fidelis tamen et diligens, removendus non est quasi suspectus.

13. We also deem every man suspected, whose conduct is such that we cannot but suspect him. But a tutor or curator who is faithful and diligent, is not to be removed, as a suspected person, merely because he is poor.

D. xxvi. 10. 8.
LIBER SECUNDUS.

TIT. I. DE RERUM DIVISIONE.

Having treated in the first book of the law relating to persons, the Institutes now proceed to treat of the law relating to things—that is, they pass from persons who exercise rights to things over which rights are exercised. Rights may be divided into those which we have in or over things as against all the world, and those which we have against particular persons. (See Introd. sec. 61.) The second book of the Institutes, and the first portion of the third, treat of the former class, and of the mode in which they are acquired.

The most proper mode of treating the law of things would be, perhaps, first to inquire of what divisions things themselves are susceptible; next, to divide rights over things (jura in rem) according to the extent of the right; and lastly, to treat of the mode in which those rights are acquired. To a certain extent this mode of dividing the subject is adopted in the Institutes, but not very distinctly or expressly. Things themselves may be divided, generally, by making the basis of division either the relation in which they stand to persons, or something inherent in the nature of the things. Things divided in the first way may be divided according as they are the subject of the rights of all men or no men on the one hand, and of particular men on the other, the latter class receiving modifications according to the character in which particular men hold them. This division of things is treated of in the first sections of this Title. The most prominent distinction inherent in things is that of things corporeal and things incorporeal, and this is treated of in the second Title. There are other divisions of things (see Introd. secs. 52–60) which are referred to in the Institutes, but not expressly noticed.

A person may have the whole sum of all rights over a thing, when in Roman law he was said to have the dominium. These rights of the dominus were summed up in the jus utendi, that is, making use of the thing; the jus fruendi, that is, reaping the fruits and profits; and the jus abutendi, that is, consuming the thing, if capable of consumption. Or any one of the jura in rem
may be separated from the rest and enjoyed by different persons. 
(See Introd. sec. 64.) These fragments of the *dominium*, called
servitudes, are treated of in the third and three following Titles.
Or a person may have a right over a thing in the ownership of
another, limited by the extent to which he has a claim against the
owner, as a creditor has over the thing given him in pledge as a
security for the debt. This right, generally termed in Roman
law the *jus pignoris*, is not spoken of expressly in the Institutes,
but a brief sketch of the law on the subject will be found in the
conclusion of the notes to the fifth Title.

The Institutes then recur to the modes by which the owner-
ship in things is acquired, and the subject is divided according as
ownership is acquired in a particular thing, or in a *universitas
rerum*, that is, the aggregate of rights possessed by a particular
person. Two of the principal modes of acquiring particular things,
occupation, that is, being the first person to appropriate an unapprop-
riated thing, and tradition, that is, the owner handing over the
thing to another person with the intention of transferring the owner-
ship, and the transferee receiving the thing with the intention of
becoming owner of it, have been treated of in the first Title, as
also have certain subordinate modes, *e.g.* accession, when an
owner acquires by the natural increment of the thing owned, and
specification, when a new thing is created, and belongs to the
creator, even though the materials belonged to another person.
All these are said to be modes of acquiring things *jure naturali*.
Two modes of acquiring particular things *jure civili* are then
noticed. (1.) The sixth Title treat of *usuapcion*, the process by
which the law attached the legal ownership after a certain length
of possession. (2.) The seventh Title treats of certain cases in
which gift might be looked on as a different mode of conferring
ownership from tradition. This ends the discussion of the modes
of acquiring the ownership in particular things. The eighth and
ninth Titles speak of certain restrictions on alienation, and of one
person acquiring ownership through other persons. In the tenth
Title the Institutes proceed to discuss the modes of acquiring a
*universitas rerum*. The two chief modes are, the gift of an *here-
ditas* by testament, and the succession to an *hereditas* in case of
intestacy. The subject of testaments occupies the remainder of
the second book, and that of succession to an intestate occupies
the first nine Titles of the third book. Some minor modes of
acquiring a *universitas rerum*, of which arrogation is the most
important, are then noticed; and with the twelfth Title of the
third book the treatment of *jura in rem*, and of the modes of
acquiring ownership in them, is brought to a conclusion. This
treatment of the modes of acquisition is subject to the incon-
venience noticed by Gaius (ii. 191), that legacies, which are a
mode of acquiring specific things, are treated of as coming under
the acquisition of a *universitas rerum* by testament.

Previously to the legislation of Justinian, there had been two
other modes of acquisition *jure civili*, applicable both in the case of particular things and in that of a *universitas rerum*, which are treated of by Gaius at considerable length. (Gal ii. 18–37. See also Ulpian, Reg. 19. 2.) These were mancipation, the process by which *res mancipi* were conveyed from one Roman citizen to another (see Introd. sec. 59), and *in jure cessio*. The *cessio in jure* was a fictitious suit, in which the person who was to acquire the thing claimed (*vindicabat*) the thing as his own, the person who was to transfer it acknowledged the justice of the claim, and the magistrate pronounced it to be the property (*addicabat*) of the claimant. Mancipation and *cessiones in jure* had become obsolete before the time of Justinian. Ulpian (Reg. 19. 2) also notices two others, *adjudicationes*, i.e. by property held in common being judicially marked out, so that the portions were owned in severalty (Bk. iv. Tit. 6. 26; and Tit. 17. 4, 5, 6, 7), and *lege*, by some special statute, as when legacies devolved under the *lex Papia Poppaea*. (Bk. ii. Tit. 20. 8, note.)

The explanation of the term possession, which occurs frequently in this Title, may be conveniently deferred until we reach the sixth Title.

Superiore libro de jure personasum exponimus: modo videamus de rebus, quae vel in nostro patrimonio vel extra nostrum patrimonium habentur. Quaedam enim naturali jure communia sunt omnium, quaedam publica, quaedam universitatis, quaedam nullius, plerique singulorum, quae variis ex causis cuique aquisceptur, sicut ex subjectis apparebit.

In the preceding book we have treated of the law of persons. Let us now speak of things, which either are in our patrimony, or not in our patrimony. For some things by the law of nature are common to all; some are public; some belong to corporate bodies, and some belong to no one. Most things are the property of individuals, who acquire them in different ways, as will appear hereafter.

Gal. ii. 1; D. i. 8. 2.

Under the word *res*, thing, is included whatever is capable of being the subject of a right. The principal division of Gaius is into things *divini juris* and *humani juris*. Here the principal division is according as things are in *novo patrimonio*, that is, capable of private ownership; or *extra nostrum patrimonium*, that is, not capable of private ownership, and either belonging to all men (*communes*), to the state (*publicae*), to no men (*nullius*), or to bodies of men (*universitatis*). The words *bona* and *pecunia*, it may be observed, are only used of things in *novo patrimonio*.

1. Et quidem naturali jure communia sunt omnium haec: aer et aqua profundi et mare et per hoc litora maris. Nemo igitur ad limis maris accedere prohibitur, dum tamen villis et monumentis et edificiis abstinea, quia non sunt juris gentium, sicut et mare.

1. By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings, which are not, like the sea, subject only to the law of nations.

D. i. 8. 2. 1; D. i. 8. 4.
Of things that are common to all any one may take such a portion as he pleases. Thus a man may inhale the air, or float his ship on any part of the sea. As long as he occupies any portion, his occupation is respected; but directly his occupation ceases, the thing occupied again becomes common to all. The sea-shore, that is, the shore as far as the waves go at furthest, was considered to belong to all men. For the purposes of self-defence any nation had a right to occupy the shore and to repel strangers. Individuals, if they built on it, by means of piles or otherwise, were secured in exclusive enjoyment of the portion occupied; but if the building was taken away, their occupancy was at an end, and the spot on which the building stood again became common. (D. i. 8. 6.)

2. Fluminia antem omnia et portus publica sunt: ideoque jus piscandi omnibus commune est in portibus, fluminibusque.

D. i. 8. 4. 1; D. xlvi. 10. 18. 7.

The word publicus is sometimes used as equivalent to communis, but is properly used, as here, for what belongs to the people. Things public belong to a particular people, but may be used and enjoyed by all men. Roads, public places, and buildings, might be added to those mentioned in the text. The particular people or nation in whose territory public things lie may permit all the world to make use of them, but exercises a special jurisdiction to prevent any one injuring them. In this light even the shore of the sea was said, though not very strictly, to be a res publica: it is not the property of the particular people whose territory is adjacent to the shore, but it belongs to them to see that none of the uses of the shore are lost by the act of individuals. Celsus says, Lidora in quae populus Romanus imperium habet populi Romani esse arbitrator (D. xliii. 8. 3), where, if we are to bring this opinion of Celsus into harmony with the opinions of other jurists, we must understand ‘populi Romani esse’ to mean ‘are subject to the guardianship of the Roman people.’

3. Est autem litus maris, quater hibernus fluctus maximus excurrit.

D. i. 16. 96.

Celsus ascribes this definition to Cicero, who apparently borrowed it from Aquilius. (Cic. Top. 7.)

4. Riperum quoque usus publicus est juris gentium, sicut ipsius fluminis: itaque naves ad esse appellere, funes ex arboribus ibi natis religare, onus aliquod in his reponeere culibet liberum est, sicuti per ipsum flumen navigare. Sed proprietas earum illorum est, quorum

4. The public use of the banks of a river is part of the law of nations, just as is that of the river itself. All persons, therefore, are as much at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and to place any part of their cargo there, as to navigate the river itself.
prediiis hærent: qua de causa arbo-
res quoque in iisdem natae eorumdem
sunt.

But the banks of a river are the pro-
erty of those whose land they adjoin;
and consequently the trees growing
on them are also the property of the
same persons.

D. i. 8. 5.

The banks of rivers belonged to the proprietors of the adja-
cent lands; but the use of them, for the purposes of navigation
or otherwise, was open to all. The proprietors, therefore, could
alone reap the profits of the soil; but if they attempted to exer-
cise their rights so as to hinder the public use of the bank they
would be restrained by an interdict of the prætor. (See Introdt.
sec. 107.)

5. Litorum quoque usus publicus
juris gentium est, sicut ipsius maris:
et ob id quibuslibet liberum est,
casam ibi imponere, in qua se reci-
piant, sicut retia siccæ et ex mare
deducere. Proprietas autem eorum
potest intelligi nullius esse, sed ejus-
dem juris esse, cujus et mare et que
subjacent mari, terra vel harena.

5. The public use of the sea-shore,
too, is part of the law of nations, as is
that of the sea itself; and therefore
any person is at liberty to place on it
a cottage, to which he may retreat, or
to dry his nets there, and haul them
from the sea; for the shores may be
said to be the property of no man,
but are subject to the same law as the
sea itself, and the ground or sand be-
neath it.

D. i. 8. 5. pr. and 1.

The shores over which the Roman people had power were not
the property of the Roman people, although it belonged specially
to the Roman people to see that the free use of them was not
hindered. (See note to paragraph 2.)

6. Universitatis sunt, non singu-
lorum, veluti que in civitatibus sunt
theatra, stadia et similia et si qua
alia sunt communia civitatum.

6. Among things belonging to a
corporate body, not to individuals,
are, for instance, city theatres, race-
courses, and other similar places be-
longing in common to a whole city.

D. i. 8. 6. 1.

Universitas is a corporate body created by the state, such as
municipalities or the guilds (collegia) of different trades; for
instance, the collegium pistorum.

Both the state and corporate bodies might have property which
they held exactly like individuals; as, for instance, the agri
vectigales, or slaves and lands belonging to a collegium. Such
things were not universitatis in the sense in which the words are
used here. They were, like the property of individuals, in nostro
patrimonio, the state or corporation being looked on as any other
owner. But some universitates, such as municipalities, had things
which they owned for the use of the public; and it is these things
that are here spoken of as res universitatis.

D. i. 8. 6. 1.

7. Nullius autem sunt res sacræ
et religiosæ et sanctæ: quod enim
hallowed, belong to no one; for that
divini juris est, id nullius in bonis est.
which is subject to divine law is not the property of any one.

Res nullius are either things unappropriated by any one, in which sense things common, or unoccupied lands, or wild animals, are res nullius; or they are things to which a religious character prevents any human right of property attaching.

8. Sacra sunt, quae rite et per pontifices Deo consecrata sunt, veluti sedes sacra et dona, quae rite ad ministerium Dei dedicata sunt, quae etiam per nostram constitutionem alienari et obligari prohibimus, excepta causa redemptionis captivorum. Si quis vero auctoritate sua quasi sacrum sibi constituerit, sacrum non est, sed profanum. Locus autem, in quo sacra sedes adiisse sunt, etiam diruto adiisse, adhuc sacer manet, ut et Papinianus scriptis.

8. Things are sacred which have been duly consecrated by the pontiffs, as sacred buildings and offerings, properly dedicated to the service of God, which we have forbidden by our constitution to be sold or mortgaged, except for the purpose of purchasing the freedom of captives. But, if any one by his own authority makes anything as it were sacred to himself, it is not sacred, but profane. But ground on which a sacred edifice has once been erected, continues to be sacred, even after the building has been destroyed, as Papinian also writes.

D. i. 8. 6. 3; C. i. 2. 21.

The distinction between res sacra and religiosa, in the older pagan law, was that the former were things dedicated to the celestial gods, the latter were things abandoned to the infernal — relictae diis monibus. (Gal. ii. 4.) In order that a thing should be sacra, it was necessary that it should be dedicated by a pontiff and with the authority of the people, afterwards of the senate, finally of the emperor. (D. i. 8. 9. 1.) Things consecrated were by law inalienable. The support of the poor in a time of famine (C. i. 2. 21), and afterwards the payment of the debts of the church (Nov. 120. 10), sufficed, as well as the release of captives, as reasons for the sale of consecrated moveables; but immovable were always inalienable.

9. Religiosum locum unusquisque sua voluntate facit, dum mortuum infert in locum suum. In communem autem locum purum inspicio et socius non licet: in commune seculum etiam invitis ceteris licet inferrere. Item si alienus usufructus est, proprietarium placet, nisi consentiente usufructuario, locum religiosum non facere. In alienum locum, concedente domino, licet inferrere: et licet postea ratum habuerit, quam illatus est mortuus, tamen religiosus locus fit.

9. Any man at his pleasure makes a place religious by burying a dead body in his own ground; but it is not permitted to bury a dead body in land hitherto pure, which is held in common, against the wishes of a coproprietor. But when a sepulchre is held in common, any one coproprietor may bury in it, even against the wishes of the rest. So, too, if another person has the usufruct, the proprietor may not, without the consent of the usufructuary, render the place religious. But a dead body may be laid in a place belonging to another person, with the consent of the owner; and even if the owner only ratifies the act after the dead body has been buried, yet the place is religious.

Gal. ii. 6; D. i. 8. 6. 4; D. xi. 7.
Directly the body or bones of a dead person, whether slave or free, were buried, the ground in which they were buried became religiousus, although previously pure, that is, neither sacer, religiousus, nor sanctus (D. xi. 7. 2. 4), provided that the person burying the body was the owner of the soil or had the consent of the owner.

Although the place was a res nullius, yet there could be a special kind of property in it. There were tombs and burial-places in which none but certain persons, as, for instance, members of the same family, could be buried; and this kind of interest in a locus religiousus was transmissible to heirs, or even to purchasers of a property, if the right of burying in a particular place was attached, as it might be, to the ownership of that property. (D. xviii. 1. 24.)

10. Sanctae quoque res, veluti muri et portae, quodammodo divini juris sunt et idee nullius in bonis sunt. Ideo autem muros sanctos dicimus, quia poena capitatis constituta sit in eos, qui alienum in muros deliquerint. Ideo et legum eae partes, quibus penas constituimus adversus eos, qui contra leges fecerint, sanctiones vocamus.

10. Hallowed things also, as the walls and gates of a city, are to a certain degree subject to divine law, and therefore are not part of the property of any one. The walls of a city are said to be hallowed, inasmuch as any offence against them is punished capitaliter; so, too, those parts of laws by which punishments are established against transgressors, we term sanctions.

Gal. ii. 8; D. i. 8. 8; D. i. 8. 9. 8; D. i. 8. 11.

Res sancte are those things which, without being sacred, are protected against the injuries of men (sanctum est quod ab injuria hominum defensum atque munitum est, D. i. 8. 8) by having a severe penalty attached to the violation of their security.

11. Singulorum autem hominum multis modis res fiunt: quarundam enim rerum dominium nanciscimus jure naturali, quod, sicut diximus, appellatur jus gentium, quarundam jure civili. Commodius est itaque a vetustiore jure incipere. Palam est autem, vetustius esse naturale jus, quae cum ipso genere humano rerum natura prodict: civilia enim jura tunc coeperunt esse, cum et civitates condit et magistratus creari et leges scribi coeperunt.

11. Things become the property of individuals in various ways; of some we acquire the ownership by natural law, which, as we have observed, is termed the law of nations; of others by the civil law. It will be most convenient to begin with the more ancient law; and it is very evident that the law of nature, established by nature at the origin of mankind, is the more ancient, for civil laws could then only begin to exist, when states began to be founded, magistrates to be created, and laws to be written.

D. xli. 1. 1.

We now proceed to inquire how property is acquired in particular things. It is acquired either by natural or civil modes. The natural mode first treated of is occupation, of which there are two essential elements; that the thing, the property in which is acquired, should be a res nullius, that is, a thing capable of being appropriated, but not yet appropriated, and that the person acquiring it should bring the thing into his possession, that is, into his
power, and do so with the intention of holding it as his property (pro suo habendi).

12. Fere igitur bestiae et volucres et piscis, id est omnia animalia, que in terra mari celo nascentur, simul-atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt: quod enim ante nullius est, id naturali ratione occupanti conceditur. Nec interest, feras bestias et volucres utrum in suo fundo quisque capiatur, an in alieno: plane qui in alienum fundum ingreditur venandi aut ancupandi gratia, potest a domino, si est providerit, prohiberi, ne ingrediatur. Quidquid autem eorum cepes, eo usque tuum esse intellegitur, donec tua custodia coercet: cum vero evaserit custodiam tuam et in naturalem libertatem se receperit, tuum esse desinit et rursus occupantis fit. Naturalem autem libertatem recipere intellegitur, cum vel oculos tuos effugerit vel ita sit in conspectu tuo, ut difficilis sit ejus persecution.

GAI. ii. 67; D. xli. 1. 1; D. xli. 1. 8 pr. and 1; D. xli. 1. 8. 2; D. xli. 1. 5.

Directly the thing ceases to be in the power of the occupant, the property in it is lost, and it is exactly as if it had never been seized or occupied. What is meant by being in the power of the occupant must vary according to the nature of the thing occupied. Several examples are given in this and the following paragraphs.

18. Illud quessitum est, an, si fera bestia its vulnerata sit, ut capi possit, statim tua esse intellegatur. Quibusdam placuit, statim tuam esse et eo usque tuam videri, donec eam persequeris: quod si desieris persequeri, desinere tuam esse et rursus fieri occupantis. Alli non aliter putaverunt tuam esse, quam si cepseris. Sed posteriori sensentiam nos confirmamus, quia multis accidere solent, ut eam non capias.

19. It has been asked, whether, if you have wounded a wild beast, so that it could be easily taken, it immediately becomes your property. Some have thought that it does become yours directly you wound it, and that it continues to be yours while you continue to pursue it, but that if you cease to pursue it, it then ceases to be yours, and again becomes the property of the first person who captures it. Others have thought that it does not become your property until you have captured it. We confirm this latter opinion, because many accidents may happen to prevent your capturing it.

D. xli. 1. 5. 1.

Gaius, in this passage of the Digest, informs us that the former opinion was that of Trebatius.
14. Apium quoque natura fera est. Itaque quae in arbores tuae con-
sederint, antequam a te alveo inclu-
dantur, non magis tuae esse intelle-
guntur, quam volucres, quae in tua
arbores nidum fecerint: ideoque si
alius eas inclusurerit, is earum dominus
erit. Favos quoque si quos ha-
fecerint, quilibet eximere potest.
Plane integra re, si provideris in-
gredientem in fundum tuum, potes
eum jure prohibere, ne ingrediatur.
Examen, quod ex alveo tuo evolave-
rit, eo usque tuum esse intellegitur,
donec in conspectu tuo est nec dif-
cilis ejus persecutio est: aliquo
occupantis fit.

14. Bees also are wild by nature. Therefore, bees that swarm upon your
tree, until you have hived them, are
no more considered to be your pro-
erty than the birds which build their
nests on your tree; so if anyone else
hives them he becomes their owner.
Any one, too, is at liberty to take the
honeycombs the bees may have made.
But of course, if, before anything has
been taken, you see any one entering
on your land, you have a right to prevent
his entering. A swarm which has
flown from your hive is still considered
yours as long as it is in your sight and
may easily be pursued; otherwise it
becomes the property of the first per-
son that takes it.

D. xli. 1. 5. 2-4.

It is said that the owner of the land, if he wished to secure
the bees for himself, must prevent any one entering integra re;
because if the bees are once taken, they belong to the person who
takes them, although the owner of the land may have an action
against the person entering against his will.

15. Pavonum et columbarum fera
natura est. Nec ad rem pertinet,
quod ex consuetudine avolare et
revolare solent: nam et apes idem
faciunt, quorum constat feram esse
naturam: cervos quoque ita quidam
mansuetos habent, ut in silvas ire
et redire solet, quorum et ipsorum
feram esse naturam nemo negat. In
his autem animalibus, quae ex con-
suetudine abire et redire solent,
talis regula comprobata est, ut eo
usque tua esse intellegatur, donec
animum revertendi habeant: nam si
revertendi animum habere desie-
rint, etiam tua esse desinunt et fiunt
occupantium. Revertendi autem
animum videntur desinere habere,
cum revertendi consuetudinem dese-
ruerint.

15. Peacocks, too, and pigeons are
naturally wild; nor does it make any
difference that they are in the habit of
flying out and then returning again, for
bees, which without doubt are natu-
really wild, do so too. Some persons
have deer so tame, that they will go
into the woods, and regularly return
again; yet no one denies that deer
are naturally wild. But, with respect
to animals which are in the habit of
going and returning, the rule has been
adopted, that they are considered yours
as long as they have the intention of
returning, but if they cease to have
this intention, they cease to be yours,
and become the property of the first
person that takes them. These animals
are supposed to have lost the intention,
when they have lost the habit, of
returning.

Gal. ii. 68; D. xli. 1. 55.

16. Gallinarum et anserum non
est fera natura; idque ex eo possu-
mus intelligere, quod alii sunt
gallinae, quas feras vocamus, item
aliis anseres, quos feros appellamus.
Ideoque si anseres tu aut gallinae
tue aliquo casu turbati turbaberent
evolaverint, licet conspectum tuum
effugerint, quocumque tamen loco

16. But fowls and geese are not
naturally wild, which we may learn
from there being particular kinds of
fowls and geese which we term wild.
And therefore, if your geese or fowls
should be frightened, and take flight,
they are still regarded as yours where-
ever they may be, although you may
have lost sight of them; and whoever
sint, tui tuae esse intelleguntur: et qui lucrandi animo ea animalia retinet, furtum committere intellegitur.

detains such animals with a view to his own profit, commits a theft.

D. xli. 1. 5. 6.

17. Item ea, quae ex hostibus capimus, jure gentium statim nostra sunt: adeo quidem, ut et liberi homines in servitutem nostram deducantur, qui tamen, si evaserint nostram potestatem et ad suos reversi fuerint, pristinum statum recipiunt.

Gal. ii. 69; D. xlii. 1. 5. 7; D. xlii. 1. 7. pr.

The moveables of an enemy were always looked on as res nullius; the first person who took them became the owner. Practically, of course, things taken in war did not belong to the particular soldier who took them, unless in very exceptional cases, because he took them as one of a large body, who by their exertions all contributed, directly or indirectly, to the capture. The army, again, did but represent the state; and though moveables were generally given up to the soldiers and divided among them, land taken in war was claimed by the state, whose servants the soldiers were and in whose behalf they fought.

Just as the freeman, who had been made a prisoner and a slave, regained his status when he returned to his own country by the jus postliminii (see Bk. i. Tit. 12. 5), so everything that returned to its former state of being free from any owner, was said to do so by a process analogous to the jus postliminii. Marcius, for example, speaks in the Digest (i. 8. 6. pr.) of a person building on a shore, and, after having said that the soil is only his while the building remains, goes on, aliquin aedificio dilapso, quasi jure postliminii revertitur locus in pristinam causam.

We have no mention here, which we might expect to have, of the mode by which things retaken in war returned to their owners, nor what things did so return. We know that the things that did return were said to do so by postliminium; Pomponius says, quum duce species postliminii sint, ut aut nos revertamur aut alicud recipiamus. (D. xlix. 15. 14.) Generally speaking, if the property of individuals was captured by an enemy and retaken, it was praeda, that is, was part of the spoil of war, and belonged to the state, not to its former owner. But there were certain things to which a jus postliminii attached, and which, if retaken, reverted to their original owner, and did not form part of the praeda. These things, so far as we know them, were land, slaves, horses, mules, and ships used in war. (Cic. Top. 8; D. xlix. 15. 2.)

18. Item lapilli, gemmae et cetera, quae in litore inveniuntur, jure naturali statim inventoris sunt.

18. Precious stones, too, gems, and other things, found upon the sea-shore, become immediately by natural law the property of the finder.

D. i. 8. 8.
In the next section Justinian leaves the subject of acquisition by occupation, but afterwards speaks of matters that properly belong to it, of islands rising in the sea (parag. 23), and things found which have been intentionally abandoned by their owners (parag. 47, 48).

19. Item ea, quae ex animalibus tnu subjectis nata sunt, males of which you are the owner, become by the same law your property.

D. xii. 1. 6.

From the 19th to the 37th paragraph inclusive, may be taken together as bearing more or less on the subject of accession. The Latin word accessio always means an increase or addition to something previously belonging to us, but commentators have used the word accession not only for the increase itself, but also for the mode in which the increase becomes our property.

First, there is the instance given in this section and in the 35th section of the produce of animals and the fruits of lands belonging to us. They are really part of that which originally belonged to us. The owner of the wheat-seed is potentially the owner of the blade and the ear; the owner of the animal is potentially the owner of its young.

Again, a thing may be an accessio, an actual gain or increase to our property, which was in theory of law, but not in fact, ours already. This is the case with an island in a river, an instance given in paragraph 22. The bed of the river becomes publicus by the mere fact of the river flowing over it; if any portion of the bed is dried so as to form an island, that portion ceases to be public, and, becoming private, is presumed to be a part of the adjacent land. It is something not newly acquired, but restored to us by nature; we have been temporarily deprived of it, and again resume our rights over it.

Again, a person who uses materials sometimes only gives them a new form, sometimes makes with them a new thing, different from the materials themselves. When he does the latter, the thing he makes, the nova species, as the jurists termed it, becomes his by the fact of his making it. The thing did not exist, and he has made it to exist, and it belongs to him by a title not dissimilar to that of occupation: it is a new thing, which he is the first to get into his power. To take an instance given in paragraph 25, a man who makes wine out of another's grapes has made something new of a kind distinct from the grapes themselves, and the wine belongs to him. This specification may be, perhaps, regarded as a distinct mode of acquisition.

Again, when two things belonging to different owners are united so as to become integral portions of a common whole, but one portion is subordinate and inferior to the other, we have to ask whether the owner of the greater became the owner of the less. The Roman jurists answered this by asking whether the
two things could after their union be separated from each other. If this was physically possible, each owner of the respective portions continued to be owner; but if not, the owner of the more important or principal thing became the owner of the less important or accessory thing, for which he gave compensation.

20. Praeterea quod per alluvionem agro tuo flumen adjicit, jure gentium tibi adquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adjici, quod its paulatim adicetur, ut intellegere non posset, quantum quocum momento temporis adicetur.

20. Moreover, the alluvial soil added by a river to your land becomes yours by the law of nations. Alluvion is an imperceptible increase; and that is added by alluvion, which is added so gradually that no one can perceive how much is added at any one moment of time.

Gal. ii. 70; D. xii. 1. 7. 1.

The deposit of earth gradually formed by alluvion upon the bank of a river is inseparable from the native soil of the bank; and the owner of the latter acquires the former by right of accession.

An exception was made in the case of agri limitati, that is, lands belonging to the state by right of conquest, and granted or sold in plots. If these plots were enlarged by alluvion, the increase did not become the property of the owner of the plot. (D. xii. 1. 16; xiii. 12. 1. 6.) The reason seems to be that the particles deposited by alluvion were considered public as forming portion of the current of the stream, the waters of which were public, and when these particles were deposited by the side of a plot granted or sold by the state, they were not allowed to enlarge the plot of which the state had already determined the proper size.

21. Quodsi via fluminis partem aliquam ex tuo prædicio detraxerit et vicini prædio appulerit, palam est eam tuam permanere. Plane si longiore tempore fundo vicini hase rit arboresque, quas secum traxerit, in eum fundum radices egerint, ex eo tempore videntur vicini fundo adquises esse.

21. But if the violence of a river should bear away a portion of your land, and unite it to that of your neighbour, it undoubtedly still continues yours. If, however, it remains for a long time united to your neighbour's land, and the trees, which it swept away with it, take root in his ground, these trees from that time become part of your neighbour's estate.

Gal. ii. 71; D. xii. 1. 7. 2.

When a large mass of earth is carried to the side of a river bank, it is quite possible to detach it, and consequently the mass remains the property of its former owner; but if it becomes inseparable in the manner described in the text, then the property in it is changed.

Videntur acquisita (for which is found videtur acquisita in the Digest (Florentine MS.)) includes the trees themselves as well as the soil of the fragment.

22. Insula, quae in mari nata est, quod raro accidit, occupantis fit: sed, quae rarae occurrit, finis enim esse creditur. At in the property of the first occupant;
flumine nata, quod frequenter accidit, si quidem mediem partem fluminis teneat, communis est eorum, qui ab utraque parte fluminis prope ripam praeda possident, pro modo latitudinis cujusque fundi, que latitudo prope ripam sit. Quodsi alteri parti proximior sit, eorum est tantum, qui ab ea parte prope ripam praeda possident. Quodsi aliqua parte divisum flumen, deinde infra unitum agrum alius ejus in formam insulæ redegerit, eiusmodem permanet is ager, cujus et fuerat.

for before occupation it belongs to no one. But when an island is formed in a river, which frequently happens, then if it occupies the middle of the river, it belongs respectively to those who possess the lands near the banks on each side of the river, in proportion to the extent along the banks of each man's estate. But if the island is nearer to one side than the other, it belongs to those persons only who possess lands contiguous to the bank on that side. But if a river divides itself at a certain point, and lower down unites again, thus giving to any one's land the form of an island, the land still continues to belong to the person to whom it belonged before.

GAL. ii. 72; D. xli. 1. 7. 3. 4.

An island formed by a stream cutting off a portion of land could not be supposed to belong to any one but its former owner. But if the island was formed by the bed of the river becoming dry in any part, it might be doubtful to whom it belonged. The bed of the river, as long as the river flowed over it, was public. *Ille alveus quem sibi flumen fecit, et si privatus ante fuit, incipit tamen esse publicus* (D. xliii. 12. 1. 7); or rather the use of it was public, while the soil itself was the property of the private individuals to whom the soil of the banks belonged, and therefore when the bed was dried, when it had ceased to be subject to public use, the private owners resumed their respective rights of ownership over it. *Quum exsiccatus esset alveus, proximarum sit, quia jam populus e o non utitur.* (D. xli. 1. 30. 1.) If the bed was not wholly but partially dried, the island formed would belong to the owner of the nearest bank, if it lay entirely on one side of the stream; or if it lay partly on one side and partly on the other, it would belong to the owners of both banks in such proportion as a line drawn along the middle of the stream would divide it.

28. Quodsi naturali alveo in universum derelicto alia parte fuere cecerpit, prior quidem alveus eorum est, qui prope ripam ejus praeda possident, pro modo scilicet latitudinis cujusque agri, que latitudo prope ripam sit; novus autem alveus ejus juris esse incipit, cujus et ipsum flumen, id est publici. Quodsi post aliquid tempus ad priorem alveum reversum fuerit flumen, rursus novus alveus eorum esse incipit, qui prope ripam ejus praeda possident.

28. If a river, entirely forsaking its natural channel, begins to flow in another direction, the old bed of the river belongs to those who possess the lands adjoining its banks, in proportion to the extent along the banks of their respective estates. The new bed follows the condition of the river, that is, it becomes public. And, if after some time the river returns to its former channel, the new bed again becomes the property of those who possess the lands along its banks.

D. xli. 1. 7. 5.

It might happen that the soil over which the river flowed was known to have belonged to a different person, and not to the
owners of the adjacent banks. If the river changed its channel and left the soil dry, to whom was the recovered land to belong? Could its original owner claim it, or was the presumption of law so fixed in favour of the owners of the adjacent banks that nothing was admitted to rebut it? Gaius says that strict law was against the original owner, but adds, *vix est ut id obtineat* (D. xli. 1. 7. 5); while Pomponius decides expressly for the original owner. (D. xli. 1. 30. 5.)


24. The case is quite different if any one's land is completely inundated; for the inundation does not alter the nature of the land, and therefore, if the water recedes, the land remains indisputably the property of the same owner.

D. xli. 1. 7. 6.

An inundation is here contrasted with a change in the course of a river. A field overflowed with water is still a field, and as much belongs to its owner as if it was dry.

25. Cum ex aliena materia species aliqua facta sit ab aliquo, queri solet, quis eorum naturali ratione dominus sit, utrum is, qui fecerit, an ille potius, qui materiae dominus fuerit: ut ecce si quis ex alienis uvis aut olivis aut spicis vinum aut oleum aut frumentum fecerit, aut ex alieno auro vel argento vel sare vas aliquod fecerit, vel ex alieno vino et melle mulsum miscerit, vel ex alienis medicamentis emplastrum aut collyrium composuerit, vel ex aliena lana vestimentum fecerit, vel ex alienis tabulis naves vel armorium vel subellium fabricaverit.

Et post multas Sabinianorum et Proculianorum ambiguitates placuit media sententia existimantium, si ea species ad materiaem reduci possit, eum dixer de dominio esse, qui merces dominus fuerat; si non possit reduci, eum potius intellegi dominium, qui fecerit: ut ecce vas conflatum potest ad rudem massam seris vel argenti vel auris reduci, vinum autem aut oleum aut frumentum ad uvas et olivas et spicas reverti non potest, ac ne mulsum qui dem sub vinum et mel resolvi potest. Quod si partim ex sua materia, partim ex aliena speciem aliquam fecerit quisque, veluti ex suo vino et alieno melle mulsum aut ex suis et alienis medicamentis emplastrum aut collyrium aut ex sua et aliena lana vestimentum fecerit, dubitan-
dum non est, hoc casu eum esse dominum, qui fecerit: cum non solum operam suam dedit, sed et partem ejusdem materie præstavit.

mead with his own wine and another man's honey, or a plaster or eye-salve, partly with his own, and partly with another man's medicaments, or a garment with his own and also with another man's wool, then in such cases, he who made the thing is undoubtedly the proprietor; since he not only gave his labour, but furnished also a part of the materials.

GAL. ii. 79; D. xli. 1. 7. 7; D. vi. 1. 5. 1; D. xli. 1. 27. 1.

When materials belonging to different persons were mixed together, or one person in good faith bestowed his labour on the materials of another, although one person only might be the owner of the product, yet he did not become so at the expense of others. He was obliged to pay those whose materials or labour had been employed the value of their respective materials or labour, and was liable to a condicio or personal action for the enforcement of the payment. He himself could claim the product itself by vindicatio, or real action, given only to the owner of a thing. (See Introd. sec. 106.) The jurists very commonly speak of a person being able to vindicate a thing as a mode of saying that he is the owner, the test of ownership being whether the supposed owner could or could not claim the thing by vindicatio. If he could bring a vindicatio, he could also bring a preliminary action called the actio ad eshibendum, the object of which was to have the thing claimed produced to the tribunal, or to get damages if it was not produced.

Supposing a person formed a thing with materials belonging to another, which was the one that could claim it by a real action, the maker of the thing or the owner of the materials? The Proculians said, the thing is a new thing, and its maker is the owner; the Sabinians said, the materials remain, although their form is changed, and their proprietor is the owner of the thing made. The distinction sanctioned by Justinian decided the question according to the fact of there being or not being a really new thing made. If there was, then the reasoning of the Proculians held good, and the maker becomes the owner by a species of occupation, quia quod factum est, ante nullius fuerat. (D. xli. 1. 7. 7.) If the thing made was only the old materials in a new form, then it belonged to the owner of the materials in accordance with the opinions of the Sabinians. The opinion of each school, therefore, was admitted where the facts were in accordance with it.

In the latter part of the section Justinian says that if the materials were partly the property of the maker, the thing made certainly belonged to him. This must be understood strictly with reference to the case spoken of in the text, that, namely, of materials, none being merely accessory, i.e. subordinate, to the others, being inseparably mixed together. If some of the materials were only accessory, and the thing made was not a new thing, it would not necessarily belong to the maker, but would only belong
to him if he was the owner of the principal materials; and if the different materials were separable from each other, they would still belong to their respective owners.

26. Si tamen alienam purpuram quia interuit suo vestimento, licet pretiosior est purpura, accessionis vice cedit vestimento: et qui dominus fuit purpurea, adversus eum, qui subripuit, habet furti actionem et conditionem, sive ipse est, qui vestimentum fecit, sive alius. Nam extinctae res liest vindicari non possint, condici tamen a furibus et a quibusdam aliis possessoribus possunt.

26. If, however, any one has woven purple belonging to another into his own vestment, the purple, although the more valuable, attaches to the vestment as an accession, and its former owner has an action of theft and a condition against a person who steals it from him, whether it was he who made the vestment or some one else. For although things which have perished cannot be reclaimed by vindication, yet they give ground for a condition against the thief, and against some other possessors.

D. x. 4. 7. 2; Gal ii. 79.

This is an instance of what is termed by commentators ad-junctio. Ulpian says, in the Digest (x. 4. 7. 2), that a person whose purple was woven in could bring an action ad exhibendum against the owner of the vestment. This, which is as much as to say that the owner of the purple is still its owner, seems at variance with what Justinian says here of the purple acceding to the vestment, and of the person, qui dominus fuit purpurea, having only a personal action. Their respective decisions would, however, be right, according as the purple was not or was an inseparable part of the vestment. Supposing the purple was so woven in that it could be again separated, then its owner, remaining its owner, could bring an action ad exhibendum. If it was made an inseparable part of the vestment, if it was an extincta res, i.e. could no more have a separate, distinct existence, then, being by its nature accessory to the vestment, it would become the property of the owner of the vestment, and its former owner would only have a personal action to recover its value. (D. vi. 1. 23. 5.)

Quibusdam possessoribus. The word quibusdam is used to exclude bona fide possessors of the res extincta, who had not done anything to cause it to perish. Against an actual thief an actio furti and a condictio might be brought, against others only a condictio. (Theophyl. Paraph.)

27. Si duorum materie ex voluntate dominorum confuse sint, totum id corpus, quod ex confusione fit, utriusque commune est, veluti si qui vinum sua confuderint aut massas argenti vel aurii confaverint. Sed si diversae materie sint et ob id propria species facta sit, forte ex vino et melle mulsum aut ex auro et argento electrum, idem juris est: nam et eo casu communem esse

27. If materials belonging to two persons are mixed together by their mutual consent, whatever is thence produced is common to both, as if, for instance, they have intermixed their wines, or melted together their lumps of gold or silver. And although the materials are different which are employed in the admixture, and thus a new substance is formed, as when mead is made with wine and honey,
speciem non dubitatur. Quodsi fortuita et non voluntate dominorum confuse fuerint vel diversae materiae vel que ejusdem generis sunt, idem juris esse placuit.

or electrum by fusing together gold and silver, the rule is the same; for in this case the new substance is undoubtedly common. And if it is by chance, and not by the intention of the proprietors, that materials, whether similar or different, are mixed together, the rule is still the same.

D. xii. 1. 7. 8, 9.

The mixing of liquids is termed by commentators confusio. When the product became common property, then any of the joint proprietors could procure their own share to be given up to them by bringing an action called communi dividundo. (Bk. iv. Tit. 17. 5.)

28. Quodsi frumentum Titii tuo frumento mixtum fuerit, si quidem ex voluntate vestra, commune erit, quia singula corpora, id est singula grana, que cujusque prorsus fuerunt, ex consensu vestro communicata sunt. Quodsi casu id mixtum fuerit vel Titius id miscuerit sine voluntate tua, non videtur commune esse, quia singula corpora in sua substantia durant nec magis istis casibus commune fit frumentum, quam grex communis esse intellegitur, si pecora Titii tuus pecoribus mixta fuerint; sed si ab alterutro vestrum id totum frumentum retineatur, in rem quidem actio pro modo frumenti cujusque competit, arbitrio autem judicis continetur, ut sit estiment, quale cujusque frumentum fuerit.

28. If the wheat of Titius is mixed with yours, and this takes place by your mutual consent, the mixed heap belongs to you in common; because each body, that is, each grain, which before was the property of one or other of you, has by your mutual consent been made your common property; but if the intermixture was accidental, or made by Titius without your consent, the mixed wheat does not then belong to you both in common; because the grains still remain distinct, and retain their proper substance. The wheat in such a case no more becomes common to you both, than a herd would be, if the cattle of Titius were mixed with yours; but, if either one of you keeps the whole quantity of mixed wheat, the other has a real action for the amount of wheat belonging to him, but it is in the province of the judge to estimate the quality of the wheat which belonged to each.

D. vi. 1. 4. 5.

This mixing together of things not liquid is termed by commentators commixtio. If the things mixed, still remaining the property of their former owners, were easy to separate again, as, for instance, cattle united in one herd, when one owner brought his claim by vindicatio, his property was restored to him without difficulty; but if there was difficulty in separating the materials from each other, as in dividing the grains of wheat in a heap, the obvious mode would be to distribute the whole heap in shares proportionate to the quantity of wheat belonging to the respective owners. But it might happen that the wheat mixed together was not all of the same quality, and therefore the owner of the better kind of wheat would lose by having a share determined in amount only by the quantity of his wheat; and the judge therefore was
permitted to exercise his judgment (arbitrio continetur—see Introd. sec. 106) how great an addition ought to be made to his share to compensate for the superior quality of the wheat originally belonging to him.

29. Cum in suo solo aliquis aliena materia edificaverit, ipse dominus intellegitur edificii, quia omne, quod inseditur, solo edicit. Nec tamen ideo is, qui materie dominus fuerat, desinit ejus dominus esse: sed tantispe neque vindicare eam potest neque ad exhibendum de ea re agere propter legem duodecim tabularum, qua cavetur, ne quis tignum alienum edibus suis injuriam eximere cogatur, sed duplum pro eo praestet per actionem, qua vocatur de tigno juncto (appellatione autem tigni omnis materia significatur, ex qua edificia fimt); quod ideo provisum est, ne edificia rescindisi necesse sit. Sed si aliqua ex causa dirutum sit edificio, poterit materie dominus, si non fuerit duplum jam consecutus, tunc eam vindicare et ad exhibendum agere.

29. If a man builds upon his own ground with the materials of another, he is considered the proprietor of the building, because everything built on the soil accedes to it. The owner of the materials does not, however, cease to be owner, but while the building stands he cannot bring a real action for the materials, or demand to have them exhibited, on account of the law of the Twelve Tables, which provides that no one is to be compelled to take out the tignum of another which has been made part of his own building, but that he may be made by the action de tigno juncto to pay double the value; and under the term tignum all materials for building are comprehended. The object of this provision was to prevent the necessity of buildings being pulled down. But if the building is destroyed from any cause, then the owner of the materials, if he has not already obtained the double value, may bring a real action for the materials, and may demand to have them exhibited.

D. xli. 1. 7. 10.

Materials, although forming part of a building belonging to the owner of the ground, were not considered themselves as necessarily belonging to the owner of the building. They were still the property of the person to whom they had belonged before being employed in the building. They were separable from the soil, and if a special law had not prevented it, could have been claimed by their owner, and their production enforced by an action ad exhibendum. The Twelve Tables forbade, however, the needless destruction of buildings, ne edificia rescindi necesse sit. They suspended the right of claiming the materials, or bringing an action ad exhibendum, until the building was destroyed. When it was destroyed in any way (alia ex causa), the materials might be reclaimed, or an action ad exhibendum brought. Meanwhile, by an action termed de tigno juncto, or, as it is sometimes written, injuncto, their owner might, if he preferred, recover double their value, forfeiting, however, thereby all right of eventually reclaiming them.

Such was the law when the builder employed the materials of another quite innocently. If his conduct was tainted with mala fides, as it would be if he knew that the materials did not belong to him, the law of the Twelve Tables still prevented the materials being at once reclaimed by the compulsory destruction of the
building; but in addition to the action de tigno juncto an action ad exhibendum was permitted to be brought as a means of punishing the builder. (D. vi. 1. 23. 6.) The effect of this action in such a case was that the defendant, not producing the thing demanded, was condemned in such a sum as the judge thought right as a punishment for his having put it out of his power to produce it—quasi dolo fecerit quominus possideat. (D. xlvii. 3. 1. 2.) Further, if the building was pulled or fell down, the owner of the materials might reclaim them. (D. xlvii. 3. 2).

380. Ex diverso si quis in alieno solo sua materia domum edificaverit, illius fit domus, cujus et solum est. Sed hoc casu materia dominus proprietatem ejus amittit, quia voluntate ejus alienata intellegitur, utique si non ignorabat, in alieno solo se edificare: et ideo, licet diruta sit domus, vindicare materiam non poterit. Certe illud constat, si in possessione constituto edificatore, soli dominus petat domum suam esse nec solvat pretium materie et mercedes fabrorum, posse eum per exceptionem doli mali repellere, utique si bona fidei possessor fuit, qui edificasset: nam scienti, alienum esse solum, potest culpa objici, quod temere edificaverit in eo solo, quod intellegret alienum esse.

80. In the converse case, if any one builds with his own materials on the ground of another, the building becomes the property of him to whom the ground belongs. But in this case the owner of the materials loses his property, because he is presumed to have voluntarily parted with them, that is, if he knew he was building upon another's land; and, therefore, if the building should be destroyed, he cannot, even then, bring a real action for the materials. Of course, if the person who builds is in possession of the soil, and the owner of the soil claims the building, but refuses to pay the price of the materials and the wages of the workmen, the owner may be repelled by an exception of dolo malus, provided the builder was in possession bona fide. For if he knew that he was not the owner of the soil, he is barred by his own negligence, because he recklessly built on ground which he knew to be the property of another.

Gal. ii. 78, 76; D. xli. 1. 7. 12.

If a person used his own materials in building on the land of another, we have to consider his position, according as he was or was not still in possession, and according as, in building, he had acted bona fide or mala fide. If he was in possession of the soil, then, if he was acting bona fide, he could not be turned out without the owner paying him for the additional value he had by the building given to the soil, this rather than the price of the materials and wages of workmen, as stated in the text, being the measure of compensation. If he was acting mala fide, that is, if he knew the soil was not his, he could not claim the additional value, but he might take away the materials he had used, if he could separate them without doing damage. (D. vi. 1. 37). There is, however, a passage of Paulus (D. v. 3. 38) which would seem to show that, in the opinion of that jurist, the mala fide possessor could claim the additional value. If he was not in possession of the soil, he might, whether having acted in good or bad faith (D. xl. 1. 7. 12; C. iii. 32. 2), reclaim the materials if the building was destroyed; and, whether he had acted in good faith or bad,
he could not bring any action for compensation for the additional value.

This statement of the law is, it will be seen, at variance, in one point, with the language of the text, which says that if the owner of the materials knew he was building on another man's land he could not reclaim the materials, because the fact that he knew this was taken to show that he meant to alienate the materials. The passage in the Code above referred to is inconsistent with this. If the owner of the materials meant to give them to the owner of the soil, no question could arise; but the fact that he used his materials, knowing the soil was not his, was declared by the constitution referred to (being a constitution of Antoninus Caracalla), not to imply, as the text takes for granted that it does imply, the intention to alienate the materials; and if there was no such intention, then the materials could be reclaimed even by the mala fide possessor. The words of the constitution are—Materia ad pristinum dominum redit, sive bona fide sive mala ædificium exstructum sit, si non donandi animo ædificia alium solo imposita sint. The date of this constitution is A.D. 213, which is posterior to the time of Gaius, from whom the text is taken.

Dolus malus (opposed to dolus bonus, artifice which the law considers honestly employed) means nearly what we mean by fraud. When a plaintiff was repelled by an exception of fraud, such words as these were introduced in the intentio of the action: si in ea re nihil dolo malo Auli Agerii factum sit, neque fiat. (See Introd. sec. 104.)

81. Si Titius alienam plantam in suo solo posuerit, ipsius erit: et ex diverso si Titius suam plantam in Mævi solo posuerit, Mævi planta erit, si modo utroque eas radices egerit. Antequam autem radices egerit, ejus permanet, cujus et fuerat. Adeo autem ex eo, ex quo radices agit planta, proprietas ejus communatur, ut, si vicini arborem ita terra Titii preserit, ut in ejus fundum radices agetur, Titii efficacem arborem dicamus; rationem etenim non permittere, ut alterius arbor esse intellegatur, quam cujus in fundum radices egisset. Et ideo prope confinium arbor posita si etiam in vicini fundum radices egerit, communis fit.

81. If Titius places another man's plant in ground belonging to himself, the plant will belong to Titius; conversely, if Titius places his own plant in the ground of Mævius, the plant will belong to Mævius—that is, if, in either case, the plant has taken root; for, before it has taken root, it remains the property of its former owner. But from the time it has taken root, the property in it is changed; so much so, that if the soil of Titius so presses on the tree of a neighbour that the tree takes root in the land of Titius, we pronounce that the tree becomes the property of Titius. For reason does not permit, that a tree should be considered the property of any one else than of him in whose ground it has taken root; and therefore, if a tree, planted near a boundary, extends its roots into the lands of a neighbour, it becomes common.

Gal. ii. 74; D. xli. 1. 7. 18.

The tree, after it had once taken root, did not belong to its former owner, although it was afterwards severed from the soil.
It would seem natural that it should belong to him, because it was separable from the soil, and did not become a part of it more than the materials of a building became part of the soil; but the jurists considered that the nourishment it had drawn from the soil had made it a new tree, *alia facta est* (D. xli. 1. 26. 2), and thus the owner of the soil claimed it by occupation.

When the text says that the tree which strikes root into the soil of Titius belongs to Titius, this is only to be understood of a tree of which all the roots are in the soil of Titius. If only some of the roots were in the soil of Titius, the tree would belong partly to Titius, partly to its former owner.

38. *Qua ratione autem plantae, que terra coalescunt, solo cedunt, cadem ratione frumenta quoque, que sata sunt, solo cedere intelleguntur.* Ceterum sicut is, qui in alieno solo sedieceverit, si ab eo dominus petat sedificium, defendi potest per exceptionem doli mali secundum ea, que diximus; ita ejusdem exceptionis auxilio tutum esse potest is, qui alienum fundum sua impensa bona fide conservit.

39. As plants rooted in the earth accede to the soil, so, in the same way, grains of wheat which have been sown are considered to accede to the soil. But as he who has built on the ground of another may, according to what we have said, defend himself by an exception of *dolus malus*, if the proprietor of the ground claims the building, so also he may protect himself by the aid of the same exception, who, at his own expense and acting *bona fide*, has sown another man's land.

Gal. ii. 75, 76; D. xli. 1. 9. pr.

38. *Litterae quoque, licet aureae sint, perinde chartis membranisque cedunt, aequo solo cedere solent ea, que inadimplementur aut inseruntur: ideoque si in chartis membranisve tuis carmen vel historiam vel orationem Titius scripses, hujus corporis non Titius, sed tu dominus esse videberis. Sed si a Titio petas, tuos libros tuasve membranas esse, nec impensam scripturam solvere paratus sis, poterit se Titius defendere per exceptionem doli mali, utique si bona fide earum chartarum membranarumque possessionem nuncius est.*

39. Written characters, although of gold, accede to the paper or parchment on which they are written, just as whatever is built on, or sown in, the soil, accedes to the soil. And therefore if Titius has written a poem, a history, or an oration, on your paper or parchment, you, and not Titius, will be the owner of the written paper. But if you claim your books or parchments from Titius, and refuse to defray the cost of the writing, then Titius can defend himself by an exception of *dolus malus*; that is, if it was *bona fide* that he obtained possession of the papers or parchments.

Gal. ii. 77; D. xli. 1. 9. 1.

In this case the letters are inseparable from, and subordinate to, the substance on which they are written, and become at once the property of the owner of that substance.

34. *Si quis in aliena tabula pinxit, quidam putant tabulum picture cedere: alius videtur picture, qualiscumque sit, tabula cedere. Sed nobis videtur melius esse, tabulum picture cedere: ridiculum est enim, picturam Apelles vel Parrhasii in accessionem vilissime tabulis cedere. Unde si a domino*

34. If a person has painted on the tablet of another, some think that the tablet accedes to the picture, others that the picture, of whatever quality it may be, accedes to the tablet. It seems to us the better opinion, that the tablet should accede to the picture; for it is ridiculous that a painting of Apelles or Parrhasius should be but the accessory
of a thoroughly worthless tablet. But if the owner of the tablet is in possession of the picture, the painter, should he claim it from him, but refuse to pay the value of the tablet, may be repelled by an exception of dolus malus. If the painter is in possession of the picture, the law permits the owner of the tablet to bring a utilis actio against him; and in this case if the owner of the tablet does not pay the cost of the picture, he may also be repelled by an exception of dolus malus; that is, if the painter obtained possession bona fide. For it is clear that if the tablet has been stolen, whether by the painter or any one else, the owner of the tablet may bring an action of theft.

Gal. ii. 78; D. xii. 1. 9. 2.

As written characters belong to the owner of the substance on which they are written, it would seem to follow that a painting also would belong to the owner of the substance on which it was painted; and Paul (D. vi. 1. 23. 3) decides that it does, saying that the painting could not exist without the substance on which it was painted, and therefore acceded to it. Gaius, whose opinion is adopted in the text, treats the opposite view as settled law, but says he knows of no sufficient reason why there should be this exception to the rule. The owner of the tablet or substance, on which the painting was painted, had, however, in one way something of the rights of an owner; for if the painter was in possession of the painting, the owner of the tablet was not left only to a personal action for the value of the board, but could claim the board itself. The action by which he did so was termed utilis, because it was only an equitable method of protecting him, the pretor allowing him to assert fictitiously that he was the owner. (See Introd. sec. 106.) The direct legal power of claiming the tablet (vindicatio recta) was in the painter whose property the tablet had become; but the former owner of the tablet was allowed still to treat it as his, in order to compel the painter to pay its value. If, when the actio utilis was brought, the painter paid the value of the tablet, the right of action was at an end, and the owner of the tablet could not get possession of the picture by offering to pay its cost.

Consequens est ut utilis actio, &c. It would not follow from the painter possessing that the owner of the tablet should have a real action of any kind. On the contrary, it was an exception that then he should have one. Therefore consequens must be taken as meaning ‘in accordance with the principles of law,’ or the sentence must be taken as meaning, ‘If the painter is in possession,’ this circumstance places the owner of the tablet in such a hard position that it is thought right he should have a
utilis actio. The word used in the Digest is not consequens but conveniens.

35. Si quis a non domino, quem dominum esse crederet, bona fide fundum emerit vel ex donacione aliaque qua justa causa egue bona fide acceperit: naturali ratione placuit, fructus, quos percepit, ejus esse pro cultura et cura. Et ideo si postea dominus supervenerit et fundum vindicet, de fructibus ab eo consumptis agere non potest. Ei vero, qui sciens alienum fundum possederit, non idem concessum est. Itaque cum fundo etiam fructus, licet consumpti sint, cogitur restituere.

36. Is, ad quem ususfructus fundi pertinet, non aliter fructuum dominus efficitur, quam si eos ipse perceperit. Et ideo licet maturis fructibus, nonandum tamen percepsit, decesserit, ad heredem ejus non per-

35. If any one has bona fide purchased land from another, whom he believed to be the true owner, when in fact he was not, or has bona fide acquired it from such a person by gift or by any other good title, natural reason demands that the fruits which he has gathered shall be his in return for his care and culture. And therefore, if the real owner afterwards appears and claims his land, he can have no action for fruits which the possessor has consumed. But the same allowance is not made to him who has knowingly been in possession of another's estate; and therefore he is compelled to restore, together with the lands, all the fruits, although they may have been consumed.

D. xii. 1. 48; D. xxii. 1. 45.

Justinian now passes to the interest of a bona fide possessor and a usufructuary in the fruits of land, a subject to which he is led by having spoken of other ways in which the interest of the owner of the soil was limited.

A person would be said to possess bona fide and ex justa causa who had received a thing from a person he believed to be the owner in any method by which ownership could legally pass. (See note on Tit. 6. 10.)

As long as the fruits still adhered to the soil, that is, were still ungathered, they belonged to the owner of the soil. If gathered, but not consumed, they belonged to the bona fide possessor as against every one except the owner of the soil. When the owner of the soil claimed them, they became his, for they had only been the property of the bona fide possessor interim (D. xii. 1. 48), that is, provisionally; but if they had been consumed, the owner of the soil could not recover their value from the bona fide possessor. The mala fide possessor, on the contrary, was obliged to give the value even of those that were consumed (restituere fructus consumptos).

There seems little doubt that the interest of the bona fide possessor extended over all the fruits of the land, and not only over those produced by his cultivation and care (see D. xii. 1. 48), although Pomponius (D. xxii. 1. 45) seems to limit it to the latter.

36. The usufructuary of land does not become owner of the fruits until he has himself gathered them; and therefore, if he should die while the fruits, although ripe, are yet ungathered, they do not belong to his heir, but are
tinent, sed domino proprietatis adjudicatur. Eadem fere et de colono dicuntur.

The interest of the usufructuary has a special Title (Tit. 4) devoted to it, and all remarks upon it may be reserved till we arrive at that Title.

Eadem fere. The heirs of the colonus (here used for any person farming land let to him) could gather fruits not gathered by him, for his rights did not perish with him; but the ungathered fruits were legally the property of the owner, and the farmer had to sue through him if they were taken away. (D. xix. 2. 60. 5; C. iv. 65. 10.)

87. In pecudum fructu etiam fetus est, sicut lac et pilus et lana: itaque agni et hædi et vituli et equuli statim naturali jure dominii sunt fructuarii. Partus vero ancillae in fructu non est, itaque ad dominum proprietatis pertinet; absurdu-dum enim videbatur, hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparavit. 87. In the fruits of animals are included their young, as well as their milk, hair, and wool; and therefore lambs, kids, calves, and colts, immediately on their birth become, by the law of nature, the property of the usufructuary; but the offspring of a female slave is not reckoned among fruits, but belongs to the owner of the property. For it seemed absurd that man should be reckoned among fruits, when it is for man's benefit that all fruits are provided by nature.

D. xxii. 1. 28.

Ulpian gives as a reason for the children of slaves not being in fructu, that non temere ancillae ejus rei causa comparantur, ut pariant. (D. v. 3. 27.) There were, however, many animals, cows or mares for instance, used for draught, that could not be said to be expressly destined to bear offspring, and yet their offspring was in fructu.

38. Sed si gregis usumfructum quis habeat, in locum demortuorum capitiæm ex fetu fructuarius summis-tère debet, ut et Juliano visum est, et in vinearum demortuorum vel arborum locum alias debet substi-tuere. Recte enim coloré debet et quasi bonus paterfamilias uti. 88. The usufructuary of a flock ought to replace any of the flock that may happen to die, by supplying the deficiency out of the young, as Julian too was of opinion. So, too, the usufructuary ought to supply the place of dead vines or trees. For he ought to cultivate with care, and to use everything as a good paterfamilias would use it.

This paragraph relates entirely to the subject of Title 4.

39. Theseaus, quos quis in suo loco invenerit, divus Hadrianus, naturalem equitatem secutus, ei concessit, qui invenerit. Idemque statuit, si quis in sacro aut in religioso loco fortuito casu invenerit. At si quis in alieno loco non data ad hoc opera, sed fortuito invenerit, dimi-

39. The Emperor Hadrian, in accordance with natural equity, allowed any treasure found by a man in his own land to belong to the finder, as also any treasure found by chance in a sacred or religious place. But if any one found treasure without any express search, but by mere chance, in a place
dium domino soli concessit. Et convenienter, ei quis in Cæsaris loco invenerit, dimidium inventoria, dimidium Cæsaris esse statuit. Cui conveniens est, et si quis in publico loco vel fiscali invenerit, dimidium ipsius esse, dimidium fisci vel civitatis. belonging to another, the emperor granted half to the finder and half to the proprietor of the soil; and on the same principle he ordered that, if anything was found in a place belonging to the emperor, half should belong to the finder, and half to the emperor. And consistently with this, if a man finds anything in a place belonging to a city or to the fiscus, half belongs to the finder, and half to the fiscus or the city.

D. xli. 1. 68. pr.; D. xlix. 14. 8. 10.

Thesaurus, says Paul (D. xli. 1. 31. 1), est vetus quaedam depositio pecuniae (that is, of anything valuable), cujus non estat memoria, ut jam dominum non habeat. Of course if it was known who placed it there, it was known to whom it belonged. But a treasure, though its depositor was unknown, was not considered exactly as a res nullius. The owner of the land in which it was found had always some interest in it. If he found it himself, it all belonged to him; if another person found it, the finder and the owner of the land divided it equally. When there was no owner of the land, as when the place was sacred or religious, the finder took it all. But no one was allowed to make the search for treasure an excuse for digging up tombs and sacred places, or for digging up other men's ground; and therefore it was only when the discovery was quite accidental, and the finder had made no search for it, that the treasure, or the half of it, as the case might be, was permitted to belong to him.

40. Per traditionem quoque jure naturali res nosis adquiruntur: nihil enim tam conveniens est naturali sequitatis, quam voluntatem domini, volentes rem suam in alium trans- ferre, ratam haberi. Et ideo cujus- cunque generis sit corporalis res, tradi potest et a domino tradita alienatur. Itaque stipendiaria quoque et tributaria præedia eodem modo alienantur. Vocantur autem stipendiaria et tributaria prædia, que in provinciis sunt, inter que nec non Italica prædia ex nostra constitutio- tione nulla differentia est.

40. Another mode of acquiring things according to natural law is tra- dition; for nothing is more conforma- ble to natural equity than that the wishes of a person, who is desirous to transfer his property to another, should be confirmed. And therefore corporeal things, of whatever kind, may be passed by tradition, and, when so passed by their owner, are made the property of another. In this way are alienated stipendiary and tributary lands, that is, lands in the provinces, between which and Italian lands there is now, by our constitution, no differ- ence.

D. xli. 1. 9. 8; C. vii. 31.

Before the property in a thing could be transferred from one person to another, it was necessary that the process should be complete in four points:—1. The person who transferred it must be the owner; 2. He must place the person to whom he trans- ferred it in legal possession of the thing; 3. He must transfer the
thing with intention to pass the property in it; 4. The person to whom it was transferred must receive it with intention to become the owner.

The placing another in legal possession of a thing was termed the *traditio* of that thing. In the simplest case, that of a portable moveable, the owner might really hand over the thing to the person who was to become its possessor; but in no case was it necessary that this should be done; what was necessary was that the party who was to receive it should have the thing in his power, and that the two parties should express, in any way whatever, the wish of the one to transfer, of the other to accept, the possession. The thing need not be touched; land, for instance, need not be entered on; but the person who was to be placed in possession must have the thing before him, so as to be able, by a physical act, to exercise power over it. (See SAVIGNY on Possession, Bk. ii. secs. 16 and 17.)

Property could not be transferred by mere agreement. (*Traditionibus et usuacipionibus dominia rerum, non nudis pactis, transferuntur.* C. ii. 3. 20.) The agreement was but the expression of the intention of the parties; and this was ineffectual unless it was accompanied by the party being placed in possession to whom the thing was to be transferred.

*Predia stipendiaria* were provincial lands belonging to the people, *tributaria* provincial lands belonging to the emperor. (GAI. ii. 21.) It will be remembered that so long as the distinction remained between Italian and provincial land the *Italicum solum* was a *res mancipi*, and could only be transferred by the peculiar form of *mancipatio*. (See Introd. sec. 59.) The distinction had long been obsolete, and was formally abolished by Justinian. (C. vii. 31.)

41. *Sed si quidem ex causa donationis aut dotis aut qualibet alia ex causa tradantur, sine dubio transferringuntur: vendite vero et tradite non aliter emptori adquiruntur, quam si is venditori pretium solverit vel alio modo ei satisfecerit, veluti promises aut pignore dato. Quod cavetur quidem etiam lege duodecim tabularum: tamen recte dicitur et jure gentium, id est jure naturali, id effici. Sed et si is, qui vendidit, fidelem emptorius secutus fuerit, dicendum est, statim rem emptoris fieri.*

41. If things are delivered by way of gift or as a *dos* or for any other purpose, the property in them is no doubt transferred. But things sold and delivered are not acquired by the buyer until he has paid the seller the price, or satisfied him in some way or other, as by procuring some third person who promises to pay, or by giving a pledge. And, although this is provided by a law of the Twelve Tables, yet it may be rightly said to spring from the law of nations, that is, the law of nature. But if the seller has accepted the credit of the buyer, the thing then becomes immediately the property of the buyer.

D. xviii. 1. 19. 58.

The seller would generally not have the intention to transfer the property until he received the price; but he might be content to look to another person for the payment of the price, or he might choose to accept the credit of the buyer instead of the price itself;
and if, in either of these cases, he intended to pass the property, it would pass at once, irrespectively of the price being paid. For the meaning of *expromissor*, see Bk. iii. Tit. 29. 3.

42. Nihil antem interest, utrum ipse dominus tradat alium rem, an voluntate ejus alius.

42. It is immaterial whether the owner delivers the thing himself or some one else by his desire.

D. xli. 1. 9. 4.

43. Qua ratione, si cui libera negotiorum administratio a domino permissa fuerit iaque ex his negotiis rem vendiderit et tradiderit, facit eam accipientis.

43. Hence, if any one is entrusted by an owner with the uncontrolled administration of his goods, and he sells and delivers anything which is a part of these goods, he passes the property in it to the person who receives the thing.

D. xli. 1. 9. 4.

By the will of the owner, the manager of the property is able to deal with it; and if he deals with it, the will of the owner is expressed through him.

44. Interdum etiam sine traditione nuda voluntas sufficit domini ad rem transferendam, velut si rem, quam tibi alius commodavit aut locavit aut apud te depositi, vendiderit tibi aut donaverit. Quamvis enim ex ea causa tibi eam non tradiderit, eo tamen ipso, quod patitur tueam esse, statim adquiritur tibi proprietatis perinde ac si eo nomine tradita fuisse.

44. Sometimes even the mere wish of the owner, without tradition, is sufficient to transfer the property in a thing, as when a person has lent or let to you anything, or deposited anything with you, and then afterwards sells or gives it to you. For, although he has not delivered it to you by way of sale or gift, yet by the mere fact of his consenting to its becoming yours, you instantly acquire the property in it, as fully as if it had actually been delivered to you for the express purpose of passing the property.

D. xlii. 1. 9. 5.

When the person to whom the property in the thing was transferred was already in physical possession of the thing, then, if the wishes of the parties to give and to receive the property in it were added to this, and the person who affected to give the property was the real owner, all the conditions of a transfer were complete. It made no difference what was their respective order in time. Generally the expression of will would precede the placing in possession, but not necessarily. When the person to whom the property in the thing was transferred had only the mere detention of the thing, that is, had it in his keeping and power as a hirer or depositary would have, but had not also the intention of dealing with it as an owner, all that was necessary to change this detention into possession and ownership was a change in the *animus* with which it was held. The intention to hold it as an owner was sufficiently shown by accepting the transfer of the property. The person, in like manner, who transferred the property, by doing so sufficiently showed his intention of placing the other in possession.
Thus the different elements of *traditio* were broken up and separated, not, as usual, united in a single act; and this is what is meant in the text by saying the property passes *sine traditio*

45. Item si quis merces in horreo depositas vendiderit, simul atque claves horrei tradiderit emptori, transfert proprietatem mercium ad emptorem.

45. So, too, any one, who has sold goods deposited in a warehouse, as soon as he has handed over the keys of the warehouse to the buyer, transfers to the buyer the property in the goods.

D. xli. 1. 9. 6.

Apparently, if we may judge from the statement of Papinian, it was also requisite that the key should be given *apud horreo*, at the warehouse (D. xviii. 1. 74). A person who was at the warehouse and had the key in his hand was in a position to exercise immediate power over the contents of the warehouse; the goods were in his custody, and he was thus placed in possession of them. The key was not symbolical, but was the means by which he was enabled to deal with the goods as an owner.


46. Nay, more, sometimes the intention of an owner, although directed only towards an uncertain person, transfers the property in a thing. For instance, when the pretors or consuls throw their largesses to the mob, they do not know what each person in the mob will get; but as it is their intention that each should have what he gets, they make what each gets immediately belong to him.

D. xli. 1. 9. 7.

47. Qua ratione verius esse videtur et si rem pro derelicto a domino habitam occupaverit quis, statim eum dominum effici. Pro derelicto aatem habetur, quod dominus ea mente abjecret ut id rerum suarum esse nollet, ideoque statim dominus esse desinit.

47. Accordingly, it is quite true to say that anything which is seized on, when it has been treated as abandoned by its owner, becomes immediately the property of the person who takes possession of it. And anything is considered as abandoned, which its owner has thrown away with the intention no longer to have it as a part of his property; for thereby it immediately ceases to belong to him.

D. xli. 7. 1.

It might seem as if the property in things abandoned was transferred, like that in things thrown to the mob, by the wish of the owner to transfer it to the person who should first take possession of it; but it is much more natural to consider, with the text, that the thing becomes a *res nullius* by being abandoned, and the property of the first occupant by being taken possession of.

48. Alia causa est earum rerum, quae in tempestaté maris levandae navis causa ejiciuntur. Ha enim

48. It is otherwise with respect to things thrown overboard in a storm, to lighten a vessel; for they remain
dominorum permanent, quia palam est, eas non eo animo ejici, quo quis eas habere non vult, sed quo magis cum ipsa navi periculum maris effugiat: qua de causa si quis eas fluctibus expulsa vel etiam in ipsa mari nactus lucrandi animo abstulerit, furtum committit. Nec longe discedere videntur ab his, quae de rheda currente, non intellegentibus dominis, cadunt.

the property of their owners; as it is evident that they are not thrown away through a wish to get rid of them, but in order that their owner, together with the ship itself, may more easily escape the dangers of the sea. Hence, any one who, with a view to profit himself by such things, takes them away when washed on shore, or when he has found them in the sea, is guilty of theft. And much the same may be said as to things which drop from a carriage in motion, without the knowledge of their owners.

D. xli. 1. 9. 8; D. xlvii. 48. 4.

A thing could not be considered as abandoned and made a res nullius unless its owner intended to cease to be its owner.

TTR. II. DE REBUS INCORPORALIBUS.

Quaedam præterea res corporales Certain things, again, are corporeal, sunt, quaedam incorporales. others incorporeal.

Gal. ii. 12; D. i. 8. 1. 1.

Justinian, after having spoken of the natural modes of acquiring property in things, returns in this Title to the division of things, and adds one more division, that of things corporeal and incorporeal, to the divisions given at the beginning of the last Title. Our senses tell us what things corporeal are: things incorporeal are rights, that is, fixed relations in which men stand to things or to other men, relations giving them power over things or claims against persons. And these rights are themselves the objects of rights, and thus fall under the definition of things. For instance, the right to walk over another man's land is said to be an incorporeal thing; for we may have a claim or right to have this right, exactly as, if the land belonged to us, we should have a right to have the land. These rights over things were termed jura in rem, and these jura in rem, some of the more important of which are treated of in this part of the Institutes, were almost exactly on the footing of 'res' in Roman law, and were the subjects of real actions equally with things corporeal. (See Introd. sec. 50.) This language of Roman law is rather in accordance with popular language and practical convenience than theoretically accurate. Strictly speaking, the ownership of a field is just as much incorporeal as the ownership of a right of way over a field, and in both cases the law only treats of the corporeal thing, the field, with reference to the incorporeal rights.

We can hardly speak of the possession of a thing incorporeal, but still the actual exercise of the right so much resembles the occupation and using of a corporeal thing, that the term quasi-possessio has been employed to denote the position of a person
who exercises the right without opposition, and exercises it as if he was its owner. As little can we speak of the *traditio* or delivery of a right; but just as *quasi-possessio* is used to express a position analogous to that of a *possessor*, so *quasi-traditio* is a term used to signify the placing of a person in this position.

1. Corporales eae sunt, quae sui natura tangi possunt: veluti fundus, homo, vestis, aurum, argentum et denique aliae res innumerabiles.

   1. Corporeal things are those which are by their nature tangible, as land, a slave, a garment, gold, silver, and other things innumerable.

   **GAL. ii. 18; D. i. 8. 1. 1.**

2. Incorporales autem sunt, quae tangi non possunt. Qualia sunt ea, quae in jure consistunt: sicut hereditas, usufructus, usus, obligationes quoquo modo contractae. Nec ad rem pertinet, quod in hereditate res corporales continentur: nam et fructus, qui ex fundo percipiuntur, corporales sunt et id, quod ex aliqua obligatione nobis debetur, plerumque corporale est, veluti fundus, homo, pecunia: nam ipsum jus hereditatis et ipsum jus utendi fruendi et ipsum jus obligationis incorporale est.

   2. Corporeal things are those which are not tangible. They are such as consist in a right, as an inheritance, a usufruct, a use, or obligations in whatever way contracted. Nor does it make any difference that things corporeal are contained in an inheritance; for fruits, gathered by the usufruituary, are corporeal; and that which is due to us by virtue of an obligation, is generally a corporeal thing, as a field, a slave, or money; while the right of inheritance, the right of usufruct, and the right of obligation, are incorporeal.

   **GAL. ii. 14; D. i. 8. 1. 1.**


   3. Among things incorporeal are the rights over estates, urban and rural, which are also called servitudes.

   **GAL. ii. 14; D. i. 8. 1. 1.**

In the last section it was said that usufruct, a personal servitude, was an incorporeal thing, and the same is now said of real or prædial servitudes. This is intended as an observation prelimary to the next three Titles, which treat of servitudes. By servitudes are meant certain portions or fragments of the right of ownership separated from the rest, and enjoyed by persons other than the owner of the thing itself. When the servitude was given to a particular person, it was said to be a personal servitude. When it was associated with the ownership of another thing, so that whoever was the owner of this other thing was the owner of the servitude, the servitude was said to be a real or prædial servitude; the latter term being used because it was indispensable that there should be an immovable thing (see paragraph 3 of next Title), in virtue of which the right given by the servitude was exercised; and the word *prædium*, being taken in a general sense, was used to denote this immovable. The thing over which the prædial servitude was exercised was also always an immovable. Things over which servitudes, whether personal or prædial, were exercised, were said to *serve* the person to whom or the thing to which the servitude was attached; and hence the terms *servitus*, *res serviens*,

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were employed, the thing in right of which the servitude was enjoyed being, in opposition, termed res dominans. (See Introd. sec. 64.)

No one could have a servitude over his own thing, nulli res sua servit. (D. viii. 2. 26.) For as he was the owner of all the portions into which the right of ownership was separable, he could not have a second right of ownership over any one portion separated from the rest. Again, as a servitude was the subtraction of some one portion of ownership, it did not have the effect of making the owner of the res servientes do any positive act; its force was either to make him undergo something, as that another should exercise a certain power over a thing of which he was owner, or to make him abstain from doing something which as owner of the thing he had power to do. Servitutum non ea natura est ut aliquid faciat quis, sed ut aliquid patiatur aut non faciat. (D. viii. 1. 15. 1.) Lastly, it may be observed that a prædial servitude was indivisible; the person who enjoyed the servitude could not break up this fragment of ownership into lesser fragments, but a usufruct could be divided.

Tr. III. DE SERVITUTIBUS.

Rusticorum prædiorum jura sunt hæc: iter, actus, via, aquæ ductus. Iter est jus eundi, ambulandi homini, non etiam jumentum agendi vel vehiculum: actus est jus agendi vel jumentum vel vehiculum. Itaque qui iter habet, actum non habet; qui actum habet, et iter habet ex quo uti potest etiam sine jumento. Via est jus eundi et agendi et ambulandi; nam et iter et actum in se via continet. Aquæ ductus est jus aquæ ducendæ per fundum alienum.

The servitudes of rural immoveables are, iter, actus, via, and aquæ ductus. Iter is the right of going or passing for a man, not of driving beasts or vehicles. Actus is the right of driving beasts or vehicles. So a man who has the right of passage simply has not the right of passage for beasts or vehicles; but if he has the latter right he has the former, and he may use the right of passage without having any beasts with him. Via is the right of going, of driving beasts or vehicles, and of walking; for the right of way includes the right of passage, and the right of passage for beasts or vehicles. Aquæ ductus is the right of conducting water through the land of another.

D. viii. 3. 1. pr.

For prædium there is no exact English equivalent. 'Estate' suffices when we are speaking of a prædium rusticum, but it is scarcely consonant with usage to speak of a house as an 'urban estate.' The French immeuble exactly corresponds to prædium, and, perhaps, by borrowing the term 'immoveable' we approach as nearly to prædium as the language will permit.

Prædial servitudes, that is, servitudes possessed over one immoveable in right of having another immoveable, were divided
into those of rural and urban immovable (prædia rustica et urbana). The distinction undoubtedly arose from the one kind being more common in the country, the other in the town. But the distinction, as it was practically understood, soon lost the traces of its origin; and a servitude was said to be that of a rural immoveable when it was one which affected the soil itself, and that of an urban immovable when it was one which affected the superficies, that is, anything raised upon the soil. Servitutes prædiorum alie in solo, alie in superficie consistunt. (D. viii. 1. 3.) If the servitude was one which affected the soil, and for the enjoyment of which the soil itself sufficed, as, for instance, the right to traverse another man's land, or to draw water from his spring, it made no difference where the land or the spring was situated. They might be in the heart of a city, and yet the servitude was one of a rural immovable. So, too, if the servitude was one which affected something built or placed on the soil, as, for instance, the right to place a beam in another man's building; although this building was in the country, the servitude was one of an urban immovable. In this paragraph and in paragraph 2, instances are given of servitudes of rural immovable. The object of the servitude iter was the right of passing across land on foot or horseback: iter est qua quis pedes vel eques commovere potest. (D. viii. 3. 12.) That of the servitude actus was the right of driving animals or vehicles across land: qui actum habet et pluvium ducere et jumenta agere potest. (D. viii. 3. 7. pr.) That of the servitude via was the right of using the road in any way whatever, as, for instance, of dragging stones or timber over it, which he could not do if he had only the actus (D. viii. 3. 7. pr.); and of having the road, in the absence of special agreement, of the width provided by the law of the Twelve Tables, that is, eight feet where it ran straight, and sixteen feet where it wound round to change its direction: vice latitudo ex lege Duodecim Tabularum in porrectum octo pedes habet; in anfractum, id est, ubi fluxum est, sedecim. (D. viii. 3. 8.) Of course the larger of these rights comprehended the smaller; if a person had the right of driving over land, he had the right of passing over it. A special agreement might indeed be made to the contrary; a person might, for instance, grant the right of driving beasts, but insist that the way should never be used except when beasts were driven.

1. Prædiorum urbanorum sunt servitutes, quæ edificiis inherent, ideo urbanorum prædiorum dictæ, quoniam edificia omnis urbana prædia appellantur, et si in villa sedificate sunt. Item prædiorum urbanorum servitutes sunt his: ut vicinus onera vicini sustineat; ut in parietem ejus liceat vicino tignum immittere; ut stilllicidium vel flumen recipiat quis in sēdes suas vel in

1. The servitudes of urban immovable are those which pertain to buildings, and they are said to be servitudes of urban immovable, because we term all edifices urban immovable, although really built in the country. Among these servitudes the following: that a person has to support the weight of the adjoining house; that a neighbour should have the right of inserting a beam into his neighbour's
The words *quaæ ædificiis inhaerent* in the text, are equivalent to the *in superficie consistunt* of Paul. (D. viii. 2. 20. pr.) The servitutes attach to some building raised on the soil.

*Onera vicini sustineat.* By this servitude a wall or pillar of the *res serviens* was obliged to support the weight of the *res dominans*. The owner of this wall or pillar, so long as he remained owner, was bound to keep it in good repair, so as to continue to support the weight safely. (D. viii. 5. 6. 2.) This was the only case where the owner of the *res serviens* had to do any positive act. But the owner of the wall, into which a beam was let by the servitute *tigni immittendi*, was not compelled to repair the wall, in order that the beam might rest there safely. (D. viii. 5. 8. 2.)

It is easy to understand what is meant by the servitutes *stillicidii vel fluminis recipiendi* and *altius non tollendi*. By the one the *res serviens* was made to receive the rain-water of the *res dominans*, by the other the *res serviens* was prohibited from being raised above the *res dominans*. But in the text we have the servitute *stillicidii vel fluminis non recipiendi*, and in the passage of the Digest (viii. 2. 2), from which much of the text is borrowed, we read of a servitute *altius tollendi*; and it is not very easy to understand what these servitutes were. Theophilus, in his paraphrase of this section, thus explains the former: *Aut tu jus hujusmodi (i.e. stillicidia tua in meæ ædes projiciendi) habebas in ædes meas; et rogavi te no stillicidia tua aut canales in domum vel aream meas projiceres.* Thus it would appear that the servitute *non recipiendi* was an extinction of a pre-existent servitute *recipiendi* made in favour of the owner of the *res serviens*. So, too, the servitute *altius tollendi* is explained to mean the allowing the house of a neighbour to be built above ours; so that the neighbour who was previously under a servitude, or at any rate under an obligation, *non altius tollendi*, by the creation of what may be called a counter-servitude, does away with the impediment to his building above our house. If it was really a servitude; as we should certainly suppose from the language of Theophilus, that was extinguished or nullified by this new counter-servitude, it seems scarcely natural that this should not be given among the modes of ending a servitude, and still more, that the usual language of the jurists with respect to the extinction of a servitude should be departed from. The ordinary phrase was, that the thing affected, the *res serviens*, was freed, *res liberatur*, and it seems a very cumbersome mode of effecting the *liberatio rei* to create a new servitute, when the object would have been at once
accomplished by merely surrendering the existing servitude to the owner of the res serviens. The commentators are therefore driven to hold that the right previously existing, that, namely, of having our water flow into our neighbour's house, or of having our neighbour's house kept from exceeding a given height, was not a servitude, but was given by law. Positive enactments, such as we read of in Tac. Annal. xv. 43; Suet. Aug. 89; D. xxxix. 1. 1. 17, may have decided that adjoining houses should, in particular places, for the mutual advantage of the owners, be of the same level or pour off their water on to the adjoining house, while those persons who were intended to be benefited might still forego this advantage, if they pleased to allow of a servitude being created to do away with the effect of the enactment. It must, however, be confessed, that no one who reads the passages in which enactments for the regulation of buildings are mentioned, would suppose that individuals were ever allowed to infringe them by the mere permission of their neighbours. All that we can be quite sure of is that these servitudes, which were the contraries of other servitudes, were constituted for the benefit of the owner of a thing that previously had been under some disadvantage.

It is to be observed that words are sometimes used to express servitudes which seem proper to the owner of the res dominans, not to the owner of the res serviens. Thus, if the above explanation is correct, the servitus tollendi means the servitus patiendi vicinum tollere (see Bk. iv. Tit. 6. 2), and what is termed in the text, as it would seem more properly, the servitus stillicidii recepiendi, is termed in the Digest (viii. 2. 2) the servitus stillicidii avertendi.

The right of view was protected in several ways. The servitude ne luminibus officiatur prevented our neighbour from doing anything, whether by building, planting trees, or by any other means, whereby the light was in any way, however slightly, intercepted from our house. The servitude ne prospectui offensatur prevented our neighbour from doing anything that would make the view from our house less pleasant and open (D. viii. 2. 15, 17. pr.); and the jus luminum forced our neighbour in building a wall to leave apertures through which we could look beyond. (D. viii. 2. 4. 40.)

2. In rusticorum prediorum servituribus quidam computari recte putant aque haustum, pecoris ad aquam adpulsam, jussi passendi, calcijs coquentes, harensi fodiendae.

2. Some think that among servitudes of rural immovablees are rightly included the right of drawing water, of watering cattle, of feeding cattle, of burning lime, of digging sand.

D. viii. 8. 1. 1.

There are many servitudes, both of rural and of urban immovablees, mentioned in the Digest, besides those given as examples in the Institutes.

3. Ideo autem ha servitutes 3. These servitudes are called the prediorum appellantur, quoniam servitudes of immovablees, because
they cannot be constituted without im-
moveables. For no one can acquire a
servitude of a rural or urban immo-
vable, unless he has an immovable be-
longing to him; nor can any one owe
such a servitude unless he has an im-
moveable belonging to him.

D. viii. 4. 1. 1.

The nature of most servitudes of urban immovable demanded
that the immovable over which, and the immovable in right of
which, the servitude was exercised, should be contiguous; but when
the servitude was one of rural immoveables, the præedia need not
necessarily be near together. Still, however, a servitude was not
permitted to exist which was useless to its owner; a person could
not have a right of way, for instance, over the land of another if
he was prevented from using the way by land, over which he had
no servitude, lying between his land and that over which the ser-
vitute was to be exercised. (D. viii. 1. 14. 2.)

There was another difference between the servitudes of rural
and urban immovable. The latter were, for the most part, used
continuously, the former only at times. The beam, for instance,
always rested in the wall; there was no moment in which the
owner of the res servium was not prohibited from blocking up his
neighbour’s lights. But the way was not always being used; nor
were cattle always being watered (D. viii. 1. 14). From this diffe-
ence in their nature, there arises an important difference in the
modes in which these two kinds of servitudes might be lost by not
being used. A continuous servitude could be lost by non-user
only when the servient owner did some act inconsistent with the
existence of that servitude, and the dominant owner for a certain
time acquiesced in the act or neglected to assert his rights. A
discontinuous servitude, on the other hand, was lost if a certain
time elapsed during which the dominant owner never did the act
for the doing of which the servitude was created. (D. viii. 2. 20.)

4. Si quis velit vicino aliquod jus
constituere, pactio nibus atque stipul-
lationibus id efficere debet. Potest
etiam in testamento quis heredem
suum damnare, ne altius sedes tollat,
ne luminibus sedium vicini officiat:
vel ut patiatur eum tignum in priet-
tem immittere vel stillicidium ha-
bere: vel ut patiatur eum per fun-
dum ire, agere aquamve ex eo
ducere.

4. If any one wishes to create a
right of this kind in favour of his
neighbour, he must do so by agree-
ments and stipulations. A person can
also, by testament, bind his heir not
to raise his house higher lest he ob-
struct a neighbour’s lights, to permit
a neighbour to insert a beam into his
wall, or to receive the water from a
neighbour’s roof; or, again, he may
oblige his heir to allow a neighbour
to go across his land, or to drive
beasts or vehicles, or to conduct water
across it.

GAI. ii. 81; D. viii. 4. 16.

Gaius tells us (ii. 29), that jura prædiorum rusticorum were
among res mancipi (see Introd. sec. 59), while jura prædiorum.
urbanorum were not, and that the former were constituted by mancipatio; the latter, as well as personal servitudes, were constituted by the process termed in jure cessio. (See introductory note to this Book.) But these modes of constituting servitudes were only applicable to the solum Italicum: in the provincial lands, where there was no legal ownership at all, no ownership of servitudes could be given. But Gaius says, that if any one wished to create a servitude over provincial prædia, he could effect it pactiombus et stipulatiombus, using the words of the text. The parties agreed to constitute the servitude, and this agreement (pactio) was generally, perhaps almost always, followed by a stipulation or solemn contract (see Introd. sec. 83), by which the person who permitted the servitude to be constituted over his prædium, bound himself to allow the exercise of the right, by subjecting himself to a penalty in case of refusal. (See Theophil. Paraphrase of Text.) When the right had been once exercised, and the owner of the servitude had thus the quasi-possessio of the servitude, the prætor secured him in the enjoyment of his right by granting him possessory interdicts (see Introd. sec. 107, and note on introductory section of Title 6 of this Book), and also permitted him, if the servitude afterwards passed out of his quasi-possessio, to bring an action to claim it, called the actio Publi-ciana, by which a bona fide possessor was allowed to represent himself fictitiously as a dominus, and to claim (vindicare) a thing as if he were the owner. (Bk. iv. Tit. 6. 4; D. vi. 2. 11. 1.) In all probability the same mode of constituting servitudes obtained also with regard to the solum Italicum; although there were proper and peculiar modes of constituting servitudes over prædia Italica, yet if an agreement and stipulation were followed by quasi-possessio, the prætor would protect the quasi-possessor. And hence it was said that servitudes were constituted jure prætorio and were maintained tuitione prætoris.

Modern writers on Roman law are much divided in opinion whether servitudes were really constituted pactiombus atque stipulatiombus, by agreements and stipulations alone, or whether we are always to understand that, to perfect the title, what is termed quasi-traditio was necessary. That is, whether, as traditio was necessary to transfer the property in a corporeal thing, so it was necessary, in order to transfer the property in an incorporeal thing, that the person to whom it was transferred should be placed in the legal quasi-possession of his right. If the servitude was a positive one, it is very easy to see how this quasi-possession could be established; for directly the right was exercised with the animus possidendi, and permitted to be so exercised by the owner of the res serviens, the person in favour of whom the servitude was constituted would have the quasi-possession. But when the servitude was a negative one, when the owner of the res serviens was merely bound not to do something, the only evident mode by which possession could be said to be gained was, when the owner of the
res dominans successfully resisted an attempt of the owner of the
res serviens to do the thing which he was bound by the servitude
to do. But as the exercise of the right given by a positive
servitude was an act evident and cognisable by all whom it con-
cerned, it is with regard to positive servitudes that the question is
principally debated, whether the exercise of the right was an indis-
pensable part of the right being constituted. On the whole, it seems
the better opinion that quasi-tradition was a necessary part of the
constitution of a servitude. Without quasi-tradition the benefit of
the interdicts could not be claimed. (D. viii. 1. 20.)

Mancipation and in jure cessio were quite obsolete in the time
of Justinian. We have two modes given in the text by which ser-
vidudes might be constituted under his legislation: (1) pactio
atque stipulationibus, i.e. agreements, whether followed or not by a
stipulation, and (2) testamento. When given testamento, a servitude
might be given as well directly to the legatee as by condemning
the heir to transfer it to him, both modes, in the time of Justinian,
having exactly the same effect. To these modes must be added:
3. That adjudicatione, when a judge awarded the property in a
servitude under the actions familiae eriscundae and commun
dividundo. (See Introd. sec. 103; D. x. 2. 22. 3.) 4. That of
reserving the servitude in making a traditio of the rest of the
property, when it was in fact constituted by having all the other
jura in rem separated from it, instead of, as usual, being itself
separated from the rest. 5. Lastly, the possessor who had had
a long quasi-possession of a servitude was protected in it. The
usucapion of servitudes, which perhaps existed previously, was for-
bidden by the lex Scribonia, passed probably in the time of Tibe-
rus. (D. xli. 3. 4. 29.) But a long bona fide possession was
protected by pretorian actions and interdicts. Traditio plane et
patientia servitutum inducit officium praetorii. (D. viii. 3. 1, 2;
D. viii. 3. 12.) This, perhaps, principally applied to servitudes
urbanorum praediorum, for these only were capable of a continuous
exercise (servitutes quae in superficie consistunt, possessione reti-
nentur). (D. viii. 2. 20. pr.) But there were particular servitudes
rusticorum praediorum, long usage of which gave rights which were
protected. Among these were the jus aquae ducendae, the
jus itineris, and the jus actus. The possessor had to show that
his possession had been neither vi, clam, nor precario; but had not
to show any good title for possession. (D. viii. 5. 10. pr.) What

was the length of time requisite for the possessor to have exercised
the right is not certain, although it may be conjectured to have
been the same as for the longi temporis possessio of provincial lands,
i.e. ten years if the parties were in the same province, and twenty
if the parties were in different provinces. If land was acquired
by usucapion, the servitudes that went with it were also acquired
in the same way (D. xli. 3. 10. 1), and if a servitude had been lost
by non-usage, it could, or at any rate some servitudes could, be
regained by two years' usucapion. (Paul. Sent. i. 27. 2.)
Tit. IV. DE USUFRUCTU.

Ususfructus est jus alienis rebus utendifrundi salva rerum substantia. Est enim jus in corpore: quo sublato et ipsum tolli necesse est.

Usufruct is the right to use and enjoy things belonging to others, provided that the substance of the things used remains unimpaired. For it is a right over something corporeal; and if this thing perishes, the usufruct itself necessarily perishes also.

D. vii. 1. 1, 2.

We now pass to personal servitudes, those, namely, which are given to a person simply as a person, and not as the owner of a particular house or piece of land. In personal as in predial servitudes one portion of the dominium is detached from the rest, but this portion is made up of many and indefinite rights, not, as in predial servitudes, of a single and definite right. Personal servitudes also differed from real in being applicable to moveables as well as to immovables; and the personal servitude ususfructus was divisible, that is, some of the fruits included in the servitude might be parted with, although the servitude usus was, like real servitudes, indivisible.

The person to whom the ususfructus was given had two rights united; he had the jus utendi, that is, the right of making every possible use of the thing apart from consuming it or from taking the fruits of it, as, for instance, the right of living in a house or employing beasts of burden; and he had also the jus fruendi, the right of taking all the fruits of the thing over which the servitude was constituted. The definition of fructus is quiequid in fundo nascitur (D. vii. 1. 59. 1), that is, the ordinary produce, but not accidental accessions or augmentations, such as a treasure found (D. xxiv. 3. 7. 12) or islands formed in a river.

He might sell, or let, or give his right of taking the fruits to another, and the profits he thence derived were termed his fructus civiles. (D. vii. 1. 12. 2.) It was only such of the fructus as were actually taken or gathered by him, or those acting under him, that belonged to him; and no fruits which were not gathered at the time of his death passed to his heir. (See Tit. 1. 36.) He was obliged to give security, on entering on the exercise of his right, that he would use his right as a good paterfamilias, and give up, at the time when his right expired, the possession of the thing. (D. vii. 9. 1.) We have had an instance of what was meant by using his right as a good paterfamilias in paragr. 38 of Tit. 1, where it is said that he is bound to replace dead sheep and dead trees. He was also bound not to alter the nature of the thing over which the right extended; he could not, for instance, build on land unbuilt on, or change the use to which land was specially destined. (D. vii. 1. 7. 1; D. vii. 1. 13. 4.) And it is with reference to this
that the words *salva rerum substantia*, in the text, are sometimes understood, so that the sentence would mean, usufruct is the right of using and taking the fruits of things belonging to another, but so as not to alter the substance. Ulpian (Reg. 24. 26) certainly uses the words *salva rerum substantia* in a sense very similar; but the concluding words of the section make it more natural to understand *salva rerum substantia* as referring here to the duration of the usufruct. It lasts as long as the thing over which it is constituted remains unaltered; for if the thing perishes, the usufruct perishes. The two sentences of this section are taken without alteration from the Digest, but are from different authors, the former being from Paul, the latter from Celsus. (D. vii. 1. 1, 2.) Very probably Paul did not use the words *salva rerum substantia* with reference to the duration of the servitudes; but the compilers of the Institutes saw that, if they were used in this sense, the two sentences would cohere together.

1. *Ususfructus a propriitate separationem recipit idque pluribus modis accidit. Ut ece si quis aliqui usumfructum legaverit; nam heres nudam habet proprietatem, legatarius usumfructum: et contra si fundum legaverit deducto usufructu, legatarius nudam habet proprietatem, heres vero usumfructum: item alii usumfructum, alii deducto eo fundum legare potest. Sine testamento vero si quis velit alii usumfructum constituere, pactis onibus et stipulationibus id efficer debet. Ne tamen in universum inutilis essent proprietates semper abscedente usufructu, placuit certis modis extinguui usumfructum et ad proprietatem reverti.*

1. The usufruct may be detached from the property; and this separation takes place in many ways: for example, if the usufruct is given to any one as a legacy; for the heir has then the bare ownership, and the legatee has the usufruct; conversely, if the estate is given as a legacy, subject to the deduction of the usufruct, the legatee has the bare ownership, and the heir has the usufruct. Again, the usufruct may be given as a legacy to one person, and the land minus this usufruct may be given to another. If any one wishes to constitute a usufruct otherwise than by testament, he must effect this by pacts and stipulations. But, lest the property should be rendered wholly profitless by the usufruct being for ever detached, it has been thought right that there should be certain ways in which a usufruct may become extinguished, and be again absorbed in the property.

D. vii. 1. 6. pr.; D. xxxii. 2. 19. pr.; D. vii. 1. 8. pr. and 2; Gai. ii. 81.

Besides the other modes of constituting servitudes mentioned in the note to the fourth paragraph of the last Title we may in the case of usufructs notice that a usufruct was, at least in one instance, constituted *lege*, i.e. by express enactment. It will be found from the first paragraph of the ninth Title of this Book, that under Justinian's legislation the father acquired the use of his son's *peculium*. We see from the text that a testator gave or reserved a usufruct by the mere wording of his will. When the dealing was *inter vivos*, the transferor gave the usufruct by agreement, or else reserved it in making a *traditio* of the *nuda proprietas*.

It will be observed that, in putting the third case of gift of
usufruct by testament, that, namely, in which the usufruct is
given to one legatee, the \textit{nuda proprietas} to another, the gift to
the latter is expressed by the words \textit{deducto eo} (i.e. \textit{usufructu})
\textit{fundum}. The Digest (xxxiii. 2. 19) explains why the words \textit{de-
ducto eo} should in such a case be carefully added to a gift of the
\textit{fundus}; for if they were not, the second legatee would be treated
as having the \textit{nuda proprietas}, and also as having a joint interest
in the usufruct with the first legatee.

2. Constituitur autem usufructus
non tantum in fundo et sedibus, ve-
rum etiam in servis et jumentis
ceterisque rebus, exceptis his, que
ipso usu consumuntur: nam eae
neque naturali ratione neque civili
recipient usufructum. Quo nume-
ro sunt vinum, oleum, frumentu-
tum, vestimenta. Quibus proxima
est pecunia numerata: namque in
ipso usu adata permutazione quo-
dammodo exiguitor. Sed utilitati-
tis causa senatus censuit, posse etiam
earum rerum usufructum consti-
tui, ut tamen eo nomine heredi util-
liter caveatur. Itaque si pecunie
usufructus legatus sit, ita datur
legatario, ut ejus fiat, et legatarius
satisdat heredi de tanta pecunia re-
stituenda, si morietur aut capite
minuetur. Cetera quaque res ita
traduntur legatario, ut ejus fiat:
sed estimatis his satisdatur, ut, si
morietur aut capite minuetur, tanta
pecunia restitutur, quanti eae fuer-
rint estimatae. Ergo senatus non
feci quidem earum rerum usu-
fructum (nee enim poterat), sed per
cautionem quasi usufructum con-
stituit.

2. A usufruct may be constituted
not only of lands and buildings, but
also of slaves, of beasts of burden, and
everything else except things which are
consumed by being used, for these are
susceptible of a usufruct neither by
natural nor by civil law. Among such
things are wine, oil, wheat, garments;
and of a like nature is coined money;
for it, too, is in a manner consumed in
the very use made of it, through con-
tinually passing from hand to hand.
But the senate, thinking such a measure
would be useful, has enacted that a
usufruct even of these things may be
constituted, if only sufficient security is
given to the heir; and therefore if the
usufruct of money is given to a legatee,
the money is considered to be given to
him in complete ownership; but he has
to give security to the heir for the re-
payment of an equal sum in the event
of his death or his undergoing a \textit{capitis
diminutio}. Other things, too, of the
same kind are delivered to the legatee
so as to become his property; but their
value is estimated and security is given
for the payment of the amount at which
they are valued, in the event of the
legatee dying or undergoing a \textit{capitis
diminutio}. The senate has not then,
to speak strictly, created a usufruct of
these things, for that was impossible,
but, by requiring security, has esta-
blished a right analogous to a usufruct.

D. vii. 1. 8. 1; D. vii. 5. 1, 2, 8, 7.

Properly only things \textit{quae in usu non consumuntur} could be
the subject of a servitude which consisted in using things only for
a time; but as things \textit{quae in usu consumuntur}, things that perish
in the using, are things that may for the most part be easily
replaced by similar things of an equal quantity and quality, the
\textit{senatusconsultum} referred to in the text (the date of which is
uncertain, but is probably not later than Augustus) permitted
that things \textit{quae in usu consumuntur} should be made subject to a
kind of usufruct by which they might be consumed at once, and
then, on an event occurring by which a real usufruct would have
expired, that is, the death or *capitis deminutio* of the usufructuary, they were to be replaced by similar things, or, what effected the same object in a different way, their pecuniary value was estimated on the commencement of the quasi-usufruct, as it is termed, and paid at its expiration. Ulpian gives the following as the terms of the *senatusconsultum*: *Ut omnium rerum quas in cujusque patrimonio esse constaret, usufructus legari possit.* (D. vii. 5. 1.)

It will be observed that the text includes garments, *vestimenta*, among things of which there was only a quasi-usufruct, whereas the Digest twice speaks of them as things of which there was a real usufruct. (D. vii. 1. 15. 4; vii. 9. 9. 3.) They were, in fact, one or the other according as it was the garments or their value that was to be given to the owner of the *nuda proprietas* at the end of the usufruct, and this might depend on the intention of the parties or the nature of the materials.

*Satisdatur.* The usufructuary not only guaranteed by a stipulation the replacement of the things or the payment of their value, but he procured a surety (*fidejussor*) to guarantee it also. D. vii. 5. 8.

8. Finitur autem usufructus morte fructuariae et duabus capitis deminutionibus, maxima et media, et non utendo per modum et tempus. Quae omnia nostra statuit constitutio. Item finitur usufructus, si domino proprietatis ab usufructuario cedatur (nam extraneo cedendo nihil agitur): vel ex contrario si fructuarium proprietatem rei acquisierit, quae res consolidatio appella tur. Eo amplius constat, si sedes incendio consumptae fuerint vel etiam terre motu aut vito suo corruerint, extingui usufructum et ne aere quem usumfructum debierit.

8. The usufruct is terminated by the death of the usufructuary, by two kinds of *capitis deminutio*, namely, the greatest and the middle, and also by not being used according to the manner and during the time fixed; all which points have been decided by our constitution. The usufruct is also terminated if the usufructuary surrenders it to the owner of the property (a cession to a stranger would not have this effect); or, conversely, by the usufructuary acquiring the property, which is called consolidation. Again, if a building is consumed by fire, or thrown down by an earthquake, or falls through decay, the usufruct of it is necessarily extinguished, nor does there remain any usufruct due even of the soil on which it stood.

C. iii. 38. 16. pr. and 1, 2; Gal. ii. 30.

The text points out five ways in which the usufruct would terminate. 1. By the death or *capitis deminutio* of the usufructuary. If the usufruct belonged to a city or corporation which could not die, it lasted for a hundred years, as being the extreme length of the duration of human life. (D. vii. 1. 56.) Previously to Justinian the *minima capitis deminutio* extinguished a usufruct (Paul. Sent. iii. 6. 29), because the person who underwent it was not the same person in the eyes of the law after undergoing it as he was before; he commenced a new existence. Justinian altered the law in this respect (C. iii. 33. 16), and he also decided
a question which had divided the jurists, whether a usufruct
acquired by a slave or a filiusfamilias terminated on the death of
the slave, or death or capitis diminutio of the son, or whether it
remained for the benefit of the master or father. He decided that
it should remain until the master's or father's natural or civil death,
and further, that in the case of a filiusfamilias, it should also con-
tinue for his benefit after his father's death; so that the father had
the usufruct for his life, and then the son, if he survived the
father, had it for his life. (C. iii. 33. 16, 17.)

2. Non utendo per modum et tempus. Secondly, the usu-
fructuary might lose the usufruct by not using it in the way agreed
on by the parties during the time fixed by law. The usufructuary
might, for instance, have the use of a fundus for the summer, and
if he used it only during the winter he would not use the usufruct
of the fundus in the way it was given him, and this was equivalent
to not using it at all; and if he did not exercise his right at any
period previous to the time fixed by law as that when the usufruct
became extinct by non-usage, his right was gone. This time was,
under the old law, one year when the usufruct affected moveables,
and two years when the usufruct affected immovable. If this
period elapsed without the right being exercised, the owner of the
nuda proprietas gained the usufruct by usucapion. Justinian
altered this by fixing three years as the time for moveables, and
ten or twenty years for immovable, according as the person
affected was present or absent. (See Tit. 6. 1.) The usufructuary
was placed so far in the position of an owner of a thing, that it
required the same length of time to make him lose the usufruct
as it did to make the owner lose the property. Hence it is said
in the Code (iii. 33. 16. 1) that he was not to lose the usufruct
unless talis exceptio (i.e. of usucapion) usufructuario opponatur,
quae etiam si dominium vindicaret posset eum presentem vel absentem
excludere.

Non-usage and capitis diminutio only affected rights already
commenced; and in order to avoid their effects the usufruct was
often given by legacy in singulos annos, vel menses, vel dies. As
a new usufruct thus began each year, month, or day, there could be
no non-usage for a longer time than the duration of each usufruct,
and capitis diminutio only affected the usufruct existing at the
time it was undergone. (D. vii. 4. 1. 3, 28.)

3. Si domino cedatur. Thirdly, usufruct was lost if it was
surrendered to the owner of the nuda proprietas. The word
cedere belongs, in the corresponding passage of Gaius, to the in
jure cessio, the fictitious suit by which personal servitutes were
given up in the time of Gaius. This mode of giving up servitutes
to the dominus being obsolete, less technical words would be more
appropriate in the text. The usufructuary could not transfer the
usufruct to another, because the usufruct attached to him personally,
and was to terminate by his death or capitis diminutio, and not
by that of a stranger. He could allow another to exercise his right
of taking the fruits until he himself died or lost the servitude, but this did not make that person the owner of the usufruct.

4, 5. The two other modes by which a usufruct might be lost, viz. (4) consolidatio, when the usufruct was extinguished,quia res sua nemini servit, and (5) the thing being consumed, that is, either really perishing, or having its substantia altered, need no explanation.

Of course, if a usufruct was made conditionally, or for a limited time, it expired when the condition was accomplished or the time ended.

Apart from the modes of extinction by death and capitis diminutio peculiar to ususfructus and usus, servitudes generally were, in the time of Justinian, extinguished in much the same way as the particular servitude of usufruct, viz.: 1. By the destruction of the thing—the res dominans or the res serviens. 2. By the owner of the res serviens becoming owner of the res dominans, or, in case of personal servitudes, by the usufructuary or usuary acquiring the remainder of the proprietas. 3. By the surrender of the servitude to the owner of the res dominans either by agreement or by permitting something that destroys the servitude (D. viii. 6. 8). 4. By the expiration of the period during which the duration of the servitude has been limited by the creator. 5. Lastly by non-usage, there being, however, a remarkable difference in this respect between servitudes rusticorum prædiorum and servitudes urbanorum prædiorum; for, as the possession of the former was not continuous, that is, the right was not always being exercised, the mere non-usage of the right during the time fixed by law extinguished it; but as the possession of the servitudes urbanorum prædiorum was continuous, it was necessary that the owner of the res serviens should do something to break the possession, or, as it was termed by the jurists, usucapere libertatem (D. viii. 2. 6), i.e. to commence the liberation of the res serviens, as, for instance, to turn a stilllicidium away from his premises; and if this was acquiesced in during the time fixed by law, that is two years before Justinian, and, after the changes introduced by Justinian, ten or twenty years according as the parties were or were not in the same province, the owner of the res dominans could not afterwards claim his servitude.

4. Cum autem finitus fuerit ususfructus, revertitur scilicet ad proprietatem et ex eo tempore nuda proprietas dominus incipit plenam habere in re potestatem.

4. When the usufruct is ended, it reverts to the property; and the person who had the bare ownership begins thenceforth to have full power over the thing.

Some texts have finitus fuerit totus ususfructus; for as the usufruct was divisible, portions of it might exist, and yet other portions have reverted to the owner of the nuda proprietas. It may be remarked that if two persons had a joint interest in the same usufruct, and the usufruct was divided between them, when
one died, his share went, not to the owner of the *nuda proprietas* but to his coproprietor: *inter fructuarios est jus accrescendi.* (D. vii. 2. 1. pr.)

**Trt. V. DE USU ET HABITATIONE.**

A naked use is constituted in the same ways as the usufruct; and is terminated in the same ways in which the usufruct also ceases.

D. vii. 1. 3. 8.

The use was a portion of the usufruct. The person to whom this right was given could use the thing, but not take any of its fruits. He had the *nudus usus* (D. vii. 8. 1), the bare use of the thing, and enjoyed all the advantages he could obtain from the use; but he could avail himself of nothing which the thing produced. He could not, like the usufructuary, let, sell, or give the exercise of his right, for he was excluded from taking what were termed *fructus civiles,* as much as from taking *fructus naturales.* The jurists, however, modified in some degree the rigour of this principle; and the owner of the use was allowed, in cases where the right would otherwise have produced no benefit whatever, or where it seemed right to put a favourable interpretation on the wording of a testament, to take as much of certain kinds of produce as was sufficient for his daily wants.

1. Minus autem scilicet juris in usu est quam in usufructu. Namque is, qui fundi nudum usum habet, nihil ulterior habere intellegetur, quam ut oleribus, pomis, floribus, feno, stramentis, lignis ad usum cottidianum utatur; in eoque fundo haec tenus ei morari licet, ut neque, domino fundi molestus sit neque his, per quos opera rustica fiunt, impedimento sit: nec uli alli jus, quod habet, aut vendere aut locare aut gratis concedere potest, cum is, qui usufructum habet, potest hic omnia facere.

D. vii. 8. 10. 4; D. vii. 8. 12. 1; D. vii. 8. 11.

The jurists differed as to the *fructus* of which a certain daily supply might be taken, and as to whether it was necessary that they should be consumed on the spot. (D. vii. 8. 10. 1; D. vii. 8. 12. 1; D. vii. 8. 15.) The station of the *usuarius* and the abundance of the fruits would make a difference in particular cases.

The *usuarius* could prevent the owner as well as any one else from coming on land subject to a *usus,* except for the purpose of cultivating it.
Aut gratis concedere. There would be a sort of fructus in being able to gratify the wish of giving and of conferring a favour, instead of receiving a price.

2. Item is, qui sedium usum habet, hactenus juris habere intellegitur, ut ipse tantum habitet, nec hoc jus ad alium transferre potest: et vix receptum videtur, ut hospitem ei recipere liceat et cum uxore sua liberisque suis, item libertis nec non alis liberis personis, quibus non minus quam servis utitur, habitandi jus habeat et convenienter, si ad mulieresem usus sedium pertineat, cum marito habitare ei liceat.

2. He who has the use of a house, has a right over it to the extent of inhabiting it himself; he cannot transfer this right to another; and it is not without hesitation that it has been thought allowable that he should receive a guest in the house, and live in it with his wife and children, and freedmen, and other free persons who may be attached to his service no less than his slaves are; and that a wife, in the same way, if it is she who has the use of a house, may live in it with her husband.

D. vii. 8. 2. 1; D. vii. 8. 4, 6, 8.

The usuarius had the use of the whole thing, and the owner could not make use of any part not used by the usuarius. (D. vii. 8. 22. 1.) So, too, the right of usus was indivisible, and could not be given in detached portions, as that of usufruct could be, to different persons. (D. vii. 8. 19.) But one person could have the use, and another the usufruct of the same thing. (D. vii. 8. 14. 3.

The doubt expressed in the text had long ago been set at rest, and it was settled that the wife or the husband might use the thing of which the use was given to the other. (D. vii. 8. 4. 1; D. vii. 8. 9.)

3. Item is, ad quem servi usus pertinet, ipse tantum operis atque ministerio ejus uti potest: ad alium vero nullo modo jus suum transferre ei concessum est. Idem seicipit juris est et in jumento.

3. So, too, he who has the use of a slave, has only the right of himself using the labour and services of the slave: for he is not permitted in any way to transfer his right to another. And it is the same with regard to beasts of burden.


4. If the use of cattle or sheep is given as a legacy, the person who has the use cannot take the milk, the lambs, or the wool, for these are among the fruits. But he may certainly make use of the animals to manure his land.

D. vii. 8. 12. 2.

As a flock was hardly of any use if a person might not take any of the fructus, the usuarius was allowed to have a little milk (modicum lac) when the usus had been constituted in a way to admit of a favourable interpretation. (D. vii. 8. 12. 2.)
5. Sed si cui habitatio legata
sive aliquo modo constituta sit, neque usus videtur neque usufructus, sed quasi proprium aliquod jus. Quam habitациюem habentibus pro-
pter rerum utilitatem secundum Marcelli sententiam nostra decisione
promulgata permisimus non solum in ea degere, sed etiam aliis locare.

5. But if the right of habitation is
given to any one, either as a legacy
or in any other way, this does not
seem a use or a usufruct, but a right
that stands as it were by itself. From
a regard to what is useful, and con-
formably to an opinion of Marcellus,
we have published a decision, by
which we have permitted those who
have this right of habitation, not only
themselves to inhabit the place over
which the right extends, but also to
let to others the right of inhabiting it.

D. vii. 8. 10. pr.; C. iii. 83.

The jurists had doubted whether habitatio was to be considered
a distinct servitude (D. vii. 8. 10. pr.), which Justinian here pro-
nounces it to be. So far as it differed from the use, or, after Jus-
tinian gave the power of letting the house, from the usufruct, of
the house, it perhaps differed by being an occupation allowed as
a fact rather than as a right, if this is the meaning of Modestinus
when, in speaking of a legacy of habitatio given in singulos annus
aut menses, he says, potius in facto quam in jure consistit. (D.
iv. 5. 10.) It did not cease by non-usage or by capitis deminutio.
(D. vii. 8. 10. pr.)

6. Hæc de servitutibus et usu-
fructu et usu et habitacione dixisse
sufficiat. De hereditate autem et
de obligationibus suis locis propio-
nemus. Exposimus summam, qvi-
bus modis jure gentium res adqui-
runtur: modo videamus, qvisbus
modis legitimo et civili jure adqui-
runtur.

6. Let it suffice to have said thus
much concerning servitudes, usufruct,
use, and habitation. We shall treat
of inheritances and obligations in their
proper places. We have already briefly
explained how things are acquired by
the law of nations; let us now ex-
amine how they are acquired by statute
and the civil law.

Before quitting the subject of servitudes it is proper to observe
that, besides the possessory interdicts by which the possession of
servitudes was secured, there were two real actions by which a
claim was made with regard to a servitude. By the one (actio in
rem confessoria), the owner of the servitude claimed to have his
servitude protected, and the right to it pronounced to be his, against
any one who attempted to disturb him in his quasi-possession, or
disputed his right.) By the other (actio in rem negatoria), the
owner of a thing over which another person claimed or exercised a
servitude himself claimed to have this thing pronounced free from
the servitude. It might seem as if this was rather a defence to
an action for the servitude than itself a real action. But it was
considered a substantive and independent action, because the owner
of the dominium thereby vindicated his claim to a portion of it,
namely, to the servitude which it was attempted to detach from
the ownership. (See Book iv. Tit. 6. 2.)

Justinian now returns to the examination of the modes in
which things are acquired, and the sixth Title would properly
follow the latter part of the first. Before, however, we leave the
subject of jura in rem falling short of ownership, we must notice
three other kinds of such jura in rem besides servitudes, of which
the Institutes here make no mention. These are the jus emphy-
teuticarium, the jus superficiarium, and the jus pignoris.

The exact time when servitudes first became a part of Roman
law is not easy to discover. The Twelve Tables determine the
width of a way, but there is nothing to show that this was intended
to regulate the width of a way to which one person had a right
over the land of another. However, the nature of servitudes
makes it almost certain that they must have very early been
recognised by law; and, at any rate, we learn that they were so
long before the end of the Republic. The period at which the
three jura in rem, which we have just named, were established
as a part of law, can be ascertained more readily. The first,
the jus emphyteuticarium, though based on an institution of the
civil law, yet only assumed its peculiar character in the time
of the Lower Empire; the two others owed their existence to the
praetors.

The jus emphyteuticarium, or, as it is more generally called,
emphyteusis (see Book iii. Tit. 24. 3), was the right of enjoying
all the fruits, and disposing at pleasure, of the prædium of another,
subject to the payment of a yearly rent (pensio, or canon) to the
owner. Formerly the lands of the Roman people, of municipalities,
or the college of priests, used to be let for different terms of years,
sometimes for a short term, such as that of five years, sometimes
for a term amounting almost to a perpetuity, under the name of
agri vectigales. (GAI. iii. 145.) Afterwards, not only the lands
but also the houses of private individuals were let in a similar
manner, and these lands and houses so let were termed prædia
emphyteuticaria (C. xi. 58. 61), a name arising from there being a
new ownership, or what almost amounted to an ownership, engrafted
(iv, ϕύτευσον) on the real dominium. Alongside this new tenure
still continued the letting by the state of agri vectigales. Either
shortly before, or in the time of Justinian, the two rights, that
relating to the agri vectigales, and that of emphyteusis, were
united under the common name of emphyteusis, and subjected to
particular regulations.

Both lands and buildings could be subject to emphyteusis.
(Nov. vii. 3. 1. 2.) The emphyteuta, as the person who enjoyed the
right was termed, besides enjoying all the rights of a usufructuary,
could dispose of the thing, or rather of his rights over it, in any
way he pleased (Nov. vii. 3. 2), except that the dominus had a
right of preemption; or, if he did not exercise this right, he had
a fine on the transfer of not more than 2 per cent. on the purchase-
money. (C. iv. 66. 3.) The emphyteuta could create a servitude over
the thing or mortgage it (D. xiii. 7. 16. 2); he had a real action
(which, however, was said to be a utilis vindicatio, because he was
not the owner, but only in the place of one) to defend or assert his
rights; and at his death his right was transmitted to his heirs. (Nov. vii. 3.) He was obliged to pay his pensio under any circumstances, whether he actually benefited by his emphyteusis or not, and could be expelled if the pensio was three years in arrear. (C. iv. 66. 1.) He was also bound to use the thing over which his right extended, so that it was not deteriorated in value at the time his right expired. (Nov. vii. 3. 2.)

The right of superficies was almost identical with that of emphyteusis, but applied only to the superficies, that is, things built on the ground, not to the ground itself. It was the right of disposing freely of a building erected on another man's soil without destroying it, subject to the payment of a yearly rent. (D. vi. 1. 74.) It must have been the creation of the jus prætorium at a time when there was nothing like the emphyteusis of buildings, and when it was only lands that were let as agri vectigales. The rights and duties of the superficiarius, the person who enjoyed the right, may be gathered from those of the emphyteuta.

The jus pignoris was the right given to a creditor over a thing belonging to another, in order to secure the payment of a debt. When the thing over which the right was given passed into the possession of the creditor, the right of the creditor was expressed by the word pignus; when the thing remained in the hands of the debtor, the right of the creditor was expressed by hypotheca. Sometimes only one or more particular things were under a hypotheca, sometimes all the property of the debtor. The right of the creditor extended only to the amount of his debt, but all the thing pledged was subject to his claim. The right might be created by the mere agreement of the parties, without any handing over or tradition of the thing pledged to the creditor. (C. viii. 17. 2. 9.) Sometimes the right was created by a magistrate, who gave execution to a creditor by this means; and in many cases the law created what was called hypotheca tacita over the property, as, for instance, over the property of a tutor, in favour of the pupil, and over the property of a husband, that the dos of the wife might be restored.

The creditor had the right (1) of selling (D. xx. 5) or pledging (C. viii. 24) the thing pledged; (2) of satisfying his own claim before that of any one else out of the proceeds of the sale, or of the money obtained by pledging the thing; (3) of having himself constituted owner of the thing if no purchaser could be found for it. The creditor could not be deprived even by agreement of his power of sale. Justinian enacted that, unless the parties otherwise agreed, the sale should take place not sooner than two years after notice to pay, and in two years more, if no purchaser could be found, the creditor could be declared the owner. (Tit. 8. 1 note.) (4) Of bringing a real action (termed the actio quasi-Serviana) against any third person who unlawfully detained the thing pledged to him, or, if he had only a hypotheca, against the borrower to put him in possession of the thing pledged. (Bk. iv. Tit. 6. 7.)
If the same thing was pledged to different creditors, the one to whom it was first pledged had generally a preference, potior tempore, potior jure. But there were certain hypothecae which had special privileges attached to them, and which had a first claim on the property of the debtor, such as the hypotheca of the fiscus or imperial treasury for the payment of taxes (C. iv. 46. 1), and that of a wife for her dos (Bk. iv. Tit. 6. 29; C. viii. 14. 12); and hypothecae which were created by an instrument signed by three substantial witnesses had a preference over others by a constitution of Leo. (C. viii. 18. 11.)

Gaius speaks of an older form of giving pledge, the contractus fiduciae, by which the full property in the thing pledged was made over to the creditor by mancipatio or in jure cessio, the debtor being entitled to a reconveyance if he paid the debt; but this was obsolete in the time of Justinian. (GAI. ii. 59, 60.)

Tr. VI. DE USUCAPIONIBUS ET LONGI TEMPORIS POSSESSIONIBUS.

Jure civili constitutum fuerat, ut, qui bona fide ab eo, qui dominus non erat, cum crediderit, eum dominum esse, rem emerit vel ex donatione alia qua justa causa acceperit, is eam rem, si mobilis erat, anno ubique, si immobils, biennio tantum in Italicum solo usucapiat, ne rerum dominia in incerto essent. Et cum hoc placitum erat, patantium antiquioribus, dominus sufficere ad inquirendas res suas prae fata tempora, nobis melior sententia resediat, ne domini maturius suis rebus defraudentur neque certo loco beneficium hoc concludatur.

Et ideo constitutionem super hoc promulgavimus, qua cautum est, ut res quidem mobiles per triennium usucapiantur, immobiles vero per longi temporis possessionem, id est inter praesentes decennio, inter absentes viginti annis usucapiantur et his modis non solum in Italia, sed in omni terra, quae nostro imperio gubernatur, dominium rerum justa causa possessionis precedente acquiratur.

By the civil law it was provided that if any one by purchase, gift, or any other legal means, had bona fide received a thing from a person who was not the owner, but whom he thought to be so, he should acquire this thing by use if he held it for one year, if it was a moveable, wherever it might be, or for two years, if it was an immoveable, but this only if it was in the solutum Italicum; the object of this provision being to prevent the ownership of things remaining in uncertainty. Such was the decision of the ancients, who thought the times we have mentioned sufficient for owners to inquire after their property; but we have come to a much better decision from a wish to prevent owners being despoiled of their property too quickly, and to prevent the benefit of this mode of acquisition being confined to any particular locality. We have accordingly published a constitution providing that moveables shall be acquired by a use extending for three years, but immovables by the 'possession of long time,' that is, ten years for persons present, and twenty for persons absent; and that by these means, provided a just cause of possession precede, the ownership of things may be acquired, not only in Italy, but in every country subject to our empire.

GAI. ii. 42-44; D. xii. 8. 1; C. vii. 85.
The subject of possessio is only treated indirectly in the Institutes, and it is necessary to have a general conception of the meaning of the term before proceeding to examine the mode of acquiring property called usucapion.

By possessio is meant primarily mere detention, i.e. the physical apprehension of a thing. If the possessor adds the intention (animus) of holding the thing as his own and of exercising over it all the rights of an owner, then he has legal possession of it as opposed to the mere physical possession involved in a simple detention. When a person had legal possession of a thing, he was protected in his possession against any one who had not a better title to possess, and in order to protect him the pretor granted him an interdict. If his possession was not founded on force or fraud, and had been acquired by a legal mode of acquisition, then it ripened, after a length of time laid down by law, into full ownership, and the process by which the change was effected was termed usucapio. Thus the meaning of the term legal or juristical possession, the protection of the rights of the possessor by interdicts, and the transmutation under certain circumstances of possessio into ownership by the lapse of time, are the three main points on which attention has to be fixed in examining the subject of possessio.

The two requisites of legal possession are briefly summed up in the words detentio and animus. The detention of a corporeal thing means such a holding of it as enables the person detaining to deal with the thing at his pleasure. Thus a person who enters on part of a piece of land has detention of the whole because it is at his pleasure to go to any part of it. A person who has the key of a granary has the means of going into the granary. The animus means the intention of the possessor to hold the thing possessed as his own, and not as a borrower holds the thing, for the latter holds it avowedly as belonging to another (alieno nomine).

When a person was in possession of a thing physically, but without the animus possidendi, as a borrower would be of the thing lent, he was said not to possess it, but to be in possession of it, non possidet, est tautum in possessione (D. xlii. 2. 10); and a person merely in possession was not protected by interdicts. The Roman jurists contrast natural with civil possession, and in natural possession they include the two cases of a possessor not possessing bona fide and ex justa causa and a person in possessione, while by civil possession they mean such a possession as was capable of transmutation by usucapion, that is, was bona fide and ex justa causa.

The edict fixed certain cases in which the pretor would himself at once give a decision and pronounce what was to be done without sending the case to be examined by a judex, and the order of the pretor thus given was called an interdict (see Bk. iv. Tit. 15). What was termed an interdictum retinendæ possessionis was granted to a person whose possession had been disturbed or threatened with disturbance, and an interdictum recuperandæ
possessioris was granted to a person who had been forcibly ejected from his possession. Whenever a person possessed a thing as a matter of fact, with the intention of treating it as if he was the owner, that is, as if it belonged to him, the possessor had a right to the interdicts that protected his possession. But it was only when the possession was bona fide and ex justa causa that the operation of usucapion would transmute his possession into ownership: that is, the possessor must have commenced his possession, thinking he had a real right to possess, and have acquired it by a recognised legal method of acquiring property. A possessio which was commenced under these circumstances was changed into dominium by lapse of time, and the time required, as fixed by the law of the Twelve Tables, was two years if the thing possessed was an immovable, and one year if it was a moveable. The operation of usucapion was of the greatest importance in the system of Roman law. Things that being res mancipi ought to have been conveyed by mancipation, but had been conveyed without the necessary ceremony, were not legally passed in ownership to the person to whom they were nominally conveyed. But the very short time requisite for the operation of usucapion quickly changed the possession into dominium, and thus ended the separation of the legal and beneficial interests. And, generally, when the pretor gave the possession of property where he could not by strict law give the ownership, that is, when he exercised his equitable jurisdiction, the operation of usucapion soon converted the possessio bonorum into the full legal dominus.

In order that the ownership of a thing should be acquired by usucapion, it was of course necessary that the thing itself should be susceptible of being held in dominio. There was no ownership possible, for instance, in the case of the solum provinciale, and, therefore, no usucapion. The emperor or the people were owners of the soil, and the actual occupier of land in the provinces could not be the owner; he could only be protected in the possession of it; and the pretors protected his possession against the claim of any one asserting himself to be the rightful possessor, by permitting the possessor, when he had held the land for ten years, if he and the claimant had during that time inhabited the same province (inter presentes), or when he had held it for twenty years, if they had not (inter absentes), to repel the action by an exception, which, as being placed at the beginning of the intentio, was termed a precescriptio (see Introd. sec. 104), and would probably be in this form: Ea res agatur, cujus non est longi temporis possessio; and this prescription or exception (for the terms may be used indifferently, as it was only in the early times of the construction of the formula that such a defence was really placed at the beginning of the intentio), if found to be true in fact, made the possessor quite secure.

This prescription, however, had not exactly the same effect as usucapion. In the first place, it did not make the person owner-
of the immovable, for nothing could do that with respect to the
solum provinciale. Secondly, if an action was brought by the
real owner, the usucapion was not interrupted until judgment had
been given against the possessor (D. xli. 4. 2. 21); whereas, if an
action was brought against the possessor of an immovable in the
solum provinciale, the praescriptio longi temporis was of no avail
unless the time required had expired before the proceeding had
reached that stage termed the litis contestatio. (See Introd. sec.
105.) Lastly, the effect of the praescriptio longi temporis was in
one way more favourable to the possessor than that of usucapion;
for the person who acquired a thing by usucapion acquired it with
all its liabilities and charges; whereas the praescriptio longi
temporis was a good plea to the action of a person who claimed to
have a right over the thing, as, for instance, a right of servitude or
mortgage, which he had not asserted while the time was running,
so that the possessor who could use this plea had the thing he
possessed quite free from any liability or charge anterior to the
commencement of his possession. (D. xli. 3. 44. 5; D. xliv. 3. 12.)

In the time of Justinian all difference between the solum
Italicum and the solum provinciale was done away. The text
furnishes us with a brief statement of the change made in the
effect of possession. Under Justinian possession during three
years (called, however, usucapion in this case—see paragr. 12 of
this Title) gave the ownership of moveables; possession during
ten years if the parties were present, or twenty if they were absent,
gave the ownership of immoveables. Thus the length of possession
no longer afforded merely a means of repelling an action, but con-
ferred the dominium, although the word praescriptio was used to
express the process. (See Tit. 9. 5 of this Book.)

1. Sed aliquando etiam se maxime quis bona fide rem possederit, non
tamen illi usucapio ullo tempore procedit, veluti si quis liberum ho-
minem vel rem sacram vel religiosam vel servum fugitivum possideat.

1. Sometimes, however, although the thing is possessed with perfect good
faith, yet usucapion does not operate by
any length of time; as, for instance,
when the possession is of a free person,
a thing sacred or religious, or a fugitive
slave.

Gal. ii. 45. 48.

The Institutes now proceed to speak of the exceptions to the
rule of acquisition by use. These exceptions arise from two sources:
either the thing which we have possessed is in its nature incapable
of being acquired by use, or there is something in the mode in
which it has come into our possession which prevents length of pos-
session having its ordinary effect.

As a general rule, no incorporeal thing could be acquired
by usucapion, incorporales res traditionem et usucapionem non
recipere manifestum est (D. xli. 1. 43); but see as to servitutes
Tit. 3. 4 note, and as to inheritances note to paragr. 10 of this
Title.

The fugitive slave could not be acquired by use, because
he was considered to have robbed his master of his interest in him by his flight, *sui furtum facere intellegitur*. (D. xlvii. 2. 60.)

2. *Furtiva quoque res et quae vi possessee sunt, nec si predicto longo tempore bona fide possessee fuerint, usucapi possunt*: nam furtivarum rerum lex duodecim tabularum et lex Atinia inhibet usucapiem, vi possessorum lex Julia et Plautia.

2. Things stolen, or seized by violence, cannot be acquired by use, although they have been possessed *bona fide* during the length of time above prescribed; for usucapiion is prevented as to things stolen, by the law of the Twelve Tables, and by the *lex Atinia*; as to things seized by violence, by the *lex Julia et Plautia*.

GAI. ii. 45; D. xli. 8. 4. 6.

The *lex Atinia* was a *plebiscitum* named after its proposer Atinius Labeo, 557 a.U.C. The *lex Plautia*, proposed by M. Plautius, was passed 665 a.U.C. We know nothing of the *lex Julia* here mentioned, except that its name makes it probable that it was passed in the time of Augustus; it may possibly be the *lex Julia de vi publica seu privata* referred to in Book iv. Tit. 18. 8.

3. *Quod autem dictum est furtivarum et vi possessorum rerum usucapiem per legem prohibitam esse, non eo pertinent, ut ne ipse fur quive per vim possit, usucapere possit*: nam his alia ratione usucapio non competit, quia seilicet mala fide possident: sed ne ullus alius, quamvis ab eis bona fide emergat vel ex alia causa acceptum, usucapiendi jus habeat. Unde in rebus mobilibus non facile procedit, ut bona fidei possessori usucapio competat. Nam qui alienam rem vendidit vel ex alia causa tradidit, furtum ejus committit.

8. When, however, it is said that the usucapiion of things stolen or seized by violence is prohibited by these laws, it is not meant that the thief himself, or he who possesses himself of the thing by violence, is unable to acquire the property by use, for another reason prevents them, namely, that their possession is *mala fide*; but that no one else, although he has in good faith purchased, or taken in any way from them, is able to acquire the property by use. Whence, as to moveables, it does not often happen that a *bona fide* possessor gains the property in them by use. For whenever any one has sold, or made over on any other title, a thing belonging to another, he commits a theft of it.

GAI. ii. 49, 50.

In the case of moveables everything sold or delivered over by a person who knew himself not to be the owner was considered stolen, and therefore could not be acquired by use; and it could not often happen that a person who was not the real owner could sell or deliver a moveable, thinking himself to be the owner.

4. *Sed tamen id aliquando alter se habet*: Nam si heres, rem defuncto commodatam aut locatam vel apud eum depositam existimans hereditarium esse, bona fide accepti vel vendiderit aut donaverit aut dotis nomine dederit, quin in, qui acceptum, usucapere possit, dubium non est, quippe

4. Sometimes, however, it is otherwise; for, if an heir, supposing a thing lent or let to the deceased, or deposited with him, to be a part of the inheritance, sells or gives it as a gift or *dos* to a person who receives it *bona fide*, there is no doubt that the person receiving it may acquire the property in it by
ea res in furti vitium non occiderit, cum utique heres, qui bona fide tamquam suam alienaverit, furtum non committit.

use; for the thing is not tainted with the vice of theft, as the heir who has bona fide alienated it as his own, has certainly not been guilty of a theft.

5. Item si is, ad quem ancillae ususfructus pertinet, partum suum esse credens vendiderit aut donaverit, furtum non committit: furtum enim sine auctu furandi non committitur.

5. So if the usufructuary of a female slave sells or gives away her child, believing it to be his property, he does not commit theft; for theft is not committed without the intention of thieving.

In such a case the usufructuary would make a legal mistake, but would not act with a criminal intention. (Tit. 1. 37.)

6. Aliis quoque modis accidere potest, ut quis sine vitio furti rem alienam ad aliquem transferat et efficiat, ut a possessori ususciapiatur.

6. It may also happen in various other ways, that a man may transfer a thing belonging to another without the vice of theft tainting the thing, so that the possessor acquires the property in it by use.

As, for instance, if a person who was not heir thought that he was, and sold a thing which was part of the inheritance (D. xli. 3. 36. 1); or if a person took possession of a thing which he believed the owner had intended to abandon (D. xlii. 7. 4).

7. Quod autem ad eas res, que solo continentur, expeditius procedit: ut si quis loci vacantis possessionem propter absentiam aut neglegentiam domini, aut quia sine successore decesserit, sine vi nanciscatur. Qui quamvis ipse mala fide possidet, quia intellegit, se alienum fundum occupasse, tamen, si alii bona fide accipienti tradiderit, poterit ei longa possessione res adquiri, quia neque furtivum neque vi possessione accepit; abolita est enim quorumdam veterum sententia existimantium, etiam fundi locive furtum fieri, et eorum, qui res soli possidens, principalibus constitutionibus prosperit, ne cui longa et indubita possessione anferri debeat.

7. But as to things appertaining to the soil, usucapion operates more readily; as if a person without violence takes possession of a place vacant by the absence or negligence of the owner, or by his having died without a successor; for, although his possession is mala fide, since he knows that he has seized on land not belonging to him, yet if he transfers it to a person who receives it bona fide, this person will acquire the property in it by long possession, as the thing he receives has neither been stolen nor seized by violence. The opinion of the ancients, who thought that there could be a theft of a piece of land or a place, is now abandoned, and there are imperial constitutions which provide that no possessor of an immovable shall be deprived of a long and undoubted possession.

If things immoveable could have been stolen, as was the opinion of Sabinus (AUL. GELL. xi. 18), the acquisition of immoveables by length of possession would have been as difficult as
that of moveables; but as the *bona fides* of the actual possessor cured the *mala fides* of the first person who began the possession, it might very well happen that the property in immovable should be gained in this way. By Novel 119 (cap. 7), a.d. 542, Justinian altered this, and only allowed the title by possession during ten or twenty years where the true owner was aware of his right, and of the transfer to the *bona fide* possessor; otherwise the right of ownership was not gained until after a possession of thirty years.

8. Aliquando etiam furtiva vel vi possessa res usucapi potest: veluti si in domini potestatem reversa fuerit; tunc enim, vitio rei purgato, procedit ejus usucapio.

D. xlii. 8. 4. 6.

In order that a thing once stolen should, after again falling under the power of its owner, be capable of being acquired by a *bona fide* possessor, it was necessary that the owner of the thing should recover it as a thing belonging to himself. If he purchased it not knowing that it belonged to him, the vice or taint of theft was not purged. (D. xlii. 3. 4. 12.)


D. xlii. 3. 18.

*Bona vacantia* was the term used to express the property of persons who died without successors. These goods belonged to the *fiscus* on being reported by the officers of the treasury (D. xlix. 14. 1. 1), but up to that time they could be acquired by usucapion.

10. Novissime scidendum est, rem tales esse debere, ut in se non ha- beat vitium, ut a bona fide emptore usucapi possit vel qui ex alia justa causa possidet.

D. xlii. 3. 24.

The word 'vice,' as used here with reference to acquisition by use, includes every obstacle that prevented a thing being of a kind to be acquired by length of possession. The first requisite
of civil possession, of possession, that is, capable of ripening into ownership by usucapion, was that the thing possessed should not have any vice in it, should not be of a kind which could not be acquired by usucapion. To the instances of such things given above in paragraphs 1, 2, and 9, may be added things forming part of a dos, unless the term of usucapion had begun to run before the marriage. (D. xxiii. 5. 16; C. v. 12. 30.) Secondly, it was necessary that the thing should be possessed ex justa causa. By this it was meant that it must have come into the power of the possessor by a means, such as sale or gift, which was recognised by law as a good foundation for the transfer of ownership. It might have so come, and yet no title be acquired to the ownership, except by usucapion: the person who transferred it might not have been the real owner; or the person who received it might not have had a right to do so.

The Digest (xli. 2. 3. 21; xli. 4. et seq.) gives a long series of Titles in which the several justa causa of possession are examined separately, and the different characters in which a person possessed are treated of. Thus, a person might possess pro emptore, as having bought the thing; pro donato, as having received it as a gift; pro dote, as having received it as a dos; pro soluto, as the payment of a debt; pro derelicto, as having taken it when abandoned by its owner. In any of these cases the person who sold, gave, or abandoned the thing, might not have been the real owner, and then the possessor could only acquire the property in the thing by use. Or again, he might possess pro legato, and then if he was not the person to whom the legacy had really been left, or if the legacy had been revoked, he might acquire by use the property in the thing. In this case it was not the testator's not being the proprietor that made the possessor not the true owner, but it was the latter's having no right to have the possession of the thing. Again, he might possess a thing pro suo, a general term specially employed to denote the possession of fructus gathered bona fide, or that of res nullius, such as wild animals. If he took possession of an animal, naturally wild, which had been tamed, and possessed it pro suo, he did not at once acquire the property in it, because it was not of a nature, since it had ceased to be wild, to be acquired by mere possession, but he became the owner by use. (D. xli. 10. 1, 2; D. xli. 2. 3. 21.)

Thirdly, it was necessary that there should be bona fides; the possessor must be quite ignorant of that which there was faulty in the manner he had gained possession. No ignorance of a leading principle of law, such as that a person below the age of puberty could not alienate his goods (D. xxii. 6. 4; D. xli. 3. 31. pr.), nor any wilful ignorance of facts, would be permitted as the commencement of usucapion. (D. xxii. 6. 6.) But if a person was only ignorant of a fact, of which it was excusable he should be ignorant, as that a vendor was under full age, his possession was bona fide. (D. xli. 4. 2. 15.) If the property of a pupil or minor had been
gained by another person by usucapio, the pretor would allow the usucapion to be rescinded on good reason being shown, but the mere fact that the usucaptor had been mistaken as to the age was not a sufficient reason. In the case of sale it was necessary that this bona fides should exist at the moment of the contract being made, and also at that of its being performed (D. xii. 3. 48), and in every case it was necessary it should exist at the commencement of possession. But after the possession was once commenced bona fide, a subsequent knowledge of the real facts did not vitiate the possession. Gaius notices three exceptional cases where a mala fide possessor might acquire by usucapio. Inheritances at one time, though incorporeal things, could be acquired by usucapion, although it was afterwards held that only the component parts could be so acquired; and as the Twelve Tables had said that things of the soil should be acquired in two years, and other things (ceteras res) in one, and the inheritance was not a thing of the soil, it was held that the inheritance or any part could be acquired in a year—the reason being, says Gaius, that the law wished to hurry heirs to enter on inheritances in order that the sacred rites might be performed, and creditors satisfied; so that if a man held anything, even land, forming part of an inheritance, for one year only, he acquired it by usucapion, although he knew it was part of the inheritance, and he was thus acting mala fide. (Gai. ii. 52–58.) But this kind of usucapion was made ineffectual in the time of Hadrian. (Gai. ii. 57.) Secondly, if a thing was given over by one man to another to hold for him fiducie causa, was, e.g., deposited with him or pledged to him, the original owner, if he got possession of the thing, could reacquire it by usucapion in a year, even if it was an immovable (Gai. ii. 59); but if it was pledged the new possession could not thus operate if it had been obtained by the request of the original owner. (Gai. ii. 60.) Thirdly, the owner of a thing mortgaged to the state and sold for non-payment of the mortgage debt could reacquire it by usucapion against the praedulator or purchaser from the state; but if it was an immovable two years' possession was necessary. (Gai. ii. 61.)

11. Error autem false cause usucapionem non parit. Veluti si quis, cum non emerit, emisse se existimans possidet; vel cum ei donatum non fuerat, quasi ex donatone possidet.

11. But if a mistake is made as to the title of possession, and it is wrongly supposed to be just, there is no usucapion. As, for instance, if any one possesses in the belief that he has bought, when he has not bought, or that he has received a gift, when no gift has really been made to him.

D. xii. 3. 27.

Supposing a person who thought that he had acquired ex justa causa had not, supposing, for instance, he thought a person intended to give him a thing who did not, or if he had received a thing in payment of a debt, while really no debt was recognised,
the question naturally suggested itself whether the imperfection in the possession could be cured by \textit{bona fides}, that is, an honest belief that the \textit{causa} was \textit{justa}, that a gift had been made, or that a debt was recognised. The question had been much debated by the jurists, and Justinian here decides it by declaring that the imperfection could not be so cured, and that if the possessor had been mistaken in this respect, length of possession would not profit him. But this doctrine is not consistent with that of the Digest, which treats a plausible error (an error into which a man might naturally and reasonably have fallen with regard to the \textit{causa}) as permitting usucapion to take place. We learn, for example, from the Digest, that where it was with respect to an act of some one through whom the possessor believed his title to have been gained, and whom he reasonably believed to have been acting for him as his procurator, that the mistake was made, the possessor could acquire by use, although this person might not have acted as the possessor supposed. (D. xlii. 4. 11.)

12. Diutina possessio, quae prod esse ceparet defuncto, et heredi et bonorum possessori continuatur, licet ipse esset praeidum alienum: quodsi ille initium justum non habuit, heredi et bonorum possessori, licet ignoranti, possessori non prodest. Quod nostra constitutio similiter et in usucapionibus observari constituit, ut tempora continetur.

12. Long possession, which has begun to reckon in favour of the deceased, is continued in favour of the heir or \textit{bonorum possessor}, although he may know that the immovable belongs to another person; but if the deceased commenced his possession \textit{mala fide}, the possession does not profit the heir or \textit{bonorum possessor}, although ignorant of this. And our constitution has enacted the same with respect to usucapiens, so that the times of possession by different persons may be reckoned as running through.

D. xlii. 4. 2. 19; D. xliv. 8. 11; C. vii. 81.

Persons who possessed \textit{pro herede} or \textit{pro possessor}, that is, as \textit{bonorum possessores}, did not themselves begin a new usucapion, but continued the \textit{persona} of the deceased, and were placed in the same position with reference to anything which he had possessed, as if he had himself continued to possess it. If, for example, the deceased had possessed the thing \textit{pro emporie} or \textit{pro donato}, the \textit{heres} or \textit{bonorum possessor} continued to possess it in the same way, and added to the time of his possession the time during which the deceased had possessed it.

\textit{Similiter in usucapionibus}, i.e. the continuation of possession by the heir or \textit{bonorum possessor} shall apply to the usucapion of moveables by three years’ possession.

18. Inter venditorem quoque et emptorem conjungi temporis, divi Severus et Antoninus rescripserunt.

18. Between the buyer and the seller, too, the Emperors Severus and Antoninus have decided by rescript that their several times of possession shall be reckoned together.

D. xlii. 4. 2. 20.
Persons who were merely successors of others in holding particular things by sale, gift, legacy, &c., did not of course continue the possession, for they did not continue the person, of their predecessor. But if both the possession of their predecessor, and their own, were such as to give rise to usucapion, the times of the two possessions were added together. If there was something to prevent this in the possession of their predecessors, their own possession was the first commencement of the usucapion.

The interruption of usucapion was termed usurpatio. (D. xli. 3. 2.) It might take place in various ways. The thing itself might be taken away from the possessor, or, if it was an immovable, he might be expelled from it (D. xli. 3. 5); or it might become impossible, from physical causes, such as an inroad of the sea, to occupy it (D. xli. 2. 3. 17); or, again, the possessor might fall into the power of the enemy, and he would not be reinstated in his possession by postliminium, for possession was a fact, and as he had ceased to possess, as a matter of fact, he could only begin a new possession by again possessing the thing (D. xlix. 15. 12. 2); or the interruption might be what was termed civil, that is, be produced by an action to contest the right, and with respect to this Justinian (C. vii. 33. 10) made the time of the first raising of the controversy (mota controversia) the period of interruption, instead of the litis contestatio (see Introd. sec. 105), which had no place in the civil process of his time.

There was also a prescription or possession, termed longissimi temporis. If there was a possession for thirty years, or, in the case of ecclesiastical property, or hypothecated property in possession of the debtor, for forty years, whatever vitium or obstacle there might be to the acquisition by use, for instance, theft, violence, absence of justa causa, or mala fides, the possessor could repel actions brought to claim the thing. (C. vii. 39; Nov. 117.)

14. Edicto divi Marci cavetur, eum, qui a fisco rem alienam emit, si post venditionem quinquentium praterierit, posse dominum rei per exceptionem repellere. Constitutio autem divae memoriae Zenois bene prospexit his, qui a fisco per venditionem vel donationem vel alium titulum aliquid accipient, ut ipsi quidem securi stasim dant et victores existant, sive convenientur sive experiantur: adversus sacratissimum autem serarium usque ad quadriennum liceat intendere his, qui pro dominio vel hypothecarum rerum, que alienata sunt, putaverint sibi quadam competere actiones. Nostra autem divina constitutio, quam nuper promulgavimus, etiam de his, qui a nostra vel venerabilis Augustae

14. It is provided by an edict of the Emperor Marcus, that a person who has purchased from the fiscus a thing belonging to another person, may repel the owner of the thing by an exception, if five years have elapsed since the sale. But a constitution of Zeno of sacred memory has completely protected those who receive anything from the fiscus by sale, gift, or any other title, by providing that they themselves are to be at once secure, and made certain of success, whether they sue or are themselves sued, in an action. While they who think that they have a ground of action as owners or mortgagees of the things alienated, may bring an action against the sacred treasury within four years. An imperial constitution, which we ourselves
have recently published, extends to those who have received as a gift anything from our palace, or that of the empress, the provisions of the constitution of Zeno relative to the alienations of the fiscus.

C. vii. 87.

As Theophilus points out, the privilege really conceded by the constitution of Marcus Aurelius was, that no possession, if the thing had been received from the fiscus, should be attacked after five years had elapsed, however otherwise open to attack. If not otherwise open to attack, the time of usucapion, being so much shorter than five years, would, previously to the changes of Justinian, have given the property before the time fixed by the constitution had arrived.

Trit. VII. DE DONATIONIBUS.

There is, again, another mode of acquiring property, donation, of which there are two kinds, donation mortis causa, and donation not mortis causa.

The phrase dono dare was appropriated in Roman law to the mode of transferring property by gift; dare signifying that the whole property in the thing was passed by delivery; and dono expressing the motive from which the delivery was made. (See Vat. Fragm. 275. 281. 283.) Viewed strictly, gift is not a peculiar mode of acquisition, but an acquisition by delivery with a particular motive for the transfer. Possibly it was on account of the solemnities with which, under Justinian, gifts had to be made that the authors of the Institutes treat gift as a separate mode of acquisition.

1. Mortis causa donatione est, quae propter mortis fit suspiciionem, cum quis ita donat, ut si quid humanitatis ei contingisset, haberet is, qui acceptis: sin autem supervixisset, qui donavit, recipere, vel si eum donationis pecuniiisset, aut prior decesserit is, cui donatum sit. Haec mortis causa donationes ad exemplum legatorum redactae sunt per omnia. Nam cum prudentibus ambiguum fuerat, utrum donationis an legati instar eam obtinere oportaret, et utriusque causa quaedam habebat insignia et alii ad aliquid genus eam retrahebant, a nobis constitutum est, ut per omnia fere

1. A donation mortis causa is that which is made to meet the case of death, as when anything is given upon condition that, if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given. These donations mortis causa are now placed, in all respects, on the footing of legacies. It was much doubted by the jurists whether they ought to be considered as a gift or as a
legacy, partaking as they did in some respects of the nature of both; and some were of opinion that they belonged to the one head, and others that they belonged to the other. We have decided by a constitution that they shall be in almost every respect reckoned amongst legacies, and shall be made in accordance with the forms our constitution provides. In short, it is a donation mortis causa, when the donor wishes that the thing given should belong to himself rather than to the person to whom he gives it, and to that person rather than to his own heir. It is thus that, in Homer, Telemachus gives to Pireus:

'Pireus, for we know not how these things shall be, if the proud suitors shall secretly slay me in the palace, and shall divide the goods of my father, I would that thou thyself should have and enjoy these things rather than that any of those men should; but if I shall plant slaughter and death amongst those men, then indeed bear these things to my home, and joying give them to me in my joy.'

D. xxxix. 6. 35. 2, 4; D. xxxix. 6. 37. pr.; C. viii. 57. 4.

There are two essential conditions of a donatio mortis causa: it must be made with the view of meeting the case of death; and it must be made to take effect only if death occurs, and so as to be revocable at any time previous, and to fail if the recipient died before the giver. The donor might, at his pleasure, alter the character of the gift, making it irrevocable; but then the gift was regarded as, and had the same legal consequences as, an ordinary donatio. (D. xxxix. 6. 27.)

It might be made conditional upon death in two ways. The donor might say, 'I hand you over my horse, but the gift is only to be complete if I die in this enterprise;' or he might say, 'I give you my horse, if I survive this enterprise you are to give it me back.' In the latter method, the delivery of the thing is made at once, subject to a conditional redelivery; in the former the delivery is made conditional. (D. xxxix. 6. 2, 29.) The donation might also be sometimes made conditional upon the death of a third person, as if a father promised to give to his daughter-in-law in case of the death of his son. (D. xxxix. 6. 11.) All who could make a testament could make a valid donatio mortis causa; and all who could receive under a testament could accept one. (D. xxxix. 6. 9 and 15.) Every kind of thing could be given in this way. (D. xxxix. 6. 18. 2.) Justinian, in the constitution referred to in the text, required that a donatio mortis causa should be made in the presence of five witnesses. (C. viii. 57. 4.)

If the gift was made in the first of the two ways above men-
tioned, although there was delivery, yet the thing was only acquired on the death of the donor, and the donor not having ceased to be dominus could therefore, if he revoked the gift, bring a real action to reclaim the thing handed over. If the gift was made in the second way, the whole property passed at once by the tradition to the recipient; and as, in the older and stricter law, the dominium passed absolutely when it passed at all, the property in the thing could not revert to the donor merely by the condition having been accomplished. He would only have a personal action against the recipient to compel him to give the value of the thing if he did not choose to give back the thing itself. The later jurists seem, however, to consider that the dominium reverted ipso jure, and that the donor could bring a real action for the thing itself. (D. xxxix. 6. 29.)

If the donor was insolvent at the time of his death, this was considered as an implied revocation of the gift. (D. xxxix. 6. 17.)

Ad exemplum legatorum redactae sunt per omnia . . . per omnia fere legatis communeretur—the latter is the more correct expression; gifts mortis causa were not exactly on the footing of legacies. For (1) they had complete effect immediately on the death of the donor, whereas legacies, to take effect, required that the heir should first enter on the inheritance (D. xxxix. 6. 29.) (2) The rules as to capacity of taking were the same in both cases, but regard was had to the capacity to receive of the person to whom the gift was made, only at the time of the death, and not, as in the case of legacies, also at the time of the disposition. (D. xxxix. 6. 22.) (3) A filiusfamilias, who could not before Justinian give anything but his peculium castrense by testament, could, with his father's permission, make a donatio mortis causa of other things. (D. xxxix. 6. 25. 1.) (4) A peregrinus could make a mortis causa donatio, though he could not give a legacy. (D. xxxix. 6. 25.) There was one remarkable mode in which they were placed on the footing of legacies. By a constitution of Severus the heir was permitted to retain as large a portion (one fourth) of the gift as he could of a legacy by the lex Falcidia. (See C. viii. 57. 2.)

The lines quoted in the text are from Odyssey xvii. 78.

2. Aliæ autem donationes sunt, quæ sine utra mortis cogitatione sunt; quæ inter vivos appellamus. Quæ omnino non comparantur legatis: quæ si fuerint perfecte, temere revocari non possunt. Perficiuntur autem, cum donator suam voluntatem scriptis aut sine scriptis manifestationi: et ad exemplum ventionis nostra constitutæ estiam in se habere necessitatem traditionis voluit, ut, et si non tradantur, hæc est plenissimum et perfectum robur et traditionis necessitas incumbat donatori. Et cum retro principium dispositiones insinuari eae

2. The other kind of donations are those which are made without any consideration of death, and are called donations inter vivos. They cannot, in any respect, be compared to legacies, and if completed cannot be revoked at pleasure. When they are completed when the donor has manifested his intention, whether by writing or not. Our constitution has declared that, after the example of sales, they shall involve the necessity of tradition; but so that even if there be no tradition they shall be completely effectual, and place the donor under the necessity of making tradition. Previous imperial
actis intervenientibus volebant, si majores ducentorum fuerant solidorum, nostra constitutio et quantitatem usque ad quingentos solidos ampliavit, quam stare et sine insinuatione statuit, et quasdam donationes invenit, que penitus insinuationem fieri minime desiderant, sed in se plenissimam habent firmitatem. Alia insuper multa ad uberiorem exitum donationum inve- nimus, que omnia ex nostris constitutionibus, quas super his poenimini, colligenda sunt. Sciendo tamen est, quod etiam plenissime sint donationes, tamen si ingrati existant homines, in quos beneficium collatum est, donatoribus per nostram constitutionem licentiam praestavimus certis ex causis cas revocare, ne qui suas res in alios contulerunt, ab his quaedam patiantur injuriam vel jacturam, secundum enumeratos in nostra constitutione modos.

constitutions have enacted that they should be registered by public deeds, if exceeding two hundred solidi, but our constitution has raised the limit to five hundred solidi, so that for a gift up to this sum registration is not necessary. We have also marked out certain donations which need no registration at all, but are completely valid of themselves. We have, too, made many other new enactments, in order to extend and secure the effect of donations, all which may be collected from the constitutions we have promul- gated on this subject. It must, however, be observed, that however absolutely a donation may be given, yet, if the object of the donor’s bounty prove ungrateful, it is permitted by our constitution, in certain specified cases, to revoke the donation; so that they who have given their property to others should not suffer from them injuries or losses of such a kind as those enumerated in our constitution.

C. viii. 54. 35. 5; C. viii. 54. 34. pr. 8, 4; C. viii. 54. 36. pr. 2 and 3; C. viii. 56. 10.

A thing given was, if a res mancipi, given by manciaption, or in jure cessio, and, if a res nec mancipi, by tradition. But a mere agreement to give gratuitously (pachum) was not in the old law binding on the person who agreed to give, and, to make a promise to give binding, it was necessary that the agreement should assume the form of a stipulation. (See Introd. sec. 83.)

The lex Cincia, 550 A.B.C., introduced several new rules into the law respecting gifts, prohibiting gifts beyond a certain amount, excepting to near relatives, but did not make a mere agreement to give in any degree valid. The first step taken in this direction was by Antoninus Pius, who declared that in gifts inter parentes et liberos a mere agreement, if perfectly clear in its terms, should be binding. (Cod. Theod. viii. 12. 4.) Constantine required that the agreement should be reduced to writing and registered, and that the property should be handed over in the presence of witnesses. (Cod. Theod. viii. 12. 1. 3.) And Justinian (C. viii. 54. 35. 5) made the agreement binding, whether reduced to writing or not; but it is to be observed that he provided, not that the property should pass by the agreement, but that the donor should be bound thereby to make tradition of the thing. So that the property in the thing was acquired by tradition, and not by donation, as a distinct mode of acquisition.

Donations not registered were only void for the sum by which they exceeded the amount fixed by law. (C. viii. 54. 34. 1.) Those valid without registration at all were such as donations made by, or to, the emperor to redeem captives, or to rebuild edifices destroyed by fire. (C. viii. 54. 36.)
Gifts *inter vivos* were revocable in certain cases specified in the Code (viii. 56. 10), as, for instance, when the person benefited seriously injured, or attempted to injure, the person or property of the donor, or failed to fulfil the conditions of the gift. Revocation in such cases was personal to the donor and to the receiver, and could not be exacted by the heirs of the one, or against the heirs of the other.

3. Est et aliud genus *inter vivos donationum*, quod veteribus quidem prudentibus penitus erat incognito, postea autem a junioribus divis principibus introductum est, quod ante nuptias vocabatur et tacitam in se conditionem habebat, ut tuncatum esset, cum matrimonium fuerit insecutum: ideoque ante nuptias appellabatur, quod ante matrimonium efficiebatur et nunquam post nuptias celebratae talis donatio procedebat. Sed primus quidem divus Justinus, pater noster, cum augeri dotes et post nuptias fuerat permissum, si quid tale eventit, etiam ante nuptias donationem augeri et constante matrimonio sua constitutione permisit: sed tamen nomen incoventiensem remanebat, cum ante nuptias quidem vocabatur, post nuptias autem tale accipiebat incrementum. Sed nos plenissimo fini tradere sanctorum cupientes et consequentia nomina rebus esse studentes, constitutimus, ut tales donaciones non augantur tantum, sed et constante matrimonio initium accipient et non ante nuptias, sed propter nuptias vocentur et dotibus in hoc exequentur, ut, quemadmodum dotes et constante matrimonio non solum augentur, sed etiam fructa et instar donaciones, que propter nuptias introductae sunt, non solum antecedant matrimonium, sed etiam eo contracto et augentur et constituantur.

3. There is another kind of donation *inter vivos* entirely unknown to the ancient lawyers, and subsequently introduced by the more recent emperors. It was termed the *donatio ante nuptias*, and was made under a tacit condition that it should only take effect when the marriage had followed on it. Hence it was called *ante nuptias*, because it preceded the marriage, and never took place after its celebration; but as it was permitted that *dotes* should be increased even after marriage, the Emperor Justin, our father, was the first to permit, by his constitution, that in case the *dos* was increased, the donation *ante nuptias* might be increased also, even during the marriage; but the donation still retained what was thus an improper name, and was called *ante nuptias*, while this increase was made to it after marriage. Wishing, therefore, to perfect the law on the subject, and to make names appropriate to things, we have enacted that such donations may not only be increased, but may also be first made during marriage, and that they shall be termed, not *ante nuptias*, but *propter nuptias*, and that they shall be placed on the footing of *dotes*, so far that, as *dotes* may be not only increased but first made during marriage, so donations *propter nuptias* may not only precede marriage, but, even after the tie of marriage has been formed, may be increased or made.

C. v. 3. 19, 20.

When the wife passed in *manum viri*, all that she had belonged to her husband; when she did not, all her property belonged exclusively to herself, and gifts between husband and wife, with a few exceptions (Ulp. Reg. vii. 1), were strictly prohibited by law. But, as a provision for the expenses of marriage, the *dos* was contributed before or after marriage (and sometimes increased afterwards) by the wife or by a paternal ascendant or some one else for her. In case the *dos* was contributed by a paternal ascendant (*dos profecticia*), it could, on the termination of the marriage by the
death of the wife, be reclaimed from the husband by the donor, but not by his heirs. If it was given for her benefit by any one else than such an ascendant (*dos adventitiae*), it could not be reclaimed by the donor or his heirs unless there had been a special agreement that it should be reclaimable, in which case it was termed *dos receptitiae* (D. xxiii. 3. 5; *Ulp. Reg.* 6. 5); but Justinian enacted that the *dos adventitiae* should go to the heirs of the wife unless a special agreement to the contrary had been made. (C. v. 13. 1. 6, 13.) Thus under Justinian the surviving husband in every case lost the *dos*. If the wife survived the husband, and was *sui juris*, the *dos*, however derived, belonged to her, unless a provision to the contrary had been made by the donor. If she was still in the power of her father, she and he had to join in claiming it. (D. xxiv. 3. 2. 1.) If the *dos* consisted of things that could be replaced by others of the same kind (*res fungibiles*) (D. xxiii. 3. 42), the things given belonged in full property to the husband, and he had to return like things to the same amount within three years (altered to one year by Justinian, Cod. v. 13. 1. 7) after the dissolution of the marriage. (*Ulp. Reg.* 6. 8.) If the *dos* consisted of things which could not thus be replaced, such as land or house, the husband was nominally the owner and managed the property, but he could only take the annual proceeds, and he had to preserve the property intact and to restore it immediately on the dissolution of the marriage. He was prevented by the *lex Julia de adulteriius et de fundo dotali*, passed in the time of Augustus, from alienating immoveable property in Italy forming part of the *dos* without the consent of the wife, or mortgaging it even with her consent; and Justinian, as we shall see in the introductory paragraph of the next Title, forbade the mortgaging or alienation of immoveables, wherever situated, forming part of the *dos*, even with the wife's consent. As to the expenses of the husband in his management, see note to Book iv. Tit. 6. 37.

If the marriage was terminated not by death but divorce, the general rule was that the husband had to restore the *dos* just as he would have had to do in case of the wife's death; but if the wife was divorced for misconduct, or divorced her husband without reason given, the husband was allowed to retain at first a part and in later times the whole of the *dos*, having, however, only a life interest in it, if there were children. (C. v. 12. 24; C. Th. iii. 16. 2.)

The *donatio ante nuptias*, of which we first hear in a constitution of Theodosius and Valentinian (C. v. 17. 8. 4), which speaks of it as recognised by law, was a gift on the part of the husband as an equivalent to the *dos*. It was the property of the wife, but managed by the husband, and could not be alienated even with her consent. Justinian provided (Nov. 97. 1) that the wife, if survivor, should receive an equal value from the *donatio propter nuptias* with that which the husband, if survivor, would have received from the *dos*, the actual amount reserved for the survivor being matter of agreement between the parties. By a constitution previous to
Justinian (C. v. 14. 9), the wife had, if survivor, the same fraction of the donatio as her husband would have had of the dos. Justinian substituted an equality of value for an equality of proportion.

Justinus, the predecessor of Justinian, was his uncle and adoptive father.

4. There was formerly another mode of acquiring property by the civil law, namely, that of accural; as, if any one, having a slave in common with Titius, had himself alone enfranchised him, either by vindicta or by testament, his share in that slave was lost, and accrued to the joint owner. But, as it was an example of very bad tendency, that both the slave should be defrauded of his freedom, and that the more humane master should suffer loss, while the more severe master profited, we have thought it advisable to apply by our constitution a gracious remedy to what seemed so odious, and have devised means by which the manumittor, and the co-proprietor, and the freed slave may be all benefited. Freedom, to favour which ancient legislators have often most obviously violated the ordinary rules of law, shall be really gained by the slave; he who has given this freedom, shall have the delight of seeing it maintained; and his co-proprietor shall be indemnified by receiving a price for the slave, proportioned to his interest in him, according to the rates fixed in our constitution.

C. vii. 7. 1. 5.

A man could not be partly free, partly a slave. If, then, a slave was enfranchised by one co-proprietor, was he a slave or free? The old law, as the text informs us, pronounced him the former. If the enfranchisement, however, was such that, according to the rules given in Bk. i. Tit. 5. 3, the enfranchised slave would have become only a Latinus Junianus or a dediticus, the enfranchisement had no effect at all, and the slave remained the slave, as before, of both. But if the enfranchisement had been such that he would have been a Roman citizen, the interest of the master who manumitted him accrued to the other proprietors. (Paul. Sent. iv. 12. 1.)

The scale of prices referred to in the concluding words of the text is given in the Code. (vii. 7. 1. 5.)

Trt. VIII. QUIBUS ALIENARE LICET VEL NON.

Accidit aliquando, ut qui dominus sit, alienare non possit et contra qui dominus non sit, alienandae rei

Sometimes it happens that he who is owner of a thing cannot alienate it, while, on the contrary, he who is not

GAL. ii. 62, 63; C. v. 13. 15.

The power of alienating belongs to the owner and to him only; and every owner can alienate the thing belonging to him. There are, however, exceptions to the rule, and these exceptions form the subject of this Title.

The subject of dotes has been already discussed in the note to paragr. 3 of the last Title.

1. Contra autem creditor pignus ex pactione, quamvis ejus ea res non sit, alienare potest. Sed hoc forsitanideo videtur fieri, quod voluntate debitoris intelligatur pignus alienare, qui ab initio contractus pactus est, ut liceret creditori pignus vendere, si pecunia non solvatur. Sed ne creditoris jus suum persequi impedirentur neque debitoris temere suarum rerum dominium amittere videantur, nostra constitutione consultation est et certus modus impositus est, per quem pignorum distractio posset procedere, cujus tenore utrique parti creditorum et debitorum sati abundaeque provisum est.

1. On the other hand, a creditor may, according to agreement, alienate a pledge, although the thing is not his own property. But this alienation may perhaps be considered as taking place by the intention of the debtor, who in making the contract has agreed that the creditor might sell the thing pledged, if the debt was not paid. But that creditors might not be impeded in the pursuit of their rights, nor debtors seem too easily deprived of their property, a provision has been made by our constitution establishing a fixed method of procedure for the sale of pledges, by which the respective interests of the creditor and debtor have been fully secured.

GAL. ii. 64; C. viii. 34. 8. pr. et seq.

The power of a creditor to sell the thing pledged, forming an exception to the rule that none but the owner could alienate, was so necessary a part of his rights that it could not be taken from him even by express agreement; and an agreement ne vendere licet had no other effect than to make it necessary for the creditor to give the debtor fuller notice of his intention to sell. (D. xiii. 7.
4–6.) Justinian, by his constitution, permitted the parties to fix the time, and place, and manner of sale at their pleasure, and it was only if there was no special agreement that the regulations of his constitution were to take effect, the gist of which was that the thing might be sold after two years had elapsed from the time when the creditor gave the debtor notice to pay, and that after two more years the creditor, if no purchaser could be found, would, on petition to the emperor he declared the owner, the debtor having a further period of two years within which he might redeem. (C. viii. 34. 3.)

Tutors and curators might, in certain cases, alienate the goods of their pupils and of those committed to their care; but, at any rate in the later times of law, they had to obtain the permission of a magistrate for the alienation of rural immovables. (See C. v. 37. 22.)

2. Nunc admonendi sumus, neque pupillum neque pupillam ullam rem sine tutoris auctoritate alienare possis. Ideoque si mutua pecuniam aliquid sine tutoris auctoritate dederit, non contrahit obligationem, quia pecuniam non factit accipientis, ideoque vindicari nummi possunt, sicubi extend: sed si nummi, quos mutuo dedit, ab eo, qui accept, bona fide consumpti sunt, condici possunt, si mala fide, ad exhibendum de his agi potest. At ex contrario omnes res pupillo et pupille sine tutoris auctoritate recte dari possunt. Ideoque si debitor pupillo solvat, necessaria est tutoris auctoritas: aliquin non liberabitur. Sed etiam hoc evidentissima ratione statutum est in constitutione, quam ad Cesareenses advocatos ex suggestione Triboniani, viri eminentissimi, questoris sacri palatii nostri, promulgavitum, qua disposition est, ita licere tutori vel curatori debitorem pupillarem solvere, ut prius sentencei judicialis sine omni damno celebrata hoc permitat. Quo subscuto, si et judex pronuntiaverit et debitor solverit, sequatur hujusmodi solutionem plenissima securitas. Sin autem alter quam disposuimus soluto facta fuerit et pecuniam salvav habeat pupillus aut ex ea locupletior sit et adhuc eandem summam pecuniae petat, per exceptionem doli mali summovetur poterit: quodsi aut mala consumpserit aut furto amiserit, nihil proderit debitori doli mali exceptio, sed nihil minus damnabitur, quia temere sine tutoris auctoritate.
The pupil might make his condition better, but not worse. (See Bk. i. Tit. 21.) He could not transfer the property in anything belonging to him, but he could acquire the property in anything transferred to him. Three illustrations of this doctrine are given. 1. The pupil could not lend anything under the contract called mutuum, the essence of which was that the thing lent became the property of the borrower, who bound himself to give back a thing of equal value. (See Bk. iii. Tit. 14. pr.) If the pupil attempted to lend a thing in this way, the thing lent could be recovered by vindication, if it was possible that the actual thing should be restored; if not, its value could be recovered by a personal action (condictio) against the borrower; or if the borrower had been guilty of mala fides, an actio ad exhibendum would lie, that is, the borrower was called upon to produce the thing borrowed; and on his being found unable to do so, he was condemned to pay not only the value of the thing, but damages to compensate for the injury inflicted.

2. If the pupil was a debtor and paid without authorisation money to a creditor, he could not transfer the property in the pieces of money paid, and had a real action to get them back, if the creditor still had them; if not, the pupil had the same remedies as just stated in regard to a mutuum, except that if he brought a condictio against a creditor, who had bona fide spent the money, and the creditor could claim the same amount of money for the debt due to him, the Roman jurists considered that instead of these cross actions the debt of the pupil ought to be considered to be extinguished.

3. If the debtor made a payment to the pupil without the authorisation of the tutor, that which he paid became the property of the pupil; and as the pupil could not make his condition worse, he could not extinguish debts due to him; and thus the debt was still owing, although the pupil retained what was paid him. The debtor might still be sued for what he owed, and he could only repel the action by a plea of dolus malus to the extent to which
the pupil then had the money paid in hand, so that if the pupil
had spent it all the debtor would have to pay over again. (Gal.
i. 84.) If the tutor authorised the payment, the debt was extin-
guished; but still the creditor was not quite safe; the pupil had a
right to receive from the tutor the money paid; and if he could
not obtain it from him, the prœtor would, under certain circum-
cstances, grant a restitutio in integrum (see note on introdutory
paragraph of Bk. i. Tit. 29), and the creditor might then be
obliged to pay over again, in order that the pupil might be kept
free from all loss. It was to guard against this that Justinian, in
the constitution alluded to in the text, provided a means whereby
the creditor should have plenissima securitas.

Tit. IX. PER QUAS PERSONAS NOBIS ADQUIRITUR.

Adquiritur nobis non solum per
nosamet ipos, sed etiam per eos, quos
in potestate habemus: item per eos
servos, in quibus usufructum ha-
blemus: item per homines liberos et
servos alienos, quos bona fide pos-
sidemus. De quibus singulis dili-
genius dispiciamus.

We acquire not only by ourselves,
but also by those whom we have in
our power; also by slaves, of whom
we have the usufruct; and by those
freemen and slaves belonging to others
whom we possess bona fide. Let us
examine separately these different
cases.

GAL. ii. 86.

The rule of law was, that no one could acquire through another
person; but if persons in the power of another acquired anything,
that which they acquired became, by the mere force of their
position, the property of the person in whose power they were;
and thus the rule may be, perhaps, more accurately expressed by
saying that nothing could be acquired per extraneam personam,
i.e. through a person who was not in the familia of the acquirer.

1. Igitur liberi vestri utriusque
sexus, quos in potestate habetis,
olim quidem, quidquid ad eos per-
venerat (exceptis videlicet castrensi-
bus peculii), hoc parentibus sui
adquirebant sine uilla distinctione:
et hoc ita parentum fiebat, ut esset
eis licentia, quod per unum vel
unam eorum adquisitum est, ali
filio vel extraneo donare vel vendere
vel quocumque modo voluerant, ap-
plicare. Quod nobis inhumanum
visum est et generali constitutione
emissa et liberis pecurcinus et
patribus debitum reservavimus.
Sanctum etenim a nobis est, ut, si
quid ex re patris ei obveniat, hoc
secondum antiquam observationem
totum parenti adquirat (quae enim
invidia est, quod ex patris occasione

1. Formerly, all that your children
under your power of either sex ac-
cquired, excepting castronia peculii,
was without distinction acquired for
the benefit of their ascendants; so much
so, that the paterfamilias who had
thus acquired anything through one of
his children, could give or sell, or
transfer it in any way he pleased to
another child or to a stranger. This
appeared to us very harsh, and by a
general constitution we have relieved
the children, and yet reserved for the
ascendants all that was due to them.
We have declared that all which the
filiusfamilias obtains by means of the
fortune of the father, shall, according
to the old law, be acquired entirely
for the father's benefit: for what hard-
ship is there in that which comes from
profectum est, hoc ad eum reverti? : quod autem ex alia causa sibi filiusfamilias adquisivit, hujus usumfructum quidem patri adquirat, dominium autem apud eum remanat, ne, quod ei suis laboribus vel prospera fortuna accessit, hoc in alium perveniens, luctuosum ei procedat.

the father returning to him? But of everything that the filiusfamilias acquires in any other way, he shall acquire the usufruct for the father, but the son shall retain the ownership, so that the son may not have the mortification of seeing that becoming the property of another, which he himself has gained by his labour or good fortune.

Gal. ii. 87 ; C. vi. 61. 6.

The filiusfamilias could not, in the strict law of Rome, have any property of his own. Sometimes, however, the father permitted the son to have what was called a peculium, that is, a certain amount of property placed under his exclusive control. This peculium remained in law the property of the father, but the son had the disposition and management of it by his father's permission, and as long as it remained in the son's possession it was, as far as regarded third persons, exactly like property really belonging to the son only, that is, they could sue and recover from him to the extent of his peculium. (See Tit. 12. pr. of this Book.) In the early times of the Empire a filiusfamilias came to have, under the name of castrense peculium, property quite independent of his father. This castrense peculium consisted of all that was given to a son when setting out upon military service, or acquired while that service lasted. (D. xlxi. 17. 1.) This belonged to the son as completely as if he had been sui juris, and he had full power of disposing of it either during his lifetime or by testament. Filiifamilias in castrensi peculio vice patrumfamiliarium funguntur. (D. xiv. 6. 2.) If, however, he did not choose to exercise his power of disposing of it by testament, his father took it at his death, not as succeeding to it ab intestato, but as the claimant of a peculium. (See Tit. 12. pr.) A further benefit was extended to the filiusfamilias by the institution of the quasi-castrense peculium, a privilege given to certain civil functionaries, corresponding to that given by the castrense peculium to soldiers. Constantine, by a constitution (C. xii. 31), placed on the footing of the castrense peculium things which a filiusfamilias, who was an officer of the palace, received from the emperor or gained by his own economy. The same advantage was subsequently extended to many other functionaries, as well as to advocates and certain ecclesiastical dignitaries. The quasi-castrense peculium must have existed in the time of Ulpian (D. xxxvi. 1. 1. 6; xxxix. 5. 7. 6), unless the passages in the Digest in which he alludes to it are interpolated, but under what form it then existed we do not know. In one respect it slightly differed from the castrense peculium; for the power of disposing of it by testament did not always accompany it, but was only given to the more privileged classes of those who were allowed to have such a peculium. Justinian, however, altered this, and gave the power
of disposing of it by testament to every one who had a quasi-castrense peculium. (See Tit. 11. 6.) Constantine also introduced another kind of peculium, termed the peculium adventitium. This consisted of everything received by a filiusfamilias from his mother at her death, whether by testament or not. (C. vi. 60. 1.) Subsequent emperors included in it all received by succession or as a gift inter vivos from maternal ascendants (C. vi. 60. 2), or by one of two married persons from the other (C. vi. 61. 1); and Justinian, as we learn from the text, included under the peculium adventitium all that came to the son from any other source than from the father himself. The father had the usufruct of the peculium adventitium, and it was only the ownership that was held by the son. The peculium which came to the son as part of the father's property, and which continued to belong to the father, has been termed by commentators profectitium, because it comes (proficiscitur) from the father.

The peculium in the time of Justinian, therefore, if profectitium, belonged to the father; in all other cases it belonged to the son; but the father had the usufruct of the peculium adventitium, while the son had as full power over the castrense or quasi-castrense peculium as if he had been sui juris.

2. Hocque a nobis dispositum est et in ea specie, ubi parere emancipando liberum ex rebus, qua acquisitionem effugiant, sibi partem tertiam retinere, sive voluerat, licentiam ex anterioribus constitutionibus habebat, quasi pro pretio quodammodo emancipationis, et inhumationem quiddam accederebat, ut filius rerum suarum ex hac emancipacione dominio pro parte defrangentur et, quod honoris ei ex emancipacione additum est, quod sui juris effectus est, hoc per rerum deminutionem decrescat. Ideoque statim posse, ut parere pro tertia bonorum parte dominii, quam retinere poterat, dimidiam non dominii rerum, sed usufructus retineat: ita etenim et res intacta et filium remanebunt et pater amplior summa fruatur, pro tertia dimidia potius

2. We have also made some regulations with respect to the power which under former constitutions a father had, when emancipating his children, of deducting a third part from the things over which he had no right of acquisition, as if this was the price of the emancipation. It seemed very hard that the son should thus be deprived by emancipation of a third part of his property, and that what he gained in honour by being emancipated, as being thus made sui juris, should be impaired by a diminution of his property. We have therefore enacted that the father, instead of retaining a third as owner, shall retain half not as owner but as usufructuary. Thus the ownership in the whole will remain with the son unimpaired, while the father will enjoy the benefits of a larger portion, the half, namely, instead of the third.

C. vi. 61. 6. 8.

The usufruct of the father over things, the ownership of which, as part of the peculium adventitium, belonged to the son, would be lost by emancipation. It was as an equivalent for this that the property in one-third of these things was given to the father on emancipation. Justinian substitutes the usufruct of one-half for the ownership of one-third.

3. Item vobis adquiritur, quod servi vestri ex traditione nanciscuntur.

3. So, too, all that your slaves acquire by tradition, or stipulation, or
in any other way, is acquired for you; and that even without your knowledge and against your wishes. For the slave being in the power of another cannot himself have anything as his own. And if he is instituted heir, he cannot enter on the inheritance except by your direction. And if he enters by your direction, you acquire the inheritance exactly as if you had yourselves been instituted heirs. Legacies, again, are equally acquired for you by your slaves. And it is not only the ownership which is acquired for you by those whom you have in your power, but also the possession. Everything of which they have obtained possession you are considered to possess, and consequently usucapion or possession longi temporis operates for you through them.

All that the slave had belonged to his master; and this rule was subject to no exceptions such as those introduced for the benefit of the filiusfamilias. The slave's peculium was always at the disposition of his master, and it made no difference what was the mode in which he acquired: he acquired it for his master even though his master had not consented or even known of the acquisition. Therefore, if the slave received anything in pursuance of a stipulation (sive quid stipulantur), he acquired it for his master, although he could not bind his master by promising anything to a person who stipulated for anything from him. The slave could not make his master's condition worse; and as an inheritance might be more onerous than lucrative, for the debts of the deceased, which the heir was bound to pay, might exceed the value of his property, a slave was not permitted to accept an inheritance, except by his master's express command. A legacy, on the other hand, could not be otherwise than advantageous, and therefore a legacy given to a slave immediately belonged to his master. There was a minor difference between the institution of a slave as heir, and a gift to him of a legacy, which deserves mention. The right to a legacy dated from the death of the deceased; the right to an inheritance dated from the time of entering on an inheritance. The slave, therefore, acquired a legacy for the benefit of the master to whom he belonged at the time when the deceased died; but a slave instituted heir, acquired for the master to whom he belonged at the time of entering on the inheritance. If, therefore, the slave changed masters or became free between these times, he acquired a legacy for his former master, but took an inheritance for his new master, or, if free, for himself.

The physical fact of possession might be accomplished through
a slave, but not the intention, which was requisite for legal possession. It was necessary that the master should have the intention of treating the thing possessed by the slave as if he himself was the owner. Animo nostro, says Paul, corpore etiam alieno, possidemus. (D. xli. 2. 3. 12.) The master could not, therefore, acquire through the slave legal possession, as opposed to mere detention, without his knowledge and consent, as he could acquire ownership; except, indeed, when the slave possessed a thing as part of his peculium, for then the permission to have a peculium was considered as indicating a general intention on the part of the master applying to, and completing, legal possession in everything acquired as part of the peculium. (D. xli. 2. 1. 5.)

All that is said here of the slave may, with the necessary exceptions as to the peculium castrense, quasi-castrense, and adventitia, be said of the filiusfamilias, who equally stipulated for his father's benefit, could not make his father's position worse, took inheritances only under his father's direction, received legacies for his father's benefit, and possessed physically, but needed his father's animus possidendi.

4. De his autem servis, in quius tantum usufructum habetis, sit placuit, ut, quidquid ex vestra vel ex operibus suis adquirant, id vobis adiciatur, quod vero extra causas persecutioni sunt, id ad dominum proprietas pertineat. Itaque si servum heres institutus sit legatum, sive ei aut donatum fuerit, non usufructuario, sed domino proprietatis adquiritur. Idem placet et de eo, qui a vobis bona fide possidetur; sive is liber sit sive alienus servus; quod enim placuit de usufructuario, idem placet et de bona fide possessore. Itaque quod extra suas causas adquiratur, id vel ad ipsum pertinet, si liber est, vel ad dominum, si servus est. Sed bona fidei possessor cum usqueperit servum, quia eo modo dominus est, ex omnibus causis per eum sibi adscribere potest: fructuarius vero usucapere non potest, primum quia non possidet, sed habet jus utendi et fruendi, deinde quia scit, servum alienum esse. Non solum autem proprietas per eos servos, in quibus usufructum habetis vel quos bona fide possidetis, vel per libera personam, quae bona fide vobis servit, adquiritur vobis, sed etiam possessorio: locum autem in utrinque persona secundum definitionem, quam pro-xime esprofimus, id est si quam possessionem ex vestra vel ex operibus suis adepti fuerint.

4. As to slaves of whom you have only the usufruct, it has been decided that whatever they acquire by means of anything belonging to you, or by their own labour, shall belong to you; but that all they acquire from any other source shall belong to the owner. So if a slave is made heir, or anything is given him as a legacy or gift, it is the owner, not the usufructuary, who receives the benefit of the acquisition. It is the same with regard to any one whom you possess bona fide, whether a free man or the slave of another person (for the rule with regard to the usufructuary holds good with regard to the bona fide possessor); and so everything the person possessed acquires, except from one of the two sources above mentioned, belongs to himself if he is a free man, and to his master if he is a slave. When the bona fide possessor has gained the property in the slave by usucaption, he, of course, becomes the owner, and all that the slave acquires is acquired for him. But the usufructuary cannot acquire a slave by use: first, because he has not the possession, but only the right of usufruct; and secondly, because he knows that the slave belongs to another. It is not only the ownership that is acquired for you by the slaves of whom you have the usufruct, or whom you possess bona fide, or by a free person whom you employ as your slave bona fide; you acquire also the
The usufructuary was entitled to the fruits of the slave, that is, to his services, and to the profits derived from letting out his services to others; but what the slave acquired by stipulation, gift, legacy, or similar means, was no part of the fruits, and therefore did not belong to the usufructuary. If the means of acquisition were derived from the usufructuary, as, for instance, if the slave acquired by parting with any of the produce, then the case would be different.

What is true of the usufructuary is true also of a bona fide possessor either of the slave of another, or of a person in fact free, but honestly believed to be a slave. And the bona fide possessor has the advantage over the usufructuary pointed out in the text, that as he has the possession, which no usufructuary can have, for no usufructuary intends to treat the thing as if he were the owner, this possession may, if continued long enough, give the rights of usucapion over a moveable, or of possessio longi temporis over an immoveable.

5. Hence it appears that you cannot acquire by means of free persons not in your power, or possessed by you bona fide; nor by the slave of another, of whom you have neither the usufruct nor the lawful possession. And this is meant, when it is said, that nothing can be acquired by means of a stranger; except, indeed, that according to the constitution of the Emperor Severus, possession may be acquired for you by a free person, as by a procurator, not only with, but even without, your knowledge; and by this possession you acquire the property, if it was the owner who delivered the thing, or by usucapion or prescription longi temporis, if it was not.

5. Ex his itaque apparat, per liberos homines, quos neque vestro juri subjectos habetis neque bona fide possidetis, item per alienos servos, in quibus neque usufructum habetis neque justam possessionem, nulla ex causa vobis adquiri posse. Et hoc est, quod dicitur, per extraneam personam nihil adquiri posse: excepto eo, quod per liberam personam veluti per procuratorem placet non solum scientibus, sed etiam ignorantibus vobis adquiri possessionem secundum divi Severi constitutionem et per hanc possessionem etiam dominium, si dominus fuit, qui tradidit, vel per usucapionem aut longi temporis prescriptionem, si dominus non sit.

GAL. ii. 95; C. iv. 27. 1; D. xii. 1. 20. 2; C. vii. 92. 1.

The rule of the older law was that no person could be represented per extraneam personam, i.e. by a person who was not under his power, in any of those acts which were regulated by the civil law. Thus, no one could acquire the ownership of a thing for another; if he received anything, as, for instance, by mancipation or in jure cessio, although he received it expressly for another, still this other person did not thereby acquire the property in the thing. But a mere natural fact such as that of possession
could take place for the benefit of one person through another person, if the person for whose benefit the thing was possessed had but the intention of profiting by it, and then this possession might lead through usucapion to ownership. If, however, a person was charged with the management of the affairs of another, he could exercise an intention of possessing for the benefit of the person for whom he acted, which a mere stranger could not; and thus it was possible non solum scientibus sed etiam ignorantibus, i.e. for persons who did not know even of the fact of possession, to acquire legal possession through an agent. But, though the text would be likely to mislead us, we learn from a constitution of Severus and Antoninus (C. vii. 32. 1), which does not appear to have made any great change in the law, that usucapion did not commence until the person, for whose benefit the thing was possessed, knew of the possession. If the procurator received possession from a person who was the owner, then it was not a question of getting ownership by usucapion, and the ownership immediately passed to the person for whom the procurator was acting, even though this person did not know of what was done. Si procurator rem mihi emerit ex mandato meo eique sit tradita meo nomine, dominium mihi, id est proprietas, adquiritur etiam ignoranti. (D. xli. 1. 13.)

6. Hactenus tantisper admonuiisse sufficiat, quemadmodum singulae res adquiruntur: nam legatorum jus, quo et ipso singulae res vobis adquiruntur, item fideicommissorum, ubi singulae res vobis relinquuntur, opportunius inferiori loco referemus. Videamus itaque nunc, quibus modis per universitatem res vobis adquiruntur. Si cui ergo heredes facti sita sive cujus bonorum possessionem petieritis vel si quem adrogaveritis vel si cujus bona libertatum conservandarum causa vobis addicte fuerint, ejus res omnes ad vos transeunt. Ac prius de heditatibus dispicianmus. Quarum duplex condicio est: nam vel ex testamento vel ab intestato ad vos pertinent. Et prius est, ut di his dispicianmus, quae vobis ex testamento obveniunt. Qua in re necessarium est, initio de ordinandis testamentis exponere.

6. What we have said respecting the modes of the acquisition of particular things, may suffice for the present. For we shall speak more conveniently hereafter of the law of legacies, by which also you acquire property in particular things, and of fideicommissa, by which particular things are left to you. Let us now speak of the modes of acquiring per universitatem. If you are made heir, or claim possession of the goods of any one, or arrogate any one, or goods are adjudged to you in order to preserve the liberty of slaves, in these cases all that belonged to such person passes to you. First let us treat of inheritances, which may be divided into two kinds, according as they come to you by testament or ab intestato. We will begin with those which come to you by testament; and for this it is necessary in the first place to explain the formalities requisite in making testaments.

Gal. ii. 97-100.

We now pass to the acquisition of a universitas rerum, to the cases in which one man succeeded to the persona of another, and acquired in a mass all his goods and all his rights and duties. (See Introd. sec. 74.)
Trt. X. DE TESTAMENTIS ORDINANDIS.

Testamentum ex eo appellatur, quod testatio mentis est. The word testament is derived from testatio mentis; it testifies the determination of the mind.

D. xxviii. 1. 1.

With respect to this derivation it is scarcely necessary to say that mentum is merely a termination, and not derived from mens. Ulpian (Reg. 20. 1) gives as a definition of a testament, mentis nostræ justa contestatio, in id solemniter facta, ut post mortem nostram valeat; and Modestinus (D. xxviii. 1. 1) gives voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri vult; the word justa implying in each, that, in order to be valid, the testament must be made in compliance with the forms of law.

1. Sed ut nihil antiquitatis penitus ignotetur, scienendum est, olim quidem duo genera testamentorum in usu suisse, quorum altero in pace et in otió utebantur, quod calatis comitibus appellabatur, altero, cum in praetūm exiturī essent, quod procingtum dicesabatur. Accessit deinde tertium genus testamentorum, quod dicesabatur per se et libram, sollicit quis per emancipationem, id est imaginariam quandam venditionem, agebatur, quinque testibus et libripende, civibus Romanis puberibus, presentibus et eo, qui familiæ emptor dicesabatur. Sed ulla quidem priora duo genera testamentorum ex veteribus temporibus in desuetudinem abierunt: quod vero per se et libram fiesbat, licet diutius permansit, attamen partim et hoc in usu esse desìit.

1. That nothing belonging to antiquity may be altogether unknown, it is necessary to observe, that formerly there were two kinds of testaments in use: the one was employed in times of peace, and was named calatis comitiis; the other was employed at the moment of setting out to battle, and was termed procingtum. A third species was afterwards added, called per as et libram, being effected by mancipation, that is, an imaginary sale in the presence of five witnesses and the libripens, all citizens of Rome, above the age of puberty, together with him who was called the emptor families. The two former kinds of testaments fell into disuse even in ancient times; and that made per as et libram also, although it has continued longer in practice, has now in part ceased to be made use of.

Gal. ii. 101–104.

When the head of a family died, the law in ancient times determined on whom his persona, that is, the aggregate of his political and social rights and duties, should devolve. But we cannot say that there was any definite period of Roman history when a man could not make a will. Originally, as we learn from the text, which is borrowed from Gains, testaments were made in the comitia calata, or in procingtum. By calata comitia is meant the comitia curiata summoned (calata) for the despatch of what we may term private business. This took place twice a year. We do not know how far it was open to any one at the meeting to oppose a testament, or whether the comitia merely registered the testaments declared in their presence. Subsequently the mode of making testaments per as et libram, that is, by a fictitious sale, was introduced, and both this mode and that of declaration before the comitia curiata
were used indifferently, nor is there any evidence to show that the one form was considered more appropriate to the *patres* than the other. Only members of the patrician *gentes* sat in the *comitia curiata*, but that is no reason why the plebeians should not have come before these *comitia* to declare their testaments. The Twelve Tables declared *uti legassit super pecunia tutela tuae rei, ita jus esto*, that is, every one’s testamentary dispositions should be carried into effect, and the necessity for the provision may have arisen from some kind of tampering on the part of members of the *comitia* with the testaments of plebeians.

*Procinctus* properly means an army in marching and fighting order. *Procinctus est expeditus et armatus exercitus* (Gai. ii. 101). The testament is said to be *procinctum*, but properly it ought to be *in procinctu factum*. Cicero speaks (de Or. i. 53) of the testament *in procinctu* as then in use, and describes it as made *sine libra et tabulis*, that is, without the forms usual in the *testamentum per eae et libram*.

In the *testamentum per eae et libram*, the *hereditas* was sold by *mancipatio* to the purchaser. Originally the testator sold the inheritance to the person who was really to be the heir. The purchaser, as Gaius expresses it, *heredis locum obtinuerebat*, and the testator instructed him how he wished his property to be disposed of after his death. But as the sale was irrevocable, a testator might be very glad to escape from proclaiming an heir whose position he could not afterwards affect. The object was attained by selling the inheritance to a third person; and the *familiaemiptor* came to be thus a mere stranger, who was only appointed *dicis gratia*, to go through the form of sale. (Gai. ii. 103.) The process of selling to this fictitious stranger is given at length in Gaius (ii. 104). The testator, having written out his will, summoned five witnesses, and a balance-holder (*libripens*), and then gave by mancipation his inheritance to the purchaser. The purchaser, on receiving it, instead of using the ordinary form, pronounced these words, *Familiam pecuniamque tuam endo mandate la tutela custodiliaque mea recipio eaque quo tu jure testamentum facere posse secundum legem publicam hoc are (or, as some added, sinque libra) esto mihi empta*; he then, after striking the scale with it, gave the piece of copper to the testator as the price of the inheritance. The testator then produced the tablets on which his testament was written, and said, *Hec ita, ut in his tabulis corisque scripta sunt, ita do, ita lego, ita testor; itaque vos, Quirites, testimonium mihi perhibete*. This announcement of his wishes was termed *mancipatio*. *Muncipare est palam nominare*. (Gai. ib.) The term is properly applicable to the oral statement; but the expression of the testator’s wishes was really considered as always made orally, as the announcement that the written documents contained a declaration of the testator’s wishes was taken as a compendious mode of stating what those wishes were. (Gai. ib.)
The concluding words of the paragraph, *partim et hoc in usu esse desistit*, refer to the change above mentioned from a sale to the real heir to a sale to a stranger. The sale became a mere matter of form, and the testament was that which the testator wrote. When the mode of making testaments by the *calata comitia* fell into disuse we do not know, but probably at an early time of the Republic. The imperial constitutions (see next Title) gave all soldiers the power of making a testament without observing the usual forms, and the testaments of soldiers under the Empire were valid, not as being made in *procinctu*, that is, by virtue of the army being regarded as an assembly of citizens, but by the power which was given to each soldier of making an informal testament. In what way they gave greater liberty to the soldier than the old power of making the will in *procinctu* we cannot say; but probably the making of the testament in *procinctu* was connected with the taking of the auspices, and thus was more liable to be declared informal.

2. Sed predicta quidem nomina testamentorum ad jus civile referebantur. Postea vero ex edicto pretorius alia forma faciendorum testamentorum introducta est: jure enim honorario nulla mancipatio desiderabatur, sed septem testium signa sufficiébant, cum jure civili signum testamentum non erant necessaria.

2. The kinds of testament which we have just mentioned belonged to the civil law, but afterwards another form of making testaments was introduced by the edict of the pretor. By the *jus honorarium* no sale was necessary, but the seals of seven witnesses were sufficient, whereas the seals of witnesses were not required by the civil law.

There was no necessity, as the text tells us, that a written will made in the old form *per ceth et libram* should be sealed. After the pretorian form of making wills became usual, a *senatus-consultum* provided (as we learn from Paul, *Sent. v. 25. 6*) that a written testament should be made on tablets of wax. These tablets were held together at one margin with the wire, and in the opposite margin there was a perforation made through all the tablets, and through this was passed a triple linen thread, and then the tablets were covered with wax on the outside, and the witnesses placed their seal (that is, made a mark with their rings) on this external wax. It was also customary for them to write their names and to state whose will it was they had witnessed (D. xxviii. 1. 30), but this was not a necessary part of the form until made so by a constitution of Theodosius and Valentinian (C. vi. 23. 21.) This constitution also permitted a will to be made in a roll, which, if the testator wished to keep the terms secret, he might close and seal up, leaving the foot of the roll open, on which the witnesses were to put their seals and subscriptions. The testator was, under this constitution, to subscribe his name or get an eighth witness to subscribe it for him.

The pretor, as the text informs us, permitted an heir instituted in a testament to have the inheritance, even though the form of mancipation was not gone through. He could not,
indeed, make this person heir, for it was necessary that an heir should derive his rights exclusively from the civil law: but he gave him the bonorum possessio, that is, permitted him to enjoy exactly what he would have enjoyed if he had been properly constituted heir, and then usucapion soon made him Quiritarian owner. (See Bk. ii. Tit. 6.) The praetor, however, required that the testament in which he was instituted should have been made in the presence and attested by the seals of seven witnesses. This was really the number of witnesses which there would have been, had the form of mancipation been gone through, if the libripens and familic emptor were included. Thus the praetor, while dispensing with the mere form of mancipation, retained exactly the same check against fraud, which that form would have afforded. (See ULP. Reg. 28. 6.)

8. Sed cum paulatim tam ex usu hominum quam ex constitutionum emendationibus cerpit in unam consonantiam jus civile et praetorium jungi, constitution est, ut uno eodemque tempore, quod jus civile quodammodo exigebat, septem testibus adhibitis et subscriptione testium, quod ex constitutionibus inventum est, et ex edicto praetoris signacula testamentis imponerentur: ut hoc jus tripartitum esse videatur, ut testes quidem et eorum presentia uno contextu testamenti celebrandi gratia a jure civili descendant, subscriptiones autem testatoris et testium ex sacrarum constitutionum observatione adhibeantur, signacula autem et numerus testium ex edicto praetoris.

8. But when the progress of society and the imperial constitutions had produced a fusion of the civil and the praetorian law, it was established that the testament should be made at one and the same time (a point required to some extent by the civil law), in the presence of seven witnesses, and with the subscription of the witnesses (a formality introduced by the constitutions), and with their seals appended, according to the edict of the praetor. Thus what is now required seems to have had a triple origin. The witnesses, and their presence at one continuous time for the purpose of giving the testament the requisite formality, are derived from the civil law; the subscriptions of the testator and witnesses, from the imperial constitutions; and the seals of the witnesses and their number, from the edict of the praetor.

C. vi. 28. 21.

The different formalities requisite were to be gone through, one immediately following after another, so as to make the whole one transaction. Est autem uno contextu nullum actum alienum testamento intermiscere (D. xxviii. 1. 21. 3).

It was, by the above-mentioned constitution, enacted in the reign of Valentinian the Third in the East, and of Theodosius the Second, his colleague, in the West, a.d. 439, that the new form of testament described in the text, and which received the name of testamentum tripartitum, was substituted for the ancient ones. But in the West the form per aes et libram was never quite superseded, and traces of it are to be found even in the middle ages.

4. Sed his omnibus ex nostra constitutione propter testamentorum sinceritatem, ut nulla fraud adhibea-
tur, hoc additum est, ut per manum testatoris vel testium nomen here-dis exprimatur et omnis secundum illius constitutionis tenorem procedant.

of testaments, and to prevent fraud, that the name of the heir shall be written in the handwriting either of the testator or of the witnesses; and that everything shall be done according to the tenor of that constitution.

C. vi. 28. 29.

This additional formality, imposed by Justinian, was afterwards abolished by him. (Nov. 119. 9.)

5. Possunt autem testes omnes et uno anulo signare testamentum (quid enim, si septem anuli una sculptura fuerint?) secundum quod Pomponio visum est. Sed et alieno quoque anulo licet signare.

5. All the witnesses may, as Pompious held, seal the testament with the same seal; for what if the engraving on all seven seals was the same? And a seal may be used belonging to another person.

D. xxviii. 1. 22. 2.

6. Testes autem adhiberi possunt ii, cum quibus testamenti facio est. Sed neque mulier neque impubes neque servus neque mutus neque surdus neque furiosus nec cui bonis interdictum est, nec is, quem leges jubes improbum intestabilemque esse, possunt in numero testium adhiberi.

6. Those persons can be witnesses with whom there is testamenti facio. But women, persons under the age of puberty, slaves, dumb persons, deaf persons, madmen, prodigals restrained from having their property in their power, and persons declared by law to be worthless and incompetent to witness, cannot be witnesses.

D. xxviii. 1. 20. 4, 7; D. xxviii. 1. 26.

When testaments were made per æs et libram, as no one could take part in the ceremony of mancipation who did not share in the jus Quiritium, no peregrinus, no one who had not the commercium, could be a witness to a testament. It was equally necessary that the seller, i.e. the testator, and the purchaser, that is (in the old form), the heir, should share in the jus Quiritium. And therefore no one who had not the commercium could take any part in the testamenti facio, the ceremony of making a testament, either as testator, heir, or witness; and this was expressed by saying that they were not persons with whom there was testamenti facio—not persons, that is, with whom any citizen could join in such a ceremony.

In the general language of Roman law testamenti facio thus came to mean the capacity (1) of making a will; (2) of taking under a will; (3) of being witness to a will.

To the list of persons who had not testamenti facio under the last of these heads, that is, who could not be witnesses to wills, given in this paragraph, we have to add, from paragraphs 9 and 10, persons in the power of the testator and the heir and persons belonging to the heir’s family.

The subject of the incapacity to make a will is discussed in the 12th Title, and that of the incapacity to take under a will in the 14th Title; but that the subject of testamenti facio may be viewed as a whole, it may be convenient to give here a summary of the rules under these two heads.
1. Making a Will.—Slaves (except slaves belonging to the State who could leave half their peculium by will (ULP. Reg. 20. 17)) could not make a will. A person in captivity could not make a will (see Title 12. 5); nor could persons who had suffered the maxima or media capitis deminutio (D. xxviii. 1. 8. 1, 2, and 4); nor, so long as the law recognised this distinction of persons, could Latini Juniani, peregrini, or dediticii. (ULP. Reg. 20. 14, 15.) A dumb man and a deaf man, the former because he could not utter the words of the nuncupatio, the deaf man because he could not hear the words of the emptor familias (ULP. Reg. 20. 13), could not make a will, but subsequently provisions were made for allowing the dumb, the deaf, and the blind to make wills under certain safeguards. (See Tit. 12. 3 and 4.)

Women at the time of Justinian could make wills. But formerly they could only make a will per æs et libram, and with the consent of their tutor. (GAI. ii. 118.) Persons in manu or in potestate could not make wills except filiisfamiliorum with regard to their peculium castrense or quasi-castrense. (See Tit. 12. pr.) Madmen, persons under puberty, and prodigals interdicted from the management of their affairs could not make wills (Tit. 12. 1 and 2), nor persons made intestabiles for a crime or those condemned for a libel ob carmen famosum (D. xxviii. 1. 18. 1), for spoliatio repetundarum (D. xxii. 5. 15), or adultery (D. xxii. 5. 14).

The extent to which the incapacity to make a will applying to other persons was removed in favour of a soldier on service is discussed in Title 11.

2. Taking under a Will.—The capacity to take under a will was much wider than that of making a will; and when fideicommissa were instituted, many persons who could not be heirs or legatees took the benefit of a fideicommissum. (See Tit. 23.)

But (apart from fideicommissa) peregrini and Latini, unless the will was that of a soldier (GAI. ii. 110), and dediticii (ULP. Reg. 22. 2), could not take as heirs or legatees. Nor could women under the lex Voconia, 585 A.U.C. (GAI. ii. 274) if the fortune of the testator exceeded 100,000 sesterces. Nor any uncertain person, as an unborn child (Tit. 20. 26), or a corporate body (ULP. Reg. 22. 5), or any of the gods, except those in whose favour, as the Tarpeian Jupiter, an exception had been made by a senatusconsultum or a constitution. (ULP. Reg. 22. 6.) These disabilities had all ceased before, or were abolished by Justinian. (C. vi. 48. 1.) Under the lex Julia et Papia Poppea (see note on Tit. 20. 8), until the restrictions imposed by it in this respect were abolished by Constantine (C. viii. 58. 1), unmarried persons (caelibes) could not take any part, and childless persons (orbi) could only take half of what was given them. There were still, however, some persons who under Justinian's legislation could not take, such as the children of persons convicted of treason (C. ix. 5. 1), and apostates and heretics (C. i. 7. 3); and children of, and
parties to, prohibited marriages could not take under the will of the parents, or of the other party to the marriage (C. v. 9. 6). Until a late period of the Empire, natural children and their mother were excluded, but, as we learn from the 89th Novel (12. pr., 1, 2, 3), a constitution of the Emperors Valens, Valentinian, and Gratian permitted a twelfth of the testator’s property to be given to the natural children and their mother where there were legitimate children, and a fourth where there were none, and the testator’s parents were not alive; and Justinian extended this fourth to the whole inheritance, their *legitima portio* (see note on Tit. 18. 3) being reserved to the testator’s ascendants, if any.

7. Sed cum aliquis ex testibus testamenti quidem faciendi tempore liber existimabatur, postea vero servus apparuit, tam divus Hadrianus Catonio Vero quam postea divi Severus et Antoninus rescripserunt, subvenire se ex sua liberalitate testamento, ut sic habeatur, atque si, ut oportet, factum esset, cum eo tempore, quo testamentum signaretur, omnium consensu hic testis libereum loco fuerit nec quisquam esset, qui ei status questionem movet.

7. A witness, who was thought to be free at the time of making the testament, was afterwards discovered to be a slave, and the Emperor Hadrian, in his rescript to Catonius Verus, and afterwards the Emperors Severus and Antoninus by rescript, declared, that they would aid such a defect in a testament, so that it should be considered as valid as if made quite regularly; since, at the time when the testament was sealed, this witness was commonly considered a free man, and there was no one who contested his status.

C. vi. 28. 1.

Regard was had only to what was the condition of witnesses at the time of signature, not at that of the death of the testator. (D. xxviii. 1. 22. 1.)

8. Pater nec non is, qui in po-
testate ejus est, item duo fratres,
qui in ejuodem patris potestate sunt,
unire testes in unum testamentum
fieri possunt: quia nihil nocet ex
una domo plures testes alieno nego-
tio adhiberi.

8. A father, and a son in his power, or two brothers under the power of the same father, may be witnesses to the same testament; for nothing prevents several persons of the same family being witnesses in a matter which only concerns a stranger.

No one of the same family with the testator or heir could be a witness to the testament, a family comprising, in this sense, the head and those under his power; for they had so intimate a connection with each other that they might be said to be witnesses for themselves, if they were witnesses for each other.

9. In testibus autem non debet esse, qui in potestate testatoris est. Sed si filii familiaris de castrensi peculio post missionem faciat testamentum, nec pater ejus recte testis adhibetur nee is, qui in potestate ejuodem patris est: reprobatum est enim in ea re domesticum testimonium.

9. But no person under power of the testator can be a witness. And if a *filius familiaris* makes, after leaving the service, a testament disposing of his *castrense peculium*, neither his father, nor any one in the power of his father, can be a witness. For, in this case, the law does not allow of the testimony of a member of the same family.

GAL. ii. 105, 106.
This had been a point on which the jurists were disagreed. Justinian here follows the opinion of Gaius (ii. 106), rejecting that of Ulpian and Marcellus. (D. xxviii. l. 20. 2.) The question could only arise respecting a testament made post missionem, as, if it was made during service, it would be entitled to the exemptions accorded to military testaments.

10. Sed neque heres scriptus neque is, qui in potestate ejus est, neque pater ejus, qui habet sum in potestate, neque fratres, qui in ejusdem patris potestate sunt, testes adhiberi possunt, quia totum hoc negotium, quod agitur testamenti ordinandi gratia, creditur hodie inter heredem et testatorem agi. Licet enim id olim jus tale valde conturbatum fuerat et veteres, qui familias emptorem et eos, qui per potestatem ei coadunati fuerant, testamentarii testimoniis repellebant, heredi et his, qui conjuncti ei per potestatem fuerant, concedebant testimonia in testamentis prestare, licet hi, qui id permittebant, hoc jure minime abuti debeo eos suadebant: tamen nos, eandem observationem corrigentes et, quod ab illis suam est, in legem necessitatem transferentes, ad imitationem pristini familias emptoris merito nec heredi, qui imaginem vestram insimi familias emptoris optinet, nec aliis personis, que ei, ut dictum est, conjunctae sunt, licenti tiam concedimus sibi quodammodo testimonia prestare: ideoque nec ejusmodi veterem constitutionem nostro codici inseri permisimus.

10. No person instituted heir, nor any one in subjection to him, nor his father, in whose power he is, nor his brothers under power of the same father, can be witnesses; for the whole business of making a testament is in the present day considered a transaction between the testator and the heir. But formerly there was great confusion on this point of law; for although the ancients would never admit the testimony of the familia emptor, nor of any one connected with him by the ties of patria potestas, yet they admitted that of the heir, and of persons connected with him by the ties of patria potestas, but, while permitting this, they exhorted them not to abuse their right. We have corrected this, making illegal what they endeavoured to prevent by persuasion. For, in imitation of the old law respecting the familia emptor, we, as is proper, refuse to permit the heir, who now represents the ancient familia emptor, or any of those connected with the heir by the tie of patria potestas, to be, so to speak, witnesses in their own behalf; and accordingly we have not suffered the constitutions of preceding emperors on the subject to be inserted in our code.

GAI. ii. 108.

When the heir had ceased to be the familia emptor, he was no party to the transaction, and therefore it was considered he could be a witness. Gaius (ii. 108) reprobrates the custom, and Justinian here pronounces it illegal. Under his legislation, there being no longer any familia emptor, the whole transaction, to use the language of the ancient mode, was between the testator and the heir.

11. Legataruis autem et fideicommissaries, quia non juris successores sunt, et alii personis eis conjunctis testimonium non denegamus, immo in quodam nostra constitueones et hoc specialiter concessimus, et multo magis his, qui in eorum potestate sunt, vel qui eos habent in potestate, huysmodi licenti tiam damus.

11. But we do not refuse the testimony of legates, or fideicommissarii, or of persons connected with them, because they do not succeed to the rights of the deceased. On the contrary, by one of our constitutions we have specially accorded to them the capacity of being witnesses; and we give it still more readily to persons in
their power, and to those in whose power they are.

GAL. ii. 108.

It would appear that the objection of his being interested, which would make the heir an unfit witness, might also have been urged against the legatee: but the legatee was admitted as a witness on the technical ground of his not being the successor of the testator. The inheritance was not transmitted to him, and he was thus looked on as a stranger.

By the senatusconsultum Libonianum, passed in the reign of Tiberius, A.D. 16, it was provided that if a man wrote a testament for another, everything which he wrote in his own favour should be null. He could not, therefore, make himself a tutor (D. xxvi. 2. 29), an heir, or a legatee. (D. xxxiv. 8. 1.)

12. Nihil autem interest, testamentum in tabulis an in chartis membranisve vel in alia materia fiat.

12. It is immaterial, whether a testament be written upon a tablet, upon paper, parchment, or any other substance.

D. xxxvii. 11. 1 pr.

18. Sed et unum testamentum pluribus codicibus conficere quis potest, secundum optimentem tamen observationem omnibus factis. Quod interdum et necessarium est, si quis navigaturus et secum ferre et domi relinquere judiciorum suorum contentionem velit, vel propter alias innumerabiles causas, que humanis necessitatibus imminet.

18. Any person may execute any number of copies of the same testament, each, however being made with the prescribed forms. This may be sometimes necessary; as, for instance, when a man who is going a voyage is desirous to carry with him, and also to leave at home, a memorial of his last wishes; or for any other of the numberless reasons that may arise from the various necessities of mankind.

D. xxviii. 1. 24.

Each codes was an original testament, valid only if itself made with all the solemnities which would have been requisite had it been the only one.

14. Sed hae quidem de testimoniiis, que in scriptis conficiuntur. Si quis autem voluerit sine scriptis ordinare jure civili testamentum, septem testibus adhibitis et sua voluntate coram eis nuncupata, sciat, hae perfectionem testamentum jure civili firmumque constitutum.

14. Thus much may suffice concerning written testaments. But if any one wishes to make a testament, valid by the civil law, without writing, let him know that, if, in the presence of seven witnesses, he verbally declares his wishes, this will be a testament perfectly valid according to the civil law, and firmly established.

C. vi. 11. 2.

Thus a testator under the legislation of Justinian might either make his testament according to the form described in paragraph 3, or orally before seven witnesses.

Sua voluntate nuncupata. The word nuncupatio was originally used to express the declaration of the testator's intentions, whether the testament was written or not; but later usage appropriated the term nuncupata to testaments where there was no written will, and where the testator declared his wishes orally.
TIT. XI. DE MILITARI TESTAMENTO.

The necessity for the observance of these formalities in the construction of testaments has been dispensed with by the imperial constitutions, in favour of military persons, on account of their excessive unskilfulness in such matters. For although they neither employ the legal number of witnesses, nor observe any other requisite formality, yet their testament is valid, but only if made while they are on actual service, a proviso introduced by our constitution with good reason. Thus, in whatever manner the wishes of a military person are expressed, whether in writing or not, the testament prevails by the mere force of his intention. But during the times when they are not on actual service, and live at their own homes, or elsewhere, they are not permitted to claim this privilege. A soldier, although a *filiusfamilias*, gains from military service the power of making a testament; but he is bound by the rules of the ordinary law, and has to observe the same formalities as we explained above to be necessary for the testaments of civilians.

Gal. ii. 109; C. vi. 21. 17.

The privilege of making valid testaments, independent of any formality, was one given to soldiers, among many others of a similar kind, rather as a special favour to them than from any consideration for their *nimia imperitia*. It dates from the time of Julius Cæsar, who granted it as a temporary concession. It was made a general rule by Nerva, and confirmed by Trajan. If the testament of a soldier was written, no witness was necessary; but if not, it is doubtful whether one witness was sufficient to prove it; probably one witness sufficed, although the law, at any rate after the time of Constantine, required, as a general rule, that two witnesses at least should be produced in every case. (D. xxii. 5. 12; D. xlviii. 18. 17.) A soldier in the power of a father might *make a testament disposing of his castrense*, and, under Justinian, his *quasi-castrense peculium*. If he made it while on service, he need observe no formality in making the testament; if he did not make it while on service, he was bound to observe the usual formalities. (Gal. ii. 106.) The concluding words of the section are meant to express that it was by military service that the *filiusfamilias* gained the power of disposing at any time of his *peculium castrense*, but that this general right, unless the soldier was
on service, had to be exercised with the observance of the usual forms. Whether before the time of Justinian the soldier could make a military testament when not serving on a campaign is doubtful.

1. Plane de militum testamentis divus Trajanus Statiliano Severo ita rescrispsit: 'Id privilegium, quod militantium datum est, ut quoquo modo facta ab his testamenta rata sint, sic intelligi debet, ut utique prius constare debat, testamentum factum esse, quod et sine scriptura a non militantium quoque fieri potest. Is ergo miles, de cujus bonis apud te queritur, si convocatis ad hoc hominibus, ut voluntatem suam testaretur, ita locutus est, ut declararet, quem vellet sibi esse here- dem et cui libertatem tribuere, potest videri sine scripto hoc modo esse testatum et voluntas ejus rata habenda est. Ceterum si, ut plerumque sermonibus fieri solet, dixit alicui: "ego te heredem facio" aut "tibi bona mea relinquo," non opor- tet hoc pro testamento observari. Nec ullorum magis interest quam ipsorum, quibus id privilegium datum est, ejusmodi exemplum non adimiti: aliquem non difficulter post mortem alicujus militis testes existent, qui adferunt, se audisse dicentem aliquem, relinquere se bona, cui visum sit, et per hoc judicia vera subvertentur.'

1. The Emperor Trajan wrote explicitly as follows, in a rescript to Statilius Severus, with respect to military testaments: 'The privilege, given to military persons, that their testa- ments, in whatever manner made, shall be valid, must be understood as meaning that it must first be clear that a testament has been made (a testa- ment may be made without writing even by persons not on military service). If, then, it appears that the soldier, concerning whose goods the action before you is now brought, did, in the presence of witnesses, called expressly for the purpose, declare who he wished should be his heir, and to what slave he wished to give freedom, he shall be considered to have made in this way a testament without writ- ing, and effect shall be given to his wishes. But if, as is often the case in the course of conversation, he said to some one, "I appoint you my heir," or, "I leave you all my estate," such words must not be regarded as a testament. No one is more inter- ested than those to whom this privi- lege has been given that such a prece- dent should not be admitted; other- wise it would not be difficult to procure witnesses who, after the death of a soldier, would affirm that they had heard him bequeath his goods to whom- ever they pleased to name; and thus the real intentions of soldiers might be defeated.'

D. xxix. 1. 24.

Convocatis ad hoc hominibus. There was no necessary cere- mony of calling witnesses. If there was but proof of what the soldier's wishes were, and that he had declared them while on ser- vice, that was enough.

2. Quin immo et mutus et sur- dus miles testamentum facere po- test.

2. A soldier, though dumb and deaf, may make a testament.

D. xxix. 1. 4.

It might happen, as Theophilus suggests, that a soldier, inca- pacitated for actual service by becoming deaf or dumb, might yet not have received his missio causaria (discharge for an accidental reason). A testament made by him in the interval between his
loss of capacity and his discharge would be considered entitled to all the privileges of a military testament.


8. This privilege is only granted by the imperial constitutions to military men, as long as they are on service, and live in the camp. Therefore, veterans after their discharge, or soldiers not in the camp, can only make their testaments by observing the forms required of all Roman citizens. And if a testament is made in the camp, and the solemnities of the law are not observed, it will continue valid only for one year after discharge from the army. Suppose, therefore, a soldier should die within a year after his discharge, but the condition imposed on the heir should not be accomplished until after the year, would his testament be valid, as being in effect the testament of a soldier? We answer, it would be so valid.

D. xxix. 1. 88.

A soldier enjoyed the privilege of making a military testament while his name was inscribed on the list of the army (in numeris), and it continued valid for a year after his name had been taken off, but this only provided he was not discharged ignominiae causad. (D. xxix. 1. 38. 1.) The doubt as to the validity of a military testament, containing a condition under the circumstances mentioned in the text, arose from the doctrine of Roman law that, when the institution of the heir was conditional, the operation of the testament dated from the accomplishment of the condition, not from the death of the testator. If, therefore, the soldier died within a year after he had quitted the service, but the condition was not accomplished until the year was expired, the testament did not, strictly speaking, take effect within the year; and therefore Justinian removes a difficulty which a rigorous adherence to the letter of the law suggested.

4. Sed et si quis ante militiae non jure fecit testamentum et miles factus et in expeditione degens resignavit illud et quodam adiectum sive detraxit vel alias manifesta est militiae voluntas hoc valere volentis, dicendum est, valere testamentum quasi ex nova militiae voluntate.

4. If a man, before becoming a soldier, has made his testament irregularly, and afterwards, while on service, opens it, and adds something or strikes something out, or in any other way makes his wish manifest that this testament should be valid, it must be pronounced to be so, as being, in effect, a new testament made by a soldier.

D. xxix. 1. 20. 1.

If the soldier manifested his intention of adhering to the dispositions of his old testament, this was as much a fresh expression of his wishes as if he had made a new testament. If he was
altogether silent on the subject, an informal testament made before his becoming a soldier was not valid, as it was necessary that there should be a positive declaration made while he was on service of his wish to make his testament valid as a military one.

5. Denique et si in adrogationem datus fuerit miles vel filiusfamilias emancipatus est, testamentum ejus quasi militis ex nova voluntate valet nee videtur capitis diminutione irritum fieri.

5. Further, if a soldier is given in arrogation, or, being a filiusfamilias, is emancipated, his testament is valid as though by a new expression of the wishes of a soldier; and is not considered as invalidated by the capitis diminutio he has undergone.

D. xxix. 1. 22, 28.

By the law of Rome every testament became void, irritum, by the testator, after its execution, suffering any of the three kinds of capitis diminutio. With soldiers it was otherwise; their testament was not invalidated by undergoing either of the two greater kinds of diminutio, if it was merely for an infraction of military law that they were condemned to a punishment involving either of these kinds of alteration of status. (D. xxviii. 3. 6. 6.) Nor was it ever invalidated by their undergoing the third and least kind. The will of the soldier was supposed to be exercised so as to declare his wish that the old testament should be valid (quasi ex nova militis voluntate); and in this case, it does not appear that any positive declaration of such a wish was necessary. His testament, made previous to his change of status, was effectual, to the fullest extent it could be, in the new position he occupied. The military testament made by a paterfamilias respecting his property became, after arrogation, an effectual disposition of his castrense peculium; and one made by a filiusfamilias respecting his castrense peculium became, after emancipation, an effectual disposition of all his property.

6. Seiendum tamen est, quod ad exemplum castrensis pecullii tam anteriores leges quam principales constitutiones quibusdam quasi castrensia degerunt peculia, atque eorum quibusdam permissionem erat stiam in potestate degentibus testari. Quod nostra constitutio latius extendens, permisit omnibus in his tantummodo pecullii testari quidem, sed jure communi: cujus constitutionis tenore perspecto licentia est nihil eorum, quo ad prefatum jus pertinent, ignorant.

6. We may here observe, that, in imitation of the castrense peculium, both old laws and imperial constitutions have permitted certain persons to have a quasi-castrense peculium, and some of these persons have been permitted to dispose of this peculium by testament, although they were in the power of another. Our constitution has extended this permission to all, in regard, that is, to these kinds of peculium, but their testaments must be made with the ordinary formalities. By reading this constitution any one may learn all that relates to the privilege we have mentioned.

C. vi. 22. 12.

We must not suppose, from the expression anteriores leges, that the peculium quasi-castrense belongs to a time of law when
leges were really made. It is even doubtful, as we have said before, whether the passages in which it is mentioned by Ulpian, the only writer before Constantine who is supposed to refer to it, are genuine. (See note on Tit. 9. 1.)

Eorum quibusdam. The right of disposing by testament of the quasi-castrense peculium had, before Justinian, been granted only to certain privileged classes, such as consuls and presidents of provinces, among those who were permitted to hold this kind of peculium. Justinian granted it to all. (C. iii. 28. 37; C. vi. 22. 12.)

It is to be observed, that soldiers had other testamentary privileges besides those mentioned in the text. They could institute as heirs persons who were generally incapacitated, such as those who had been deportati, or who were peregrini. (GAI. ii. 110.) They were not obliged formally to disinherit their children, if they knew that they had any (C. vi. 21. 9), their testament was not set aside as inofficious (C. iii. 28. 9), they could give more than three-fourths of their property in legacies (C. vi. 21. 12), they could die partly testate and partly intestate (D. xxxix. 1. 6), and could dispose of the inheritance by codicils (D. xxxix. 1. 36. pr.). The succeeding Title will show how much they thus differed from ordinary citizens.

Titt. XII. QUIBUS NON EST PERMISSUM TESTAMENTA FACERE.

Non tamen omnibus licet facere testamentum. Statim enim hi, qui alieno jure subjecti sunt, testamenti faciendo jus non habent, adeo quidem ut, quamvis parentes eis permissionis, nihil magis iure testari possint; exceptis his, quos anteae numeravimus et precipue militibus, qui in potestate parentum sunt, quibus de eo, quod in castris adquisierint, permissionem est ex constitutionibus principum testamentum facere. Quod quidem initio tantum militantibus datum est tam ex auctoritate divi Augusti quam Nervae nec non optimi imperatoris Traiani; postea vero subscriptione divi Hadriani etiam dimissis militia, id est veteranis, concessum est. Itaque si quidem fecerint de castrensi peculio testamentum, pertinebit hoc ad eum, quem heredem reliquerint: si vero intestati decessioni, nullis liberis vel fratribus superstitibus, ad parentes eorum jure communi pertinebit. Ex hoc intelligere possumus, quod in castris adquisierit.

The power of making a testament is not granted to every one. In the first place, persons in the power of others have not this right; so much so, that, although their descendants give permission, still they cannot make a valid testament. We must except those whom we have already mentioned, and particularly filiusfamilias who are soldiers, for the imperial constitutions have given them the power of bequeathing whatever they have acquired while on actual service. This permission was at first granted by the Emperors Augustus and Nerva, and the illustrious Emperor Trajan, to soldiers on service only; but afterwards it was extended by the Emperor Hadrian to veterans, that is, to soldiers who had received their discharge; and therefore, if a filiusfamilias disposes by testament of his castrense peculium, this peculium will belong to the person whom he makes his heir: but, if he dies intestate, without children or brothers, this peculium will then belong, according to the ordinary
miles, qui in potestate patris est, neque ipsum patrem adimetre posse neque patris creditorres id vendere vel alter inquestare neque, patre mortuo, cum fratribus esse commune, sed scilicet proprium ejus esse id, quod in castris adquisierit, quamquam jure civili omnium, qui in potestate parentum sunt, peculia perinde in bonis parentum computantur, assi servorum peculia in bonis dominorum numerantur: exceptis videlicet his, que ex sacris constitutionibus et preceipue nostris propter diversas causas non adquiruntur. Preter hos igitur, qui castrense peculium vel quasi castrense habent, si quis alius filiusfamilias testamentum fecerit, inutil est, licet suae potestatis factus deceperit.

law of the patria potestas, to the person in whose power he is. We may hence infer, that whatever a soldier, although under power, has acquired while on service, cannot be taken from him even by his father, nor can his father's creditors sell it, or otherwise disturb the son in his possession, nor is he bound to share it with brothers upon the death of his father, but it remains his sole property, although, by the civil law, the peculia of all those who are in the power of ascendants are reckoned among the goods of their ascendants, exactly as the peculium of a slave is reckoned among the goods of his master; those goods excepted. which by the constitutions of the emperors, and especially by our own, are prevented, for different reasons, from being so acquired. With the exception, therefore, of those who have a castrense or quasi-castrense peculium, if any other filiusfamilias makes a testament, it is useless, although he becomes sui juris before his death.

D. xxviii. 1. 6; D. xxix. 1. 1; C. vi. 61. 8. 4; C. vi. 59. 11; D. xlix. 17. 10; D. xxxvii. 6. 1. 15; D. xxviii. 1. 10.

The first thing, says Gaius (ii. 114), which we have to inquire, if we wish to know whether a testament is valid, is whether the person who made it had the testamenti factio, that is, in this instance, had the right to take the part of testator in the making of a testament. To be able to do this he must have the commercium; and further, he must be sui juris, or otherwise, as he could have no property, he could have nothing to dispose of by testament. Every Roman citizen who was sui juris had the right of making a testament, and if he was capable of exercising his right, and made a formal testament, this testament was valid.

As to the persons incapacitated to make a will, see note on Tit. 10. 6.

The filiusfamilias could have no property independently of his father, and he could not dispose of the property he might have if he became sui juris by outliving his father, because a future interest would not pass by mancipation. This was a part of the public law (testamenti factio non privati sed publici juris est, D. xxviii. 1. 3), and could not be waived by the mere consent of a private individual. It required express enactment to alter the law, and it was so far altered as to permit a filiusfamilias to dispose by testament of a castrense or quasi-castrense peculium. (See paragr. 6. of preceding Title.) If, however, the possessor of the peculium did not dispose of it by testament, the head of the family took it, previously to the time of Justinian, not as heir ab intestato, but as lawful claimant of a peculium. For the possessor,
not having exercised the power the law gave him, was in the same position as if the law had never permitted such a disposition. Justinian deferred this claim of the head of the family, when the possessor of the peculium had left children or brothers. If he had not left any, the head of the family then took the peculium; whether in right of his headship, or as heir ab intestato, is a disputed point. We have, however, the authority of Theophilus in the paraphrase of this paragraph for supposing, that when Justinian in the text says he took it jure communi, it is meant that he took it by the right of patria potestas, and there seems no necessity for understanding the passage otherwise.

1. Præterea testamentum facere non possunt impuberæ, quia nullum eorum animi judicium est; item furioæ, quia mente carent. Nec ad rem pertinet, si impubes postea pubes factus aut furiosus postea compos mentis factus fuerit et deserret. Furioæ autem si per id tempus fecerint testamentum, quo furorem intermissus est, jure testati esse videntur, certe eo, quod ante furorem fecerint, testamentum valente: nam neque testamenta recte facta neque alius ulterior negotium recte gestum postea furo rem interveniens peremitt.

C. xxii. 22. 9; D. xxviii. 1. 20. 4.

In this and the succeeding paragraphs of this Title, instances are given of persons who have the right, but are not capable of exercising it. A testament made by a person incapable of exercising the right was not rendered valid by his subsequently becoming capable, nor one made by a person capable rendered invalid by his subsequently becoming incapable.

2. Item prodigus, cui honorum suorum administratio interdicta est, testamentum facere non potest, sed id, quod ante fecerit, quam interdictio ei bonorum fiat, ratum est.

D. xxv. 1. 18.

3. Item mutus et surdus non semper facere testamentum possunt. Utique autem de eo surdo loquimur, qui omnino non exaudit, non qui tardæ exauditis: nam et mutus is intellectiget, qui eloqui nihil potest, non qui tarde loquitur. Sepse autem etiam litterati et eruditi homines varii casibus et audiendi et loquendi facultatem amittunt: unde nostra constitutio etiam his subvenit, ut certis casibus et modis secundum normam ejus possint testari aliqua

2. A prodigal also, who is interdicted from the management of his own affairs, cannot make a testament; but a testament made before such interdiction is valid.

3. Again, a deaf or a dumb person is not always capable of making a testament: by deaf, we mean one who is so deaf as to be unable to hear at all, not one who hears with difficulty; and by dumb, we mean a person who cannot speak at all, not one who merely speaks with difficulty. For it often happens, that even learned and erudite men lose by various accidents the faculty of hearing and speaking. Our constitution, therefore, comes to their aid, and permits them, in certain cases,
and with certain forms, to make testaments, and do many other acts, according to the rules therein laid down. But if any one, after making his testament, becomes deaf or dumb by reason of ill health or any other accident, his testament remains valid notwithstanding.

C. vi. 22. 10; D. xxviii. 1. 6. 1.

The constitution referred to (C. vi. 22. 10) permits a testament to be made by any deaf or dumb person not physically incapable of making one, i.e. by any one not deaf and dumb from birth.

4. Cæcus atrim non potest facere testamentum nisi per observationem, quam lex divi Justini patris mei introduxit.

4. A blind man, again, cannot make a testament except by observing the forms which the law of the Emperor Justin, our father, has introduced.

C. vi. 22. 8.

Justin, besides the seven witnesses ordinarily necessary, required in the case of a testament made by a blind man, whether blind through illness or from birth, that a notary (tabularius) should be present, or else an eighth witness, if a notary could not be found, who should either write at the dictation of the blind man, or read aloud to him a testament previously prepared. (C. vi. 22. 8.) But in this Justin only regulated and did not originate the testaments of the blind; they seem to have been always allowed.

5. Ejus, qui apud hostes est, testamentum, quod ibi fecit, non valet; quamvis redierit: sed quod, dum in civitate fuerat, fecit, sive redierit, valet jure postlimini, sive illic decesserit, valet ex lege Cornelia.

5. The testament of a captive in the power of an enemy is not valid, if made during his captivity, even although he subsequently returns. But a testament made while he was still in his own state is valid, either by the jus postlimini, if he returns, or by the lex Cornelia, if he dies in captivity.

D. xlix. 15. 18.

A captive was incapacitated from performing, during his captivity, any act good in law; and thus, though his right to make a testament was not lost, but only suspended, he was incapable, while a captive, of exercising the right. But if he had exercised it before his captivity, the testament was valid, whether he returned to his country or not. If he did return, the right not having been lost, and having been once duly exercised, the testament was valid jure postlimini. If he did not return, but died in captivity, it was still valid, as he was supposed, by a fiction of law, to have died at the moment when he was made captive, and so before his captivity had begun. This fiction was introduced by a rather strained construction of the terms of the lex Cornelia de falsis (678 A.U.C.), which provided that the same penalty should attach to the forgery of a testament of a person dying in captivity.
as to that of a testament made by a person dying in his own country. It was argued that the law could never have intended to attach a penalty to the forgery of a testament which was invalid. If it was valid, it could only be so by treating it as if made by a person who had not died in captivity, and whose right was not suspended at the time of his death. For it was necessary that a person should have the right of making a testament, not only at the time when he made it, but also at the moment of his death; but in this we must distinguish between the right to make a testament, and the capacity of exercising that right; for the loss of capacity to make a testament did not, as we have seen, affect a testament made by one capable at the time of making it. This favourable interpretation of the *lex Cornelia* (beneficium legis Cornelic) (Paul. Sent. iii. 4. 8) was gradually extended, so as to embrace every branch of law, such as tutorship, heirship, &c., to which it could be made applicable. *In omnibus partibus jurs is qui recurret non est ab hostibus quasi tunc decessisse videtur cum captus est.* *(D. xli. 15. 18.)*

**Trt. XIII. DE EXHEREDATIONE LIBERORUM.**

Non tamen, ut omnimodo valeat testamentum, sufficit hæc observatio, quam supra exposuimus. Sed qui filium in potestate habet, debet curare, ut eum heredem instituat vel exheredem nominatim faciat: aliquin si eum silentio præterierit, inutiliter testabitur, adeo quidem ut, etiam vivo patre filius mortuos sit, nemo ex eo testamento heres existere possit, quia silicet ab initio non constiterit testamentum. Sed non iac de filiabus vel alius per virilem sexum descenditibus liberis utrusque sexus fuerat antiquitatis observatum; sed si non fuerant heredes scripti scriptæve vel exheredati exheredateve, testamentum quidem non infirmabatur, juss autem adscessendi eis ad certam portionem prestabatur. Sed nec nominatum eas personas exheredare parentibus necesse erat, sed licebat et inter ceteros hoc facere.

The observance of the rules already laid down is not, however, all that is required to make a testament altogether valid. A person who has a son in his power must take care either to institute him his heir, or to disinherit him by name, for if he passes him over in silence, his testament will be of no effect; so much so, that even if the son dies while the father is alive, yet no one can be heir under the testament, because it was void from the beginning. But the ancients did not observe this rule with regard to daughters, or to other descendants, through the male line, of either sex; for although these were neither instituted heirs nor disinherited, yet the testament was not invalidated, only they had a right of joining themselves with the instituted heirs so as to receive a specified portion of the inheritance. Descendants were not obliged to disinherit them by name, but might include them in the term *coterius.*

*Gal. ii. 115. 128, 124. 127.*

The power of making a testament was a derogation of the strict law regulating the devolution of the property of deceased persons. Of those whose claims a citizen *sui juris* was permitted thus to set aside, the first and most important class was that of what were called the *sui heredes,* that is, persons in the power of the testator, but becoming *sui juris* by the testator's death, whose *own*
the inheritance was said to be in consequence of their position in the family. (See Intro. sec 77.) They were necessarily either children, natural or adoptive, of the testator, or his descendants in the male line, and their position in the testator's family, together with their claim to his property if he died intestate, was considered to entitle them to have an express declaration of his intention from a testator who wished to use his power of depriving them of the inheritance. We have already seen, in the case of the *castrense peculium* (Tit. 12. pr.), that when the law permitted an exception to a general rule of law, unless advantage was taken of the exception, the general rule prevailed. So here, unless the testator expressly took advantage of his power of disinheriting the *sui heredes*, the general rule that they succeeded to him prevailed. The law would not permit his intention to disinherit them to be inferred from his silence, thus drawing a distinction in their favour as compared with the other classes of persons who might inherit *ab intestato*.

In order, therefore, as the text informs us, to disinherit a son, it was necessary that he should be referred to by name, or in a special and unmistakable manner, as *Titius filius meus exheres esto*, or, in case of an only son, *filius meus exheres esto*. But daughters and the descendants of sons (those of daughters would not, of course, be members of the family at all) might be disinherited by the general clause *ceteri exheredes sunt*. Whenever a person existed at the time the will was made, to disinherit whom it was necessary to refer to him by name, but who was passed over altogether, the whole testament was entirely bad, and the testator was considered to die intestate. Nor was the testament made valid by this person ceasing to exist before the death of the testator, although this was a point not established in the time of Gaius (ii. 123). If a person existed at the time of making the testament, to disinherit whom it was only necessary the general clause should be employed, the testament which did not contain this was good, but the person, if the heir named and instituted in the testament was among the *sui heredes*, took a *pars virilis* of the inheritance, that is, was joined so as to make one more heir and one more equal sharer in the inheritance (*jus accessorendi*): if the heirs instituted were strangers, the person took one-half the inheritance. *Scriptis heredibus ad crescunt, suis quidem heredibus in partem virilem, extraneis autem in partem dimidiam.*

(Ulp. Reg. 22.17.)

1. Nominatim autem exheredari quis videtur, sive ita exheredetur 'Titius filius meus exheres esto,' sive ita, 'filius meus exheres esto' non adiecto proprio nomine, scilicet si alius filius non exet. Postumi quoque liberi vel heredes institui debent vel exheredari. Et in eo par omnium condicio est, quod et

1. A child is disinherited by name, if the words used are 'Let Titius my son be disinherited,' or thus, 'Let my son be disinherited,' without the addition of a proper name, in case the testator has no other son. Posthumous children, too, must either be instituted heirs, or disinherited; and the condition of all such children is
In the strictness of the old civil law, a child born after the death of the testator (posthumus) was incapable of being instituted. He had not, at the time of the testator's death, any certain existence: and the law said, Incerta persona heres institui non potest. (Ulp. Reg. 22. 4.) But still it might be that the child, when born, was a suus heres of the testator; and as his agnatio would be considered in law to date from the time of conception, not birth, the testator would pass over one of his sui heredes if he omitted to include him or exclude him in the testament; although, if he had included him, the posthumous child could not have taken anything. In the course of time the law permitted the posthumous child, if a suus heres, to be instituted as an heir; but the civil law never permitted the posthumous child of a stranger, i.e. a child born after the death of the testator, to be instituted. The pretor, however, gave him bonorum possessio, and Justinian permitted such persons to be instituted. (Bk. iii. Tit. 9. pr.) And thus the institution of a posthumous suus heres having once been permitted, the next step was to consider it imperative on the testator, if he wished to exclude the posthumous child from a share in the inheritance, to do so in the case of a son by referring to him specially (nominatim does not, of course, here mean 'by name,' but by a phrase expressly referring to him, such as postumus exheredes esto), and in the case of a daughter, or any descendant other than a son, by adopting the general clause of disinheritance, ceteri exheredes sunt, and also by giving the child some legacy, however trifling, in order to show that it was not by accident that the testator allowed this clause to embrace the case of a posthumous child.

The jurist Gallus Aquilius, who lived towards the end of the Republic, invented a form of institution by which the case was
provided for of a son dying in the testator's lifetime, and then the
testator dying, and then there being born a posthumous son of
the son, who would, of course, be a suus heres of the testator.
(D. xxviii. 2. 29. pr.)

2. Postumorum autem loco sunt
et hi, qui in sui heredes locum suc-
cedendo quasi adgarnscendo fiunt
parentibus sui heredes. Ut ecce si
quis filium et ex eo nepotem ne-
ptemve in potestate habeat, quis
filius gradu preceedit, is solus jura
sui hereditis habet, quamvis nepos
quoque et nepis ex eo in eadem
potestate sunt: sed si filius ejus
vivo eo moriatur aut qualibet alia
ratione exeat de potestate ejus,
incipit nepos neptivse in ejus locum
succedere et eo modo jura suorum
heredum quasi agnatione nanci-
scuntur. Ne ergo eo modo rumpatur
ejus testamentum, sicut ipsum filium
vel heredem instituere vel nomina-
tim exheredare debet testator, ne
non jure faciat testamentum, ita et
nepotem neptemve ex filio necesse
est ei vel heredem instituere vel ex-
heredare, ne forte, viv0 ex filio
mortuo, succedendo in locum ejus
nepos neptivse quasi agnatione
rumpant testamentum. Idque lege
Junia Velleia provisum est, in qua
simul exheredationis modus ad
similitudinem postumorum demonstr-
stratur.

2. Those ought also to be placed
on the footing of posthumous children,
who, succeeding in the place of a suus
heres, become by quasi-agnation sui
heredes of their ascendants. Thus, for
instance, if any one has a son in his
power, and by him a grandson or
granddaughter, the son, being first in
degree, has alone the rights of a suus
heres, although the grandson or grand-
daughter by that son is under the
same parental power. But, if the son
should die in his father's lifetime, or
should by any other means cease to be
under his father's power, the grandson
or granddaughter would succeed in his
place, and would thus, by quasi-agna-
tion, obtain the rights of a suus heres.
In order, then, that the force of his
testament may not be broken, the tes-
tator, who is, as we have said, obliged,
in order to make an effectual tests-
ament, to institute his son as heir or to
disinherit him by name, is equally
obliged to institute as heir, or to dis-
inherit, a grandson or granddaughter
by that son, lest, if, during his life-
time, his son should die, and the
grandson or granddaughter succeed in
his place, the force of the testament
may be broken by quasi-agnation.
Provision has been made for this by
the Lex Junia Velleia, in which is given
a mode of disinheriting in such a case
like that of disinheriting posthumous
children.

GAI. ii. 184.

A testament was made void, not only by the birth of a post-
humous suus heres, but by any one coming into the position of a
suus heres after the time when the testament was made. The
testator might (under the ancient law) have subsequently
married a wife in manu; an emancipated son might come again into his
father's power; a captive son might return home; or the testator
might adopt a person into his family. In all these cases, as well
as in that mentioned in the text, the testament would be invalid-
dated by a process which bore a close analogy to agnation, that is
by these persons becoming, otherwise than by birth, the sui heredes
of the testator, just as it would be by direct agnation, if a son was
born to the testator after the date of the testament. The Lex Junia
Velleia (GAI. ii. 134), passed in the time of Augustus (763 A.U.C.),
provided (1st) that a testator might institute or exclude any one
conceived before the date of the testament who should, after the
date of the testament, be born his suus heres in his lifetime, thus
giving a new signification to postumus (ULP. Reg. xxii. 19), and
(2ndly) that he might exclude a grandchild, or other descendant,
born before the date of the testament, who might, if the son of
the testator died in the testator’s lifetime, step into the place of
his father, and become a suus heres during the testator’s lifetime.
Previously such a person could not have been excluded in his
capacity of suus heres, for at the date of the testament he was not
in that position, which he only attained subsequently. He could
have been instituted before the lex Junia Velleia, for he was an
existing person, and therefore not a persona incerta; but when
he became a suus heres, as it was not in this character that he had
been instituted, the testament would have been broken but for
the lex Junia Velleia. (D. xxviii. 2. 29. 11 to end.) If persons,
coming under the lex Junia Velleia, were excluded, the lex Junia
required that, as in the case of posthumous suj heredes, the males
should be excluded nominatim, and the females inter ceteros, but
with a legacy. In the case of the testator having subsequently a
child not conceived when the testament was made and born in the
testator’s lifetime, and in the cases of quasi-agnatio mentioned
above, no law helped the testator, and he had to make a new testa-
ment in order to die testate. Commentators term persons coming
under the first head above mentioned postumi Velleiani, and per-
sons coming under the second head quasi postumi Velleiani.
(DEMANGEAT, i. 619.)

3. Emancipatos liberos jure civili
neque heredes instituere neque ex-
heredare necesse est, quia non sunt
sui heredes. Sed praeator omnes
tam feminini sexus quam masculini,
si heredes non instituantur, exhere-
dari jubet, virilis sexus nominatim,
feminini vero et inter ceteros.
Quoddam heredes instituiti fuer-
nit neque ita, ut diximus, exhere-
dati, promittit praeator sia contra
tabulas testamenti bonorum posses-
sionem.

3. The civil law does not make it
necessary either to institute emanci-
pated children heirs, or to disinheri-
them in a testament; because they are
not suj heredes. But the praeator orders,
that all children, male or female, if
they are not instituted heirs, shall be
disinherited; the males by name, the
females by name or under the general
term ceteri: for if they have neither
been instituted heirs, nor disinherited
in manner before mentioned, the
praeator gives them possession of goods
contra tabulas.

GAL. ii. 185.

An emancipated child, passing out of the testator’s family,
ceased to be his suus heres. But though he thus lost all legal
claim upon the testator’s inheritance, yet he had gained no pro-
vision by being emancipated, and the praeator, therefore, came to
his relief, and set aside the testament, if he had not been ex-
pressly excluded. He did not do this nominally, for the testament
was legally good, but he did what amounted to the same thing; he
divided the property equally among all as if the testator had died
intestate, giving the children what was termed ‘possession of the
goods;’ a possession said, in this case, to be contra tabulas, as it
overthrew the provisions contained in the tablets of the testament. The emancipated son, however, had to bring into account the property he had acquired since emancipation, if the effect of his getting the testament set aside was injurious to the properly instituted *suus heres*. The properly instituted *suus heres* might, for example, have had only a quarter of the inheritance left him, and then he would gain, not lose, by the emancipated son getting the testament set aside and sharing the inheritance with him. (D. xxxvii. 4. 13.) An emancipated daughter might, under the praetorian system, be in a better position than an unemancipated, if both were passed over, and might in effect be in as good a position as the male *suus heres* who was passed over. For if the emancipated daughter was passed over, the testament would be overthrown altogether, and she would, if an only child, take all the property; whereas, if the unemancipated daughter was passed over, she could only take half at most. Antoninus (either Antoninus Pius or Marcus Aurelius) put them on an equality, by giving the emancipated only the share she would have had, had she not been emancipated. (Gal. ii. 125, 126.)

The old civil law permitted grandsons, not in the immediate power of the testator, to be disinherited by the general *ceteri* clause. The praetor required them to be disinherited *nominationem*. (Gal. ii. 129.) Further, whereas in the initiatory section we have been told that the testament was wholly void if a son passed over died in the lifetime of his father, and Gaius tells us that this was the opinion of the Sabinians, yet there are passages which seem to show that the praetors sometimes upheld a contrary rule. (D. xxxvii. 11. 2. pr.; D. xxviii. 3. 17.)

4. Adoptivi liberi quandiu sunt in potestate patris adoptivi, ejusdem juris habentur, oujus sunt justis nuptis quaestii: itaque heredes instiennent vel exheredandi sunt secundum ea, quae de naturalibus exponimus: emancipati vero a patre adoptivo neque jure civili neque quod ad edictum praeoris attinet, inter liberos numerantur. Qua ratione accidit, ut ex diverso quod ad naturalem parentem attinet, quandiu sint in adoptiva familia, extraneorum numero habentur, ut eos neque heredes instituere neque exheredare necesse sit. Cum vero emancipati fuerint ab adoptivo patre, tunc incipient in ea causa esse, in qua futuri essent, si ab ipso naturali patre emancipati fuissent.

4. Adoptive children, while under the power of their adoptive father, are in the same legal position as children sprung from a legal marriage; and therefore they must either be instituted heirs or disinherited, according to the rules we have laid down respecting natural children. But neither by the civil nor the praetorian law are such children, if emancipated by their adoptive father, reckoned among his natural children. On this principle it is that, conversely, adoptive children, while in their adoptive family, are considered strangers to their natural father, who need not institute them heirs or disinherit them; but if they are emancipated by their adoptive father, they then begin to be in the same position in which they would have been if emancipated by their natural father.

Gal. ii. 186, 187.

If an adopted son was emancipated by his adoptive father, he would, under the old law, have no legal claim on the inheritance of his adoptive or his natural father. But the praetor came to his
aid, and gave him 'possession of the goods' of his natural father, unless he was expressly excluded by his natural father's testament. On his adoptive father he would, after emancipation, in no case have any claim whatever, until Justinian altered the law in the manner referred to in the next paragraph.

5. Sed haec vetustas introdubbat. Nostra vero constitutio inter masculos et feminas in hoc jure nihil interesse existimans, quia utraque persona in hominum productione similiiter naturae officio fungitur et lege antiqua duodecim tabularum omnem similiiter ad successionem ab intestato vocabantur, quod et praetores postea seculi esse videntur, ideo simplex ac simile jus et in filiis et in filiabus et in ceteris descendentibus per virilem sexum personis non solum natis, sed etiam postumis introdixit, ut omnes, sive sui sive emancipati sunt, aut heredes instituuntur aut nominatim exhereditantur et eundem haebeat effectum circa testamenta parentum suorum infirma et hereditatem auferendam, quem filii sui vel emancipati habent, sive jam natos sunt sive adhuc in utero constituti, postea nati sunt. Circa adoptivos autem certum indiximus divisionem, quae constitutio nostra, quam super adoptivis tulimus, contineatur.

5. Such was the ancient law. But, thinking that no distinction can reasonably be made between the two sexes, inasmuch as they equally contribute to the procreation of the species, and because, by the ancient law of the Twelve Tables, all children were equally called to the succession ab intestato, which law the pretors seem afterwards to have followed, we have by our constitution made the law the same both as to sons and daughters, and also as to all other descendants in the male line, whether already born or posthumous; so that all children, whether they are sui heredes or emancipated, must either be instituted heirs or be disinherited by name; and their omission has the same effect in making void the testaments of their ascendants, and taking away the inheritance from the instituted heirs, as would be produced by the omission of sons who were sui heredes or emancipated, whether they have been already born, or having been already conceived are born afterwards. With respect to adoptive sons, however, we have established a distinction between them, which is set forth in our constitution on adoptive persons.

C. vi. 28. 4; C. viii. 47. 10. pr. and 1.

Under the legislation of Justinian a testament would be rendered invalid by the omission of any one male or female whom it was necessary either to institute or exclude, and every exclusion must be made nominatim. An adopted son, if adopted by a stranger, i.e. not an ascendant, lost none of his claims upon his natural father's property, but only had a claim upon that of his adoptive father, if the latter died intestate; for if the adoptive father made a testament, it was not necessary he should notice the adoptive son. But an adopted son, if adopted by an ascendant, either a maternal grandfather or an emancipated father (see Bk. i. Tit. 11. 2), stood in the position of a suas heres to the ascendant, and a testament made by such ascendant would be invalid in which he was passed over.

6. Sed si expeditione occupatus miles testamentum facit et liberos suos jam natos vel postumos nominatim non exheredaverit, sed silentio preterierit, non ignorans, an

6. If a soldier on active service makes his testament, and neither disinherits his children already born, nor his posthumous children by name, but passes them over in silence, pro-
habeat liberos, silentium ejus pro exheredatione nominatim facta va-
lere constitutionibus principum caut-
tum est.

C. vi. 21. 9;

7. Mater vel avus maternus ne-
cesse non habent liberos suos aut heredes instituere aut exheredare, sed possunt eos omittere. Nam silentium matris aut avi materni ceterorumque per matrem ascenden-
tium tantum facit, quantum exhered-
datio patris. Neque enim matri filium filiamve neque avo materno nepotem neptemve ex filia, si eum eamve heredem non instituat, ex-
heredare necesse est, sive de jure civili quæramus, sive de edicto pre-
toris, quo preteritis libris contra tabulas honorum possessionem promittit. Sed aliud eis adminicu-
lum servatur, quod paulo post vobis manifestum fiet.

D. xxix. 1. 7.

7. Neither a mother nor a maternal grandfather need either institute children as heirs, or disinherit them, but may pass them over in silence; for the silence of a mother or a ma-
ternal grandfather, or of any other ascendant on the mother’s side, has the same effect as a father disinherit-
ing them. For a mother is not obliged to disinherit her children, if she does not institute them her heirs; neither is a maternal grandfather under the neces-
sity of instituting or of disinheriting his grandson or granddaughter by a daughter; whether we look to the civil law, or the edict of the pretor, by which he promises possession of goods contra tabulas to those children who have been passed over in silence. But children, in this case, have another remedy, which we will hereafter ex-
plain to you.

GAL. iii. 71.

The children could never be the sui heredes of their mother, for women never had any one in their power; nor could they be the sui heredes of a maternal ascendant, except by adoption, and the case of adoption is not spoken of here.

Aliud adminiculum. This refers to the action for setting aside the testament as officious, that is, made without proper regard for natural ties. (See Tit. 18.)

TIT. XIV. DE HEREDIBUS INSTITUENDIS.

Hieredes instituere permissum est tam liberos homines quam servos tam proprios quam alios. Proprios autem olim quidem secundum plurium sententiae non aliter quam cum libertate recte instituere licebat. Hodie vero etiam sine libertate ex nostra constitutione heredes eos instituere permissum est. Quod non per innovationem indiximus, sed quoniam et æquius erat et Atiliicino placuisse Paulus suis libris, quos tam ad Masurium Sabinum quam ad Plautium scripsit, refert. Proprios...
autem servus etiam is intellegitur, in quo nudam proprietatem testator habet, alio usumfructum habente. Est autem casus, in quo nec cum libertate utiliter servus a domina heres instituitur, ut constitutione divorum Severi et Antonini cavetur, cujus verba haec sunt: 'Servum adultero maculatum non jure testamento manumissum ante sententiam ab ea muliere videri, quae res fuerat ejusdem criminis postulata, rationis est: quare sequitur, ut in eundem a domina collata institutio nullius momenti habeatur.' Alienus servus etiam is intellegitur, in quo usumfructum testator habet.

of Atilicinus. Among a testator's own slaves is included one in whom the testator has only a bare ownership, another having the usufruct. But there is a case, in which the institution of a slave by his mistress is void, although his liberty is expressly given to him, according to the provisions of a constitution of the Emperors Severus and Antoninus, in these words: 'Reason demands that a slave, accused of adultery with his mistress, shall not be allowed, before sentence is pronounced, to be made free by the testament of the mistress who is alleged to be a partner in the crime. Whence it follows that if a mistress institutes such a slave as her heir, it is of no avail.' In the term, 'the slave of another,' is included a slave of whom the testator has the usufruct.

Gal ii. 185–187; C. vi. 27. 5; C. vii. 16. 1; D. xxviii. 5. 48. 2.

By institution is meant the declaration who is to be heir, that is, who is to carry on the legal existence, the persona, of the testator. And as, unless his existence was continued, there could be no thing or person from whom the testamentary dispositions could derive any force, or be of any efficacy, the institution was the all-important part of the testament. It was veluti caput atque fundamentum totius testamenti. All other dispositions were accessories to it, being only conditions or laws imposed upon the heir. In the older law a peculiar form of words was appropriated to the institution. 'Titius heres esto' was the recognised form. Even in the days of Gaius and Ulpian (Gal. ii. 116, 117; Ulp. Reg. 21), such expressions as 'Titius heredem esse jubeo,' terms of command, were considered right, and expressions such as 'Titium heredem esse volo,' 'heredem instituo,' 'heredem facio,' were considered wrong. And it was not till 339 a.d. that Constantine the Second permitted the institution to be made in any terms by which the meaning of the testator could be clearly ascertained. (C. vi. 23. 15.) Again, in the older law, as everything else in the testament derived its force from the institution, it was considered that the institution ought to be put at the head or top of the testament, and any legacy or other disposition placed before it was passed over, and had no effect. An exception was made in behalf of an appointment of a tutor (see Bk. i. Tit. 14. 3); and the clause in which the testator disinherited his sui heredes was naturally placed before that in which he instituted testamentary heirs. Justinian, as we shall see in Title 20. 34, enacted that, provided the institution appeared in some part of the testament, it should be immaterial in what part it might be placed,
Any one, as has been said above, might be instituted, and consequently take as heir, who had the rights of a citizen, or who, as it was technically termed, had the testamenti factio cum testatore, i.e. the power of joining with the testator in going through the ceremonies of the jus Quiritium. As to the different grounds of incapacity to take under a will, see note on Tit. 10. 6.

If a person instituted his own slave, this was held to give the slave his liberty by necessary implication. If he instituted the slave of another, the slave took the inheritance for his master's benefit, provided the master had the testamenti factio with the testator; but if he had not, the institution of the slave was void.

In the law before Justinian, enfranchisement by a person who had only a bare property in a slave, was not held to confer freedom, a proprietatis domino manumissus liber non fit, sed servus sine domino est. (ULP. Reg. 1. 19.) Under Justinian the slave became free, and could acquire for himself, and could take as heir; but he was obliged to serve as slave to the usufructuary, during such time as the usufruct continued.

The slave accused of adultery with his mistress might be subjected, as all slaves might, to the torture, to extract evidence of his guilt. If he had been enfranchised, he would have escaped this, and thus the mistress who died before sentence was pronounced, as, for example, by suicide, might have defeated justice, as against the slave, unless she had been restrained from using her power of enfranchising him by her testament.

1. Servus autem a domino suo heres institutus, si quidem in eadem causa manserit, fit ex testamento liber heresque necessarius. Si vero a vivo testatore manumissus fuerit, suo arbitrio adire hereditatem potest, quia non fit necessarius, cum utrumque ex domini testamento non consequitur. Quodsi alienatus fuerit, jussu novi domini adire hereditatem debet et ea ratione per eum dominus fit heres; nam ipse alienatus neque liber neque heres esse potest, etiam si cum libertate heres institutus fuerit: destitisse etenim a libertatis datione videtur dominus, qui eum alienavit. Alienus quoque servus heres institutus si in eadem causa duraverit, jussu domini adire hereditatem debet. Si vero alienatus fuerit aut vivo testatore ant post mortem ejus, antequam adeat, debet jussu novi domini adire. At si manumissus est vivo testatore vel mortuo, antequam adeat, suo arbitrio adire hereditatem potest.

1. A slave instituted heir by his master, if he remains in the same condition, becomes, by virtue of the testament, free and necessary heir. But, if his master has enfranchised him before dying, he may at his pleasure accept or refuse the inheritance, for he does not become a necessary heir, since he does not obtain both his liberty and the inheritance by the testament of his master. But, if he has been alienated, he must enter on the inheritance at the command of his new master, who thus through his slave becomes the heir of the testator. For a slave once alienated cannot gain his liberty or himself take an inheritance by virtue of the testament of the master who alienated him, although his freedom was expressly given by the testament; because a master who has alienated his slave, has shown that he has renounced the intention of enfranchising him. So, too, when the slave of another is appointed heir, if he remains in slavery, he must take the inheritance at his master's bidding; and, if the slave is alienated in the lifetime of the testator, or after his death, but before he
has actually taken the inheritance, it is at the command of his new master that he must accept it. But, if he is enfranchised during the lifetime of the testator, or after his death, and before he has accepted the inheritance, he may enter upon the inheritance or not, at his own option.

GAL. ii. 188, 189.

It was necessary that the heir, as being the person who carried on the legal existence of the testator, should be possessed of civil rights. If, then, a slave of the testator was instituted, as it was in the power of the testator to make him free, and he had invested him with a character requiring freedom, this institution was considered to involve his freedom. The slave of any one else, if instituted, was only a channel by which his master, if possessed of civil rights, acquired the inheritance. (See Bk. i. Tit. 6. 1.) If a slave of the testator was instituted his heir, and remained his slave at the time of the testator’s death, the slave, immediately upon the testator dying, became his heres necessarius, that is, became his heir without any option of refusing or taking the inheritance. But if it was given under any condition, and the condition failed, the institution then became invalid.

If the slave instituted did not belong to the testator at the time of the testator's death, his condition at the time of his taking on him the inheritance (aditio hereditatis) determined for whom the inheritance was acquired. If at that time he was a slave, he acquired it for the person who was then his master; if free, for himself.

Disposing of the slave to another revoked the gift of liberty, because this was considered as a legacy, a mere accessory to the inheritance, to revoke which anything was sufficient, which showed a change of intention on the part of the testator; but it did not revoke the institution, because this was the keystone of the testament, and could only be revoked by a new testament, or destruction of the old one.

2. Servus alienus post domini mortem recte heres instituitur, quia et cum hereditariis servis est testamenti factio: nondum enim aditus hereditas persone vicem sustinet, non heredis futuri, sed defuncti, cum et eius, qui in utero est, servus recte heres instituitur.

2. The slave of another may be instituted heir even after the death of his master, as there is testamenti factio with slaves belonging to an inheritance; for an inheritance not yet entered on represents the person of the deceased, and not that of the future heir. So, too, the slave even of a child in the womb may be properly instituted heir.

D. xxviii. 5. 81. 1; D. xxviii. 5. 64.

After the death of a testator, and before the inheritance was entered on, the inheritance itself represented the person of the deceased, as it did that of an unborn child until the birth. A slave, during this interval, was said to belong to the inheritance,
and if a testament was made by any one instituting as heir a slave belonging to the inheritance, the slave took the inheritance thus given him for the benefit of that inheritance to which he belonged. And that he should do so, it was not necessary that the person by whose testament he was instituted heir should have testamenti factio with the future heir, but it was only necessary that he should have it with the person to whose inheritance the slave belonged.

8. Servus plurium, cum quibus testamenti factio est, ab extraneo institutus heres, unicuique domino rum, cujus ius su diademit, pro portione dominii adquirit hereditatem.

8. If a slave belonging to several masters, with all of whom there is testamenti factio, is instituted heir by a stranger, he acquires a proportion of the inheritance for each master by whose command he took it, corresponding to the several interests they each have in him.

D. xxix. 2. 67, 68.

If the slave was instituted heir by one of his masters, then, if this master expressly gave him his freedom, he became the heres necessarius of the master instituting him, and free; a due proportion of the price at which he was valued being paid to each of his other masters. But if his liberty was not expressly given him, the share which the testator had in him accrued proportionately to all those of his masters by whose orders he entered on the inheritance. (See Tit. 7. 4. of this Book.)

4. Et unum hominem et pluris in infinitum, quot quis velit, heredes facere licet.

4. A testator may appoint one heir or several, the number being quite unrestricted.

5. Hereditas plurumque dividitur in duodecim uncias, que assim appellatia continentur. Habent autem et hae partes propria nomina ab uncia nasse ad assem, ut puta hae: uncia, sextans, quadrans, triens, quinquentax, semia, septunx, bes, dodrans, dextans, deunx, as. Non autem utique duodecim uncias esse oportet. Nam tot uncias assem efficiunt, quot testator voluerit, et si unum tantum quis ex semisse verbi gratia heredem scripturit, totus as in semisse erit: neque enim idem ex parte testatus et ex parte intestatus decedere potest, nisi sit miles, cujus sola voluntas in testando spectatur. Et e contrario potest quis in quantascunque voluerit plurimas uncias suam hereditatem dividere.

D. xxvii. 5. 50. 2; D. xxviii. 5. 18. 1 et seq.; D. xxix. 1. 6.

In making a testament, where the testator wished to give different shares to his heirs, the singular system referred to in the
text was often adopted. The testator did not give a fifth, a fourth, &c., to each heir, but gave so many parts, e.g. five or four parts to one heir, and so many more to another. The number of parts given to each was added up, and the total formed the number of which these parts were taken to be a fraction. For instance, if a testator gave to A five parts, to B six, and to C two, the whole number amounting to thirteen, A took five-thirteenths, B six-thirteenths, and C two-thirteenths.

So far all was simple, but a greater complication was introduced by adopting, conjointly with this calculation of parts, a mode of reckoning derived from the familiar measure of the as, or pound weight, and its division into twelve ounces. The hereditas was considered to be represented by the as, and the parts by the ounces. But the testator had the power of determining how many ounces there should be in this imaginary pound. In the instance above given the as contains thirteen uncte. But supposing the testator assigned a certain number of parts to some of his heirs, and not to others, as, to A five parts, to B six parts, and then made C a co-heir, but without assigning him any number of parts, the law supposed the testator to have divided his pound into twelve ounces as the standard number, and gave the heir to whom no number of parts was assigned such a number as made up the as. In this instance, therefore, C would have one ounce or part. But if the whole number of parts expressly given exceeded twelve, then the testator was supposed to have been measuring out his inheritance by the double as (dupondius), and the heir to whom no express number was given took the number of parts wanting to make up twenty-four. If the parts expressly given exceeded twenty-four, then the tripoundius, containing thirty-six ounces, was the measure, and so on. The testator never died only partly testate; for whatever he gave was taken to make up the whole inheritance. If his testament only disposed of a portion of his property in the way mentioned in the text, viz. by his only giving six ounces (semis) to his heir, and his instituting only one heir, six was considered to be the number of ounces he wished to have in the as, and therefore he died testate as to all his property. If he did not use any expression referring to the parts of an as, but gave his heir specific things, having other property besides, what he did give was considered to represent what he did not give; as, for instance, if a man possessed large estates, and made A his heir, giving him one farm, and named no other heir, A took all his property: for this one farm was taken to be a description of the whole.

The as was thus divided: unctia, one ounce; sextans, one-sixth of an as, or two ounces; quadrans, one-fourth, or three ounces; triens, one-third, or four ounces; quindecim, five ounces; semis, one-half, or six ounces; septuans, seven ounces; bes, contracted from bis triens, eight ounces; dodrans, contracted from de quadrans, the as minus a quadrans, nine ounces; dex-
tans, contracted from de sextans, ten ounces; and deunx, eleven ounces.

6. Si plures instituantur, ita demum partium distributio necessaria est, si nolit testator eos ex sequis partibus heredes esse: satis enim constat, nullis partibus nominatis, sequis ex partibus eos heredes esse. Partibus autem in quemdam personam expressam, si quis aliqui sine parte nominatus erit, si quidem aliquam pars assi decret, ex ea parte heres fit, et si plures sine parte scripti sunt, omnes in eadem parte concurrent. Si vero totus as completus sit, in partem dimidiam vocantur et illae vel illi omnes in alteram dimidiam. Nec interest, primus an medius an novissimus sine parte scriptus sit: ea enim pars data intellegitur, quae vacat.

6. If several heirs are appointed, it is not necessary that the testator should specify their several shares, unless he intends that they should not take in equal portions. For if no division is made, the heirs clearly take equal portions. But if the shares of some should be specified, and another be named heir without having any portion assigned him, he will take the fraction that may be wanting to make up the as. And if several are instituted heirs without having any portion assigned them, they will all divide this remaining fraction among them. But, if the whole as is given among those whose parts are specified, and there is then no fraction left, then they whose shares are not specified take one moiety, and he or they whose shares are specified the other moiety. It is immaterial whether the heir whose share is not specified holds the first, middle, or last place in the institution; it is always the part not specifically given that is considered to belong to him.

D. xxviii. 5. 9. 12; D. xxviii. 5. 17; D. xxviii. 5. 20.

From this paragraph we may add one more detail of the system pursued in calculating the parts of the inheritance. If the number of parts expressly given amounted exactly to twelve, and there was an heir instituted to whom no parts were given, the dupondius was taken as the standard, and this heir to whom no parts were given took twelve out of twenty-four.

7. Videamus, si pars aliqua vacet nec tamen quisquam sine parte heres institutus sit, quid juris sit? Veluti si tres ex quartis partibus heredes scripti sunt. Et constat, vacantem partem singulis tacite pro hereditaria parte accedere et perinde haberet, ac si ex tertius partibus heredes scripti essent: et ex diverso si plusasse in portionibus sit, tacite singulis decrecere, ut, si verbi gratia quattuor ex tertio partibus heredes scripti sint, perinde habebatur, ac si unaquiesque ex quarto parte scriptus fuissest.

7. Let us inquire how we ought to decide in case a part remains unappropriated, and yet each heir has his portion assigned him: as, if three should be instituted and the inheritance divided into four parts. It is clear, in this case, that the undisposed part would be divided among them in proportion to the share given to each, and it would be exactly as if each had had a third part assigned him. And (conversely), if heirs are instituted with such portions as in the whole to exceed the as, then each heir must suffer a proportionate diminution; for example, if four are instituted, and the inheritance divided into three parts, this would be the same as if each of the written heirs had been given a fourth only.

D. xxviii. 5. 18. 2, et seq.
8. Et si plures unciae quam duodecim distributas sunt, is qui sine parte institutus est, quod dipondio deset, habebit: idemque erit, si dipondius expletus sit. Quae omnes partes ad assem postea revocabatur, quamvis sint plurium unciarum.

9. Heres et pure et sub condicione institutus potest. Ex certo tempore aut ad certum tempus non potest, veluti ‘post quinquennium quam moriar’ vel ‘ex kalendis illis aut usque ad kalendas illas heres esto’: diemque adjectum pra super vacuo habebi placet et perinde esse, ac si pure heres institutus esset.

8. If more than twelve ounces are bequeathed, then he who is instituted without any prescribed share shall have the amount wanting to complete the second as; and so, if all the parts of the second as are already bequeathed, he shall have the amount necessary to make up the third as. But all these parts are afterwards reduced to one single as, however great may be their number of ounces.

D. xxviii. 5. 18.

The concluding sentence of the section means, that though, for the sake of calculating the parts, we go beyond the as to the dipondius or tripondius, yet we must always consider the as as representing the inheritance. For example, to be quite correct, we must make 15-24ths into 7½-12ths, so that the portions of the inheritance may be expressed with reference to the twelve unciae of the as.

9. An heir may be instituted simply or conditionally, but not from or to any certain period; as ‘after five years from my death,’ or ‘from the calendars of such a month,’ or ‘until the calendars of such a month.’ The term thus added is considered a superfluity, and the institution is treated exactly as if unconditional.

D. xxviii. 5. 34.

The first part of this paragraph must be understood as referring to heirs other than sui heredes. If a suus heres, or at any rate if a filius, was instituted sub conditione, unless the fulfilment of the condition was within his own power, the testament was null. (D. xxviii. 5. 4. pr.)

If the institution was conditional, all those rights which otherwise would date from the death of the testator, dated from the accomplishment of the condition. When the condition was accomplished, the heir entered on the inheritance, and then by this aditio (not by the accomplishment of the condition) his rights were carried back to the time when the testator died. Heres quandoque adeundo hereditatem jam tunc a morte successisse defuncto intellegitur. (D. xxix. 2. 54.) Until the heir entered the inheritance was said jacere, to be in abeyance. But the rule that aditio has a retrospective effect is qualified by another rule already mentioned, that an inheritance in abeyance represents the person of the deceased testator, not of the future heir. (See par. 2.)

There are two rules of Roman law, which deserve attention, as illustrating how completely succession was regarded as the transfer of the whole persona of the deceased. It was a rule of law that a person could not die partly testate and partly intestate; if his testament was valid at all, his heredes ab intestato were en-
tirely excluded. It was also a rule of law, that a person who once became heir, could not cease to be heir. Thus we have seen (par. 5) that if there was a single heir, and he was instituted for six ounces, he took the whole inheritance; for the testator could not die testate as to six ounces and intestate as to the remaining six. Again, if a person was instituted heir from a certain time, there would be no one but the heredes ab intestato to take in the meantime, and they must cease to be heirs when the time arrived; if the institution was to take effect only up to a certain time, the instituted heir would cease to be heir at the expiration of the time, and the heredes ab intestato would then take the inheritance. Such an institution would have offended against the second rule we have just mentioned, viz. that a person who had once been heir could not cease to be heir (D. xxviii. 5. 88), whence the adage semel heres semper heres; for in the first case the heredes ab intestato, in the second the instituted heir, would cease, at the end of a certain time, to be heir. But if the institution was conditional, the heredes ab intestato did not take until the condition was fulfilled, and were excluded by the possibility which existed at every moment of time that the testamentary heir would be able to enter on the inheritance by the condition being accomplished. (D. xxix. 2. 39.)

The text speaks of certum tempus; if the time only was uncertain, if the event was one that must happen at some time, as that B should die, but the time of its happening was, as in this case, uncertain, and the testator said, 'Let A be my heir from the date of B's death,' this would operate to make the institution conditional. Dies incertus conditionem in testamento facit. (D. xxxv. 1. 75.) It would be uncertain whether A would outlive B; but if, during A's lifetime, B died, which he might at any moment, the condition, viz. that A should outlive him, would be accomplished, and this possibility excluded the heredes ab intestato.

A soldier might make his testament ex certo tempore or ad certum tempus (D. xxix. 1. 41. pr.), and might die partly testate and partly intestate. (See par. 5.)

10. Impossibilis condicio in institutionibus et legatis nec non in fideicommissis et libertaibus pro non scripto habetur.

10. An impossible condition in the institution of heirs, gift of legacies, creation of fideicommissa, and gifts of freedom, is considered as not inserted at all.

D. xxviii. 7. 1.

That the institution was regarded as unconditional instead of void, when the condition was one not allowed by law, must be ascribed to the anxiety of Romans not to die intestate, and the consequent favour with which the law regarded any means of treating a will as valid. An obligation containing an impossible condition would be void. (Bk. iii. Tit. 19. 11.)

Possibilis est quae per rerum naturam admitti potest: impossibilis quae non potest. (Paul. Sent. iii. 4. 2. 1.) But a thing
contrary to law, or to boni mores, was considered as impossible as if it was impossible per rerum naturam. (Paul. Sent. iii. 4. 2; D. xxviii. 7. 14.)

11. Si plures condiciones institutioni adscriptae sunt, si quidem conjunctum, ut puta si illud et illud factum erit, omnibus parentum est: si separatim, veluti si illud aut illud factum erit, cui libet obteneparente satis est.

11. When several conditions are attached to the institution, if they are placed in the conjunctive, as, 'if this thing and that thing are done,' all the conditions must be complied with. But, if the conditions are placed in the alternative, as, 'if this or that is done,' it will be sufficient to comply with any one.

D. xxviii. 7. 5.

12. Hi, quos numquam testator vidit, heredes instituiri posunt, veluti si fratris filios peregrini natos igno-
rans, qui essent, heredes instituiter: ignorantia enim testantis inutilem institutionem non facit.

12. A testator may institute persons his heirs whom he has never seen, as, his brother's sons, born in a foreign country, and unknown to him; for the want of this knowledge will not make the institution void.

C. vi. 24. 11.

Trt. XV. DE VULGARI SUBSTITUTIONE.

Potest autem quis in testamento suo plures gradus heredum facere, ut puta 'si ille heres non erit, ille heres esto;' et deinceps, in quantum velit, testator substitutur postest et novissimo loco in subsidium vel servum necessarium heredem instituere.

A man by testament may appoint several degrees of heirs; as, for instance, 'if so and so will not be my heir, let so and so be my heir.' And so on through as many substitutions as he shall think proper. He may even, in the last place, and as an ultimate resource, institute a slave his necessary heir.

Gal. ii. 174; D. xxviii. 6. 86. pr.

Substitution was really a conditional institution. If A is not my heir, if, for instance, he dies before me, I appoint B. The extent to which substitution was carried, was owing to the importance attached to dying testate; and partly also, in the time of the emperors, to the wish to guard against the operation of the lex Julia et Papia, which created numerous causes of incapacity to take under a testament, and gave the shares of those instituted, but incapable of taking, as caduca, to those named in the testament who were married and had children, and, if there were no such persons, to the aerarium, or public treasury. As the effect of the lex Julia et Papia cannot be discussed without taking legacies into consideration, a detailed account of the two laws known by this name is deferred till we reach the 20th Title. By substitution, that which under these laws was a caducum went to the substituted heir, if qualified to take, and did not follow the course of devolution which these laws prescribed.
This kind of substitution is termed *vulgaris*, as opposed to *substitutio pupillaris*, the subject of the next Title.

1. *Et plures in unius locum posunt substitui, vel unus in plurium, vel singuli singula, vel invicem ipsi, qui heredes instituti sunt.*

1. A testator may substitute several in the place of one, or one in the place of several, or one in the place of each one, or he may substitute the instituted heirs themselves reciprocally to one another.

Gal. ii. 175; D. xxviii. 6. 36. 1.

Three advantages which co-heirs gained by being substituted to each other are to be noticed: (1) If any one instituted heir died before the testator, or refused to take his share of the inheritance, his share was, in fact, undisposed of. But as the testator was always supposed to have disposed of his whole estate if he disposed of any part, this share was divided among all those who entered on the inheritance in proportions corresponding to the share given them by the will. Their claim to this was called the *jus accrescendi*. But a testator sometimes produced nearly the same effect as the law would have produced for him, by substituting the heirs who entered on the inheritance in the place of those who did not, thus preventing any share from becoming vacant. The effect was nearly the same, but not quite so. It was open to the substituted heirs to refuse the inheritance of this new part, which required to be expressly entered on: whereas, if instituted heirs once entered on the share given them by the testament, they could not decline accepting any further portion which devolved on them by the *jus accrescendi*. (D. xxx. 2. 33. pr.) (2) Surviving co-heirs might possibly gain by not having to share with the representatives of deceased heirs. The representatives of an instituted heir who died after entering on the inheritance received his portion of the share of a co-heir subsequently renouncing. But if the co-heirs were substituted to each other, then only those living at the time when the choice of entering on the vacant share was offered them, took by substitution (D. xxviii. 6. 23; D. xxviii. 5. 59. 7), the benefit of substitution, like that of institution, being personal; and the representatives of a co-heir who had died after entering, but before he had accepted the benefit of substitution, would lose what, under the *jus accrescendi*, would come to them. (D. xxviii. 6. 45. 1.) (3) The laws known under the joint name of the *lex Julia et Papia Poppea*, had, while in force, given a further reason for this mode of mutually substituting the heirs to each other, as under their provisions some persons could take what was given them, but could not claim *caduca*. By substitution, an heir incapable of claiming a *caduca*um under these laws might take it as substituted heir. For the mode in which these laws operated, see note on Tit. 20. 8.

It is easy to understand, that where there were more than two persons instituted, the devolution might not be the same by substitution and by the *jus accrescendi*. Supposing A, B, and C
were all instituted heirs, and B substituted to A, and then D substituted to B; if A and B died, by B being substituted to A the shares of A and B would both go to D; but by the *jus accrescendi* (i.e. supposing B had not been substituted to A) the share of A would have been vacant, and would have been divided between D and C.

2. Et si ex disparibus partibus heredes scriptos invicem substituerit et nullam mentionem in substitutione habuerit partium, eas videtur partes in substitutione dedisse, quas in institutione expressit: et ita divus Pius rescrispsit.

2. If a testator, having instituted several heirs with unequal shares, substitutes them reciprocally the one to the other, and makes no mention of the shares they are to have in the substitution, he is considered to have given the same shares in the substitution which he gave in the institution; thus the Emperor Antoninus decided by rescript.

C. vi. 26. 1.

If he chose, however, to specify the shares they were to take in that portion to which they were substituted, there was no necessity that they should be the same shares as those they were said to take by institute.

3. Sed si instituto heredi et coheredi suo substituto dato alius substitutus fuerit, divi Severus et Antoninus sine distinctione rescripsit, ad utramque partem substitutum admitti.

3. If a co-heir is substituted to any instituted heir, and a third person to that co-heir, the Emperors Severus and Antoninus have by rescript decided that this third person shall be admitted to the portions of both without distinction.

D. xxviii. 6. 41. pr.

A testator institutes two heirs, A and B. He substitutes B to A, and to B he substitutes C. Supposing neither A nor B takes the inheritance, C will take the part of each, *utramque partem*, and will take it without any distinction (*sine distinctione*) as to what was the order in which the testament was drawn up, or whether it is A or B that first dies or refuses or becomes incapable of taking the inheritance. How he would take the part of B is clear enough; but if B died or refused the inheritance before A, how would C take A’s share? He did so by the rule *substitutus substituto censeetur substitutus instituto*; the person substituted to the substitute is considered substituted to the instituted heir; C is substituted to B, who is substituted to A, and therefore C is, by what was termed a *tacita substitutio*, substituted to A, and takes his part.

4. Si servum alienum quis patremfamilias arbitratus, heredem scripsit et, si heres non esset, Mævium ei substituerit isque servus iussu domini adierit hereditatem, Mævius in partem admittitur. Illa enim verba ‘si heres non erit’ in

4. If a testator institutes the slave of another his heir, supposing him to be a *paterfamilias*, and, to provide for the case of this person not becoming his heir, substitutes Mævius in his place: then, if that slave should afterwards enter upon the inheritance at the com-
eo quidem, quem alieno juri subjectum esse testator scit, sic accipitur: si neque ipse heres erit neque alium heredem esse coeperit, non adquirerit. Iudicem Tiberius Caesar in persona Parthenii servi sui constituit.

emand of his master, the substituted person, Mævius, would be admitted to a part. For the words, 'if he does not become my heir,' in the case of a person whom the testator knew to be under the dominion of another, are taken to mean, if he neither becomes heir himself, nor causes another to be heir; but in the case of a person whom the testator supposed to be a paterfamilias, the words mean, 'if the heir acquires the inheritance neither for himself nor for him to whose dominion he afterwards becomes subject.' This was decided by Tiberius Caesar in the case of his own slave Parthenius.

D. xxviii. 5. 40, 41.

The pars which each took was one-half. (Theoph. Par.) That each should take half in such a case was a mere arbitrary regulation, formed on no principle of law, but only meeting, as was supposed, the equity of the case. It seemed hard that the master of the slave should lose all benefit from the institution, when the words of the testament gave him the whole inheritance, and hard that the instituted heir should take nothing when the master of the slave was profiting by a mistake of the testator. Accordingly Tiberius decided that each should have half.

Trt. XVI. DE PUPILLARI SUBSTITUTIONE.

Liberis suis impuberibus, quos in potestate quis habet, non solum ut, ut supra diximus, substituer e potest, id est ut, si heredes ei non extiterint, alius ei sit heres, sed eo amplius ut et, si heredes ei extiterint et adhuc impuberes mortui fuerint, sit eis aliquis heres. Veluti si quis dicit hoc modo: 'Titius filius meus heres mihi est: si filius meus heres mihi non erit, sive heres erit et prini moritur, quam in suam tutelam venerit (id est pubes factus sit), tunc Seius heres esto.' Quo casu si quidem non extiterit heres filius, tunc substitutas petri fit heres: si vero extiterit heres filius et ante pubertatem decesserit, ipsi filio fit heres substitutus. Nam moribus institutum est, ut, cum ejus statis sunt, in qua ipsi sibi testamentum facere non possunt, parentes eis faciant.

A testator can substitute an heir in place of his children, under the age of puberty, and in his power, not only in the manner we have just mentioned, namely, by appointing some other person his heir in case his children do not become his heirs, but also, if they do become his heirs, but die under the age of puberty, he may substitute another heir; as, for example, if any one says, 'Let Titius, my son, be my heir, and, if he should not become my heir, or, becoming my heir, should die before he comes to be his own master, i.e. before he arrives at puberty, let Seius be my heir.' In this case, if the son does not become the heir, the substituted heir is heir to the father; but, if the son becomes heir, and then dies under the age of puberty, the substituted heir is then heir to the son. For custom has established that ascendants may make testaments for their children who are not of an age to make testaments for themselves.

GAL. ii. 179, 180.
A child under the age of puberty might be *sui juris*, and so have the legal right to make a testament; his *status* might be such as to give him the *testamenti factio*, but he would not have the power of exercising his right to make a testament, according to the distinction between a right and the power of availing oneself of the right, so often met with in Roman law. If this child, then, died before attaining fourteen years, he would necessarily die intestate, which in Roman eyes was so great a misfortune for any one, that the father of the child was permitted to make the child's testament, but only as a part of, and as accessory to, his own. The right to make a child's testament depended on the possession of the *patria potestas*, and could only be exercised with regard to those children who were in the father's power.

In the words *si filius meus heres mihi non erit, sive heres erit et prius moriatur*, we have an instance both of the vulgar and the pupillary substitution. It was long a vexed question among the jurisprudents (Cic. _de Orat._ i. 39. 57), whether, if one only was expressed, the other was implied; whether, for instance, if the words *si filius meus heres mihi non erit* stood alone, and the child became heir but died under the age of puberty, the substituted heir would take as if he had been substituted by vulgar substitution. Marcus Aurelius terminated the doubt by deciding that each substitution implied the other (D. xxviii. 6. 4), so that, when the son was instituted heir, the person substituted to him by pupillary substitution was considered as substituted to him by vulgar substitution; and conversely, the person substituted by vulgar substitution was considered as substituted by pupillary substitution, unless, in either case, the testator had expressed a wish to the contrary.

1. Qua ratione excitati, etiam constitutionem in nostro postemus codice, qua prospectum est, ut, si mente captos hабeant filios vel nepotes vel pronepotes cujuscumque sexus vel gradus, licet eis, etiam præter sint, ad exemplum pupillaris substitutionis certas personas substituire: sin autem resipserint, caedem substitutionem infirmari, et hoc ad exemplum pupillaris substitutionis, que, postquam pupillus adolesceat, infirmatur.

1. Guided by this principle, we have also inserted a constitution in our code, which provides that, if a man has children, grandchildren, or great-grandchildren, out of their right minds, of whatever sex or degree, he may, although they have attained the age of puberty, substitute certain persons as heirs in place of such children, on the analogy of pupillary substitution. But if they regain their reason, the substitution becomes void, on the analogy of pupillary substitution, which ceases to operate when the minor attains to puberty.


This kind of substitution is termed by the commentators *quasi-pupillaris* or *exemplaris*, because made *ad exemplum pupillaris substitutionis*. The power here given differs from that of making a child's testament in two points: (1) it could be made by any ascendant, whether paternal or maternal, and not only by the *paterfamilias*; and (2) the testator could not substitute any one
he pleased. He was obliged to appoint one among certas personas, viz. one of the descendants of the insane, and, if there was none, then one of his brothers. If he had no brother, the choice of the testator was then unrestrained. (C. vi. 26. 9.)

If for any other cause than insanity a descendant was incapable of making a testament, the emperor would, if he thought fit, give a licence to the head of the family to make a testament for him. (D. xxviii. 6. 43. pr.)

2. Igitur in pupillari substitutione secundum presatum modum ordinata duo quodammodo sunt testamenta, alterum patris, alterum filii, tamquam si ipse filius sibi heredem instituisset: aut certe unum est testamentum duarum causarum, id est duarum hereditatum.

2. Therefore in a pupillary substitution, made in the way we have mentioned, there are in a manner two testaments, one of the father, the other of the son, as if the son had instituted an heir to himself; or at least there is one testament, dealing with two matters, that is, two inheritances.

3. Sin autem quis ita formidolosus sit, ut timeret, ne filius ejus pupillus adhuc ex eo, quod palam substitutum accept, post obitum ejus periculo insidiarum subiceretur: vulgarem quidem substitutionem palam facere et in primis testamenti partibus debet, illam autem substitutionem, per quam et si heres exitierit pupillus et intra pubertatem deceiserit, substitutus vocatur, separatim in inferioribus partibus scribere eamque partem proprio lino propriaque cera consignare et in priore parte testamenti cavere ne inferiores tabule vivo filio et adhuc impudere aperturant. Illud palam est, non ideo minus valere substitutionem impuberis filii, quod in iisdem tabulis scripta sit, quibus sibi quisque heredem instituisset, quamvis hoc pupillo periculosum sit.

3. If a testator is so apprehensive as to fear lest, after his death, his son, being yet a pupil, should be exposed to the risk of having designs formed against him from another person being openly substituted to him, he ought to make openly a vulgar substitution and insert it in the first part of his testament; and to write the substitution, by which a substituted heir is called to the inheritance, if his son should become an heir and then die under the age of puberty, by itself, and in the lower part, which part ought to be separately tied up and sealed: and he ought also to insert a clause in the first part of his testament, forbidding the lower part to be opened while his son is alive and under the age of puberty. Of course a substitution to a son under the age of puberty is not less valid because written on the same tablet in which the testator has instituted him his heir, whatever danger it may involve to the pupil.

4. Non solum autem hereditibus institutis impuberibus liberis ita substituire parentes possunt, ut et si heredes eis exitierint et ante pubertatem mortui fuerint, sit eis heres is, quem ipsi voluerint, sed etiam exheredatis. Itaque eo casu si quid pupillo ex hereditatibus legatiasse aut donationibus propinquorum atque amicorum adquisuitam fuerit, id omne ad substitutum pertinet. Quaequecumque dictum de substitutione impuberum liberorum vel heredum institutorum vel exhere-

4. Ascendants may not only substitute to their children under the age of puberty, so that if such children become their heirs, and die under the age of puberty, any one whom the testator pleases shall be made their heir, but they may also substitute to their disinherited children; and therefore, in such a case, whatever a disinherited child, within the age of puberty, may have acquired by succession, by legacies, or by gift from relations and friends, all becomes the property of the substituted heir. All
we have said concerning the substitution of children under the age of puberty, whether instituted heirs, or disinherited, is applicable also to posthumous children.

It was not because he instituted a child in his own testament that a *paterfamilias* could make the testament of that child, but because the child was in his power, and hence he could make the testaments even of children whom he disinherited. Grandchildren and other descendants could also be made subject to a pupillary substitution by their grandfather, if they were immediately in his power, that is, if their own father was dead or emancipated.

It was necessary that the child should be under the power of the father at the time of making the substitution, and also at that of the father’s death. No testator could, therefore, substitute to an emancipated child. (D. xxviii. 6. 2. pr.) If, after the child became *sui juris*, he was arrogated, this vitiates the substitution; but the person who arrogated him was obliged to give security that if the child died under the age of puberty, he would give up to the substituted heir, or to the *heredes legitiimi* if no one was substituted, all that would have come to the pupil if the substitution had remained valid. Pupillary substitution might also be made by the adoptive father; but it did not affect the property which the pupil had when arrogated. (See Bk. i. Tit. 11. 3.) It is, perhaps, hardly necessary to observe, that in every case of pupillary substitution save the last, the substituted heir took not only what the pupil received from the father, but all that the pupil would have had to dispose of by testament, if he had been capable of making a testament.

5. Liberis autem suis testamentum facere nemo potest nisi et sibi faciat: nam pupillare testamentum pars et sequela est paterni testamenti, adeo ut si patris testamentum non valeat, ne filii quidem valebit.

5. No one can make a testament for his children unless he also makes a testament for himself: for the pupillary testament is a part of, and accessory to, the testament of the parent, so much so, that if the testament of the father is not valid, neither is that of the son.

D. xxviii. 6. 2. 1.

The two testaments were generally contained in the same instrument; but a testator might, if he pleased, make his son’s testament by a different instrument, or might even make it by verbal nuncupation, although his own testament was written.

6. Vel singulis autem liberis vel qui eorum novissemus impubes moriatur substitut potest. Singulis quidem, si neminem eorum intestato desedere voluit: novissimo, si jus legitimarum hereditatum integrum inter eos custodiri velit.

6. A testator may make a pupillary substitution to each of his children, or to him who shall die the last under the age of puberty; to each if he is unwilling that any of them should die intestate; to the last who shall die, if he wishes that the order of legal succession should be rigidly preserved among them.

D. xxviii. 6. 87.
7. Substituitur autem impuberi aut nominativm, veluti 'Titius' aut generaliter 'quisquis mihi heres erit:' quibus verbis vocantur ex substitutione, impubere filio mortuo, qui et scripti sunt heredes et extirpunt, et pro qua parte heredes facti sunt.

7. A substitution may be made to a child under the age of puberty by name, as 'Let Titius succeed;' or generally, as, 'whoever shall be my heir.' By these latter words all are called to the inheritance by substitution, on the death of the son under the age of puberty, who have been instituted, and have become heirs to the father, and each in proportion to the share assigned to him as heir.

D. xxviii. 6. 8. 1.

Quisquis mihi heres erit, idem impuberi filio heres esto, is the full expression given in the Digest.


The father could not extend the time beyond fourteen years, but he could make it less; as, for example, si filius meus intra decimum annum decesserit.

The substitution pupillaris would be at an end not only by the pupil attaining the age of puberty, but by his undergoing a capitis diminutio and not recovering his former status before the age of puberty, or dying before his father, as, in either of these cases, it would be impossible he should make a testament. Or, again, if no one entered on the father's inheritance, or the father's testament was in any way made inoperative, the testament of the son was void, because it was on the validity of the testament of the father that the validity of the testament of the son depended.

9. Extraneo vero vel filio puberi heredi instituto etsi substituere nemo potest, ut, si heres exititerit et intra aliquod tempus decesserit, alius ei sit heres: sed hoc solum permissum est, ut sem per fideicommissum testator obliget, alii hereditatem ejus vel totam vel pro parte restitutere: quod jus quale sit, suo loco trademus.

9. After having instituted a stranger or son of full age, a testator cannot then go on to substitute another heir to him, if he dies within a certain time. All that is allowed is, to oblige, by a fideicommissum, the person instituted to give up all or a part to a third person. What the law is on this point we will explain in its proper place.

GAL. ii. 184.

It is to be observed that, in a fideicommissum, the testator does not attempt to deal with the inheritance of another; he only regulates the transmission of his own, and nothing, therefore, passed by the fideicommissum, except what came to the person instituted from the testator.

Soldiers could make a testament for their children without having made their own, and could substitute, so far as the inheritance they gave went, to their children over puberty, to emancipated children and strangers. (D. xxviii. 6. 2. 1; D. xxviii. 6. 10. 5; D. xxviii. 6. 15; D. xxix. 1. 41. 4 and 5.)
Tir. XVII. QUIBUS MODIS TESTAMENTA INFIRMANTUR.

Testamentum jure factum usque eo valet, donec rumpatur irritumve valid until it is either revoked or rendered ineffectual.

If something was originally wanting to the validity of the testament, if some formality was wanting, it was spoken of as being injustum, non jure factum, or imperfectum; and as nullius momenti, if a child was not properly disinherited. But it might be quite valid when made, and subsequently lose its effect; in such a case it was either rupturn, i.e. its force was broken, it was revoked, either by agnation or a suus heres, or by a subsequent testament; or it was irritum, rendered useless by the testator undergoing a change of status, or by no one entering, under it, on the inheritance. (D. xxviii. 3. 1.) In this last case it was specially said to be destitutum; but the general expression irritum was applied, as well as the more particular term destitutum, to a testament that had been abandoned.

We have no term nearer to rupturn than revoked; but it does not express it very accurately, as the rupture of the testament might be something quite independent of the testator’s will, whereas revocation properly implies a voluntary act of the testator. We have hitherto, in order to keep up the metaphor, translated it, ‘the force of the testament is broken;’ but this paraphrase is too cumbersome to be retained when the expression occurs frequently.

1. Rupturn autem testamentum, cum in eodem status manente testatore ipsius testamenti jus vitiatur. Si quis enim post factum testamentum adoptaverit sibi filium per imperatorem eum, qui sui juris est, aut per pretorem secundum nostram constitutionem eum, qui in potestate parentis fuerit, testamentum ejus rupturn quasi agnatione sui heredis.

1. A testament is revoked when, the testator still remaining in the same status, the effect of the testament is destroyed; for if, after making his testament, he arrogates a person sui juris by license from the emperor, or if in the presence of the prutor, and by virtue of our constitution, he adopts a child under the power of his natural ascendant, then the testament is revoked by this quasi-agnation of a suus heres.

Gal. ii. 188, et seq.

We have already seen how the rupture of the testament might be avoided by instituting or disinheriting posthumous children and quasi-postumi. (Tit. 13. 2.) But when a new suus heres came into the family by the civil agnation produced by adoption or arrogation, the stricter law of the time of Gaius pronounced that the testament was inevitably revoked. But in the times of the later jurists, if the new suus heres had been instituted by anticipation, the testament was considered as not revoked (D. xxviii. 2. 23),
and it was only when he had been omitted or disinherited, that
the rule making the testament of no effect was allowed to prevail.
And Justinian seems here to countenance the opinion by omitting
the word omnimodo, which Gaius adds to rumpitur.

2. Posteriore quoque testamento, quod jure perfectum est, superius
rumpitur. Nec interest, an exti-
terit aliquis heres ex eo, an non ex-
titerit; hoc enim solum spectatur,
an aliquo casu existere potuerit.
Ideoque si quis aut noluerit heres
esse, aut vivo testatore aut post
mortem ejus, antequam hereditatem
adiret, decesserit, aut condicione,
sub qua heres institutus est, defec-
tus sit, in his casibus paterfamilias
intestatus moritur: nam et prius
testamentum non valet, ruptum a
posteriore, et posterius sequae nullas
vires habet, cum ex eo nemo heres
extiterit.

2. A former testament is equally
revoked by a subsequent one made
as the law requires, nor does it sig-
ify whether under the new testament
any one becomes heir or not; the only
question is, whether there could have
been an heir under it: therefore, if
an instituted heir renounces, or dies,
either during the life of the testator,
or after the testator's death, but before
entering upon the inheritance, or if his
interest terminates by the failure of
the condition under which he was insti-
tuted—in any of these cases the testa-
tor dies intestate; for the first testa-
ment is invalid, being revoked by the
second, and the second is of as little
force, as there is no heir under it.

Gal. ii. 144.

If the heir instituted in a second testament would have taken
as heres ab intestato, the second testament, although it might be
not formally made (jure perfectum), was still held valid, as an
expression of the last will of the deceased, who died intestate
indeed, but whose wishes were binding on the heir. (D. xxviii. 3.
2; C. vi. 23. 21. 3.)

The two modes mentioned in the text by which a testament
could be revoked are the agnation of a suus heres and the making
a subsequent testament. But the testator could also revoke it
by tearing or defacing it, or by signifying a wish to have it re-
voked before three witnesses; or if the testament had at the
time of the testator's death been made ten years, it was enough to
make it considered as revoked if the testator had signified, before
three witnesses or by a deed, his wish that it should not remain in
force. Theodosius had enacted that a testament should be always
invalid after ten years had expired from the time of its being
made. Justinian allowed testaments to remain valid, as a general
rule, for any length of time, but retained the effect of the lapse of
time if the testator had also signified, as above mentioned, his
wish to have his testament revoked. (C. vi. 23. 27.)

When it is said that a subsequent testament to revoke a prior
one must be regularly made, it must be understood that, in the
case of soldiers, their privilege of making a testament in any way
they pleased would permit them to revoke a prior testament by
any testament that expressed their intentions.

3. Sed si quis, priore testamento
jure perfecto, posterius sequae jure
fecerit, etiam si ex certis rebus in eo

8. If any one, after having duly
made a testament, makes another in an
equally valid way, although the heir is
heredem institerit, superius testamentum sublatum esse divi Severus et Antoninus rescripserunt. Cujus constitutionis inseri verba iussimur, cum alio quaque praterea in ea constitutione expressum est. *Imperatores Severus et Antoninus Cocceius Campanus. Testamentum secundo loco factum, licet in eo certarum rerum herus scriptus sit, jure valere, perinde ac si rerum mentio facta non esset, sed teneri heredem scriptum, ut, contentus rebus sibi datis, aut suppleta quarta ex lege Falcidia, hereditatem restituet his, qui in priore testamento scripti fuerant, propter inserta verba secundo testamento, quibus, ut velaret prius testamentum, expressum est, dubitari non oportet.ET ruptum quidem testamentum hoc modo efficitur.

It was not the *lex Falcidia*, but the *senatusconsultum Pegassianum*, by which this fourth was in such a case given to the heir. (See Tit. 23. 5.)

If the heir was instituted for a part only, *certae res*, he would by law be instituted for the whole, as no one could die partly testate; but if in the second testament it was expressed that the first should be valid, this would be the same as imposing a *fideicommissum* on the heir under the second testament, the terms of the *fideicommissum* being contained in the first testament.

4. Allo quoque modo testamenta jure facta infirmantur, veluti cum is, qui fecerit testamentum, capite diminutus sit. Quod quibus modis accidit, primo libro rettulimus.

4. Testaments duly made are also invalidated in another way, viz. if the testator suffers a *capitis deminutio*. We have shown in the First Book under what circumstances this may happen.

Gal. ii. 145.

As it was from his civil *status* that a testator's power of making a testament proceeded, any change in this was held, except in the case of soldiers (Tit. 11. 5), to invalidate any exercise of the power made before the change.

5. Hoe antem casu irrita fieri testamenta diciturum, cum alioquin et que rumpantur, irrita flunt, et quae statim ab initio non jure flunt, irrita sunt: et ea, que jure facta sunt, postea propter capitis diminutionem irrita flunt, possumus nihil.
minus rupta dicere. Sed quia sane commodius erat singulas causas singulis appellationibus distinguere, ideo quadem non jure facta dicitur, quaedam jure facta rumpi vel irrita fieri.

6. But testaments at first validly made, and afterwards rendered ineffectual by a capitis diminutio, are not absolutely void: for if they have been attested by the seals of seven witnesses, the instituted heir can obtain possession of the goods according to the testament, provided that the testator was a Roman citizen, and was sui juris at the time of his death. For if a testament becomes ineffectual because the testator has lost the rights of a citizen or his liberty, or because he has given himself in adoption, and at the time of his death was under the power of his adoptive father, then the instituted heir cannot demand possession of the goods according to the terms of the testament.

GAL. ii. 147.

The meaning of the prætor giving the bonorum possessio secundum talulas is, that he ordered that possession of the property should be given as the testator intended, though, by the rules of strict law, the testament in which he had expressed his intention was invalidated. The instance referred to in the text is that of a testator, after making his testament, suffering a capitis diminutio, but returning to his old status before dying. In such a case the prætor gave the bonorum possessio; but if the testator had been arrogated and then emancipated, he must (since the arrogation was his own act) have after his emancipation expressly declared his wish to abide by his testament made before arrogation (GAL. ii. 147), or the prætor would not give the bonorum possessio to the instituted heir. This, however, cannot have been necessary after Justinian enacted that a person arrogated retained the dominium of his property.

7. A testament cannot be invalidated solely because the testator is afterwards unwilling that it should take effect; so much so that, if any one, after making one testament, begins another, and then, being prevented by death, or from having
changed his mind, does not complete it, it is decided in an address to the senate by the Emperor Pertinax, that the first testament shall not be made ineffectual, unless the subsequent one is regularly made and complete, for an imperfect testament is undoubtedly null.

C. vi. 28. 21. 5.

8. The emperor declared in the same address to the senate, that he would not accept the inheritance of any testator, who, on account of a suit, made the emperor his heir; that he would never make valid a testament legally deficient in form, if, in order to cover the deficiency, he himself was instituted heir; that he would not accept the title of heir, if he was instituted by mere word of mouth; and that he would never take anything by virtue of any writing wanting the authority of strict law. The Emperors Severus and Antoninus have also often issued rescripts to the same purpose: 'for although,' say they, 'we are freed from the tie of the laws, yet we live in obedience to them.'

D. xxxii. 28.

Testators occasionally made the emperor their heir, in order that their adversary in a lawsuit might have him to contend with.

An oratio was an address to the senate by the emperor, in which he explained to them what they were to enact; they then put his recommendations into the shape of a senatusconsultum.

Trt. XVIII. DE INOFFICIOSO TESTAMENTO.

Quia plerumque parentes sine causa liberos suos vel exheredant vel omitunt, inductum est, ut de inofficioso testamento agere possint liberi, qui queruntur, aut inique se exheredatos aut inique præteritos, hoc colore, quasi non sane mentis fuerunt, cum testamentum ordinarent. Sed hoc dicitur, non quasi vere furiosus sit, sed recte quidem fecit testamentum, non autem ex officio pietatis; nam si vere furiosus est, nullum est testamentum.

Since ascendants often disinherit their children, or omit them in their testaments, without any cause, children who complain that they have been unjustly disinherited or omitted, have been permitted to bring the action de inofficioso testamento, on the supposition that their parents were not of sane mind when they made their testament. This does not mean that the testator was really insane, but that the testament, though regularly made, is inconsistent with the duty of affection he owed. For, if a testator is really insane at the time, his testament is null.

D. v. 2. 2, 8, 5.
As we may gather from the text, a testament was termed *inofficiosum*, which was at variance with the dictates of natural affection, and those duties of near relationship which were expressed by the term *officium pietatis*. A presumption seemed to arise that the persons very closely connected with the testator, if passed over, must have done something to merit the testator's disapproval. They might therefore naturally desire to have their character (*estimatio*) protected against this imputation, and they therefore applied to the prætor to set the testament aside. A testament regularly and validly made, but liable to the objection that it was *inofficiosum*, was liable to be set aside on the application of the children, or, if there were no children, on that of the ascendants, or, if there were no ascendants, on that of the brother or sister of the deceased, the claim of these last, however, only prevailing where the person instituted was *turpis*.

It is not known at what date the action *de* *inofficioso testamento* was first introduced. It is referred to by Cicero (*In Verr. i. 42*). It was brought before the *centumviri*, as were all actions concerning inheritances, and if they pronounced the testament *‘inofficiosum’*, all its dispositions were set aside, and the inheritance passed according to the succession *ab intestato*. (*See Introd. sec. 77, 92.*)

The power of bringing the action was, however, not confined entirely to those who were disinherited. Children omitted by the mother, and grandchildren omitted by the maternal grandfather, might bring it, as we have already seen. (*Tit. 13. 7.*)

The object of permitting the action was that those permitted to bring it on account of their strong claims on the testator should not be disinherited or omitted altogether without sufficient cause. If, therefore, they got in any way a fourth of what they would have received in a succession *ab intestato*, or were excluded for what the law considered a just cause (which Justinian afterwards required to be expressed in the testament, Nov. 115. 3), such as gross misconduct towards the testator, they could not bring this action.


1. It is not children only who are allowed to attack the testaments of their ascendants as inofficious. Ascendants are also permitted to attack those of their children. The brothers and sisters of a testator, also, by the imperial constitutions, are preferred to infamous persons, if any such have been instituted heirs. Thus, then, they cannot bring such an action against any heir. Beyond brothers and sisters no cognate can bring or succeed in such an action at all.

C. iii. 28. 21, 27.

Before Justinian, brothers and sisters could only bring this action while the tie of agnation was in existence. He permitted them to bring it *durante vel non agnatione* (C. iii. 28. 27), and
thus made it sufficient that they should be merely *consanguinei*, i.e. born of the same father. Subsequently, by the 118th Novel, uterine brothers or sisters were placed on the same footing as *consanguinei*.

2. Tam autem naturales liberi, quam secundum nostrae constitutio-
nis divisionem adoptati ita demum de inofficiioso testamento agere pos-
sunt, si nullo alio jure ad bona de-
functi venire possunt. Nam qui
alio jure venirent ad totam heredi-
tatem vel partem ejus, de inofficiioso
agere non possunt. Postumi quo-
que, qui nullo alio jure venire pos-
sunt, de inofficiioso agere possunt.

2. But natural children, as well as adopted (the distinction between adopted children laid down in our constitution being always observed), can only attack the testament as inofficious, if they can obtain the effects of the deceased in no other way; for those who can obtain the whole or a part of the inheritance by any other means, cannot bring an action *de inofficiioso*. Posthumous children, also, who are unable to recover their inheritance by any other method, are allowed to bring this action.

D. v. 2. 6. pr. and 8. 15.

Those adopted by strangers could not impugn the testament of the adoptive father, if they were disinheritied or passed over, but those who were adopted by their ascendants could. This is the *divisio* here alluded to. (See Bk. i. Tit. 11. 2.)

The *actio de inofficiioso testamento* was only a last resource open to those who had no other; a pupil, therefore, arrogated, and afterwards disinheritied by the arrogator, could not bring this action, because he was entitled to the *quarta Antonina* (see Bk. i. Tit. 11. 3); nor, again, could an emancipated son, omitted in the testament of his father, because the preitor gave him possession of the goods *contra tabulas*. (See Tit. 13. 3.)

3. Sed hæc ita accipienda sunt, si nihil eis penitus a testatoribus testamento relictum est. Quod no-
stra constitutio ad verecundiam
nature introduxit. Sin vero quan-
tacumque pars hereditatis vel res eis
fuerit relictâ, de inofficiioso querela
quiæscente, id, quod eis deest, usque
ad quartam legitimate partis repletur,
lícet non fuerit adjunctum, boni viri
arbitratu debere eam repleri.

3. All this must be understood to take place only when nothing at all has been left them by the testament of the deceased: a provision introduced by our constitution, out of respect for the rights of nature. For, if the least part of the inheritance or any one single thing has been given them, they cannot bring an action *de inofficiioso testamento*: but they must have made up to them one-fourth of what would have been their share, if the deceased had died intestate, supposing what is given does not amount to this fourth: and this, although the testator has not added to his gift any direction that this fourth is to be made up to them according to the estimate of a trustworthy person.

C. iii. 28. 80. pr. and 1.

*plebiscitum* was passed in the year 714 A.U.C., called the *lex Falcidía* (Tit. 22), which provided that one clear fourth of the
inheritance must remain to the heir, and that legacies could only affect three-fourths. Either from the analogy of this law, or by some express enactment, it was decided that every one who was near enough in blood to the testator to bring the action de inofficioso, might bring it, though mentioned in the testament, unless one-fourth was thereby given him of what he would have received in a succession ab intestato. This fourth part was spoken of under different names. Sometimes it was itself termed the Falcidia (solam eis Falcidiam debeite successionis relinquant, Cod. Theod. xvi. 7. 28). Sometimes it is spoken of as the portio legibus debita, or portia legitima (C. iii. 28. 28. 1), and commentators have called it simply the legitima. In the text, it will be seen, the term legitima pars is used to express the share the persons would have taken ab intestato.

Before the time of Justinian (Cod. Theod. ii. 19. 4), unless a testator either expressly gave this fourth, or gave a direction that such an additional share of the goods should be added to that actually given, as some trustworthy person, who should make an estimate of the value of all the goods of the deceased, should consider would be necessary to make what was given equal to the fourth, the testament could be attacked and set aside as inofficious; but Justinian altered the law on this point, and enacted that if the testator gave anything at all, the action de inofficioso could not be brought, but only an action to obtain what was wanting to make up the fourth, while the testament itself remained valid. (C. iii. 28. 30. pr.) There were considerable differences between this action to make up what was wanting to the fourth part (actio in supplementum legitime) and that de inofficioso: the former was a personal action, there was no limit to the time in which it was to be brought, it was transmissible to the heirs of the person who could bring it, and it left the testament valid; the latter was a real action, was obliged to be brought within a certain time (see note to paragr. 7), could not be transmitted to the heirs, unless the person entitled to bring it had manifested an intention to do so, and if it was successfully brought, the testament was set aside.

4. Si tutor nomine pupilli, cujus tutelam gerebat, ex testamento patris sui legatum accipit, cum nihil erat ipsi tutori relictum a patre suo, nihil minus possit nomine suo de inofficioso patris testamento agere.

4. If a tutor accepts in the name of the pupil under his charge a legacy given in the testament of the tutor's own father, while nothing has been left to the tutor himself by his father's testament, he may nevertheless in his own name attack the testament of his father as inofficious.

D. v. 2. 10. 1.

To accept a legacy was to acquiesce in the validity of the testament; but it was reasonable that a tutor, who had an unavoidable duty to perform towards his pupil, should not be personally bound by an act done in his capacity as tutor.
5. Sed et si e contrario pupilli nomine, cui nihil relictum fuerit, de inofficioso agerit et superatus est, ipse quod sibi in eodem testamento legatum relictum est, non amittit.

5. Conversely, if a tutor, in the name of his pupil, to whom nothing has been left, attacks as inofficious the testament of the pupil's father, and attacks it unsuccessfully, he does not lose any legacy that may have been left to himself in the same testament.

D. v. 2. 80. 1.

Any one who unsuccessfully attacked usque ad sententiam a testament as inofficious, forfeited to the fiscus whatever was given him by the testament; but not if he desisted from the action (D. v. 2. 8. 14).

6. Igitur quartam quis debet habere, ut de inofficioso testamento agere non possit: sive jure hereditario sive jure legati vel fideicommissi, vel si mortis causa ei quarta donata fuerit, vel inter vivos in his tantummodo casibus, quorum nostra constitutio mentionem facit, vel aliis modis, qui constitutionibus continentur.

6. That a person should be barred from bringing the action de inofficioso testamento, it is necessary that he should have a fourth, either by hereditary right, or by a legacy or a fideicommissum, or by a donatio mortis causa, or a donatio inter vivos in the cases mentioned in our constitution, or by any of the other means set forth in the constitutions.

7. Quod autem de quarta diximus, ita intellegendum est, ut, sive unus fuerit sive plures, quibus agere de inofficioso testamento permititur, una quarta eis dari possit, ut pro rata distribuatur eis, id est pro virili portione, quarta.

7. What we have said of the fourth must be understood as meaning that, whether there is one person only or several, who can bring an action de inofficioso testamento, only one-fourth is to be distributed among all proportionally, that is, each is to have the fourth of his proper share.

D. v. 2. 8. 6 and 8; D. v. 2. 25. pr.; C. iii. 28. 29; C. iii. 35. 2.

If the donatio inter vivos had been made on the express condition that it should be reckoned as part of the quarta legittima (D. v. 2. 25; C. iii. 28. 35), or had been advanced for the purchase of a military rank (C. iii. 28. 30), or was such as unduly to diminish the testator's property, then it was taken into account in estimating how much the recipient was entitled to as his fourth; but, generally speaking, as it was the receipt of the fourth of that which a person would have received ab intestato that excluded him from bringing the action de inofficioso, the right to this action could not be taken away by the receipt of gifts, which, having been made inter vivos, could not have formed part of the inheritance ab intestato.

The words, vel aliis modis, &c., refer to sums given by parents to their children as part of dotes, and to donationes propter nuptias (C. iii. 28. 29), which were taken into account in reckoning the amount due as the portio legittima.

The right to the action de inofficioso might be extinguished, (1) by the person entitled to the quarta legittima dying without having manifested an intention to dispute the testament; if he had done so, the right to the action passed to his heirs (D. v. 2. 6. 2); (2) if he had allowed a time, fixed first at two and
subsequently at five years (Cod. Theod. ii. 19. 5), to elapse without bringing the action; and (3) when he had acquiesced directly or indirectly in the testament; as, for instance, by making a contract with the persons instituted, in their capacity as heirs (D. v. 2. 20), or by a demand against those persons for the payment of a legacy, or by desisting in the action when once brought. (D. v. 2. 8. 1.)

Justinian, in his Novels, introduced considerable changes in the law on these points. First, if those entitled to the portio legitima were more than four in number, they divided between them one-half of the whole inheritance; if they were four or less than four, they divided between them a third of the whole inheritance. (Nov. 18. 1.) Secondly, those who could claim a portio legitima were required to be made heirs, and the testament was not to be upheld because those entitled to the portio legitima had something otherwise given them, as by legacy or trust. (Nov. 115. 3. 4.) Thirdly, if the testament was declared inofficious, it was only the institution of the heir or heirs that was to be set aside; the trusts, legacies, gifts of liberty, and appointments of tutors were to remain good. (Nov. 115. 4. 9.) And, fourthly, Justinian fixed and specified the reasons, such as attempts on the testator’s life, accusing him of grave crime, &c., limiting them to fourteen in the case of descendants and to a less number in other cases, for any one of which a testator might disinherit or omit his descendants or ascendants or brothers or sisters; the one on which the testator had acted was to be expressly stated. (Nov. 115. 3. 4.)

TIT. XIX. DE HEREDUM QUALITATE ET DIFFERENTIA.

Heeres autem aut necessarii dicuntur aut sui et necessarii aut extranei.

GAL. ii. 152.

1. Necessarius heres est servus heres institutus; ideo sic appellatur, quia, sive velit sive nolit, omnimodo post mortem testatoris proinus liber et necessarius heres fit. Unde qui facultates suas suspectas habent, solent servum suum primo aut secundo vel etiam ulteriori gradu heradem instituere, ut, si creditoribus satis non fiat, potius ejus heredes bona quam ipsius testatoris a creditoribus possessaantur vel distrahanter vel inter eos dividantur. Pro hoc tamen incommodo illud ei commodum praestatur, ut ea, quae post mortem patroin sui sibi aquisierit, ipsi reserventur: et quamvis non

1. A necessary heir is a slave instituted heir; and he is so called, because, whether he wishes or not, at the death of the testator he becomes instantly free, and necessarily heir; he, therefore, who suspects that he is not in solvent circumstances, commonly institutes his slave to be his heir in the first, second, or some more remote place; so that, if he does not leave a sum equal to his debts, it may be the goods of this heir, and not those of the testator himself, that are seized or sold by his creditors, or divided among them. But, to compensate for this inconvenience, a slave enjoys the advantage of having reserved to him
sufficient bona defuncti creditoribus, iterum ex ea causa res ejus, quas sibi adquirerit, non venetur.

whenever he has acquired after the death of his patron; for although the goods of the deceased should be insufficient for the payment of his creditors, yet property so acquired by the slave is not on that account made the subject of a further sale.

Gal. ii. 159-155; D. xiii. 6. 1. 17.

The sale of goods for the payment of debts brought on the debtor an ignominy which a testator was very anxious his memory should escape.

The heres necessarius was legally bound by all the debts of the deceased; but the pretor made a change in the strict law, and permitted the goods of the deceased to be distinctly separated from the possessions of the heres necessarius, if the heres necessarius demanded, before in any way interfering with the goods of the deceased, that this separation should take place. When it did take place, the creditors could only recover from him the amount of what actually came into his hands as heir, while he could deduct from the inheritance all that he had acquired after he became sui juris (D. xiii. 6. 1. 18); and (as Ulpian in the passage quoted goes on to say) anything due to him from the testator, which Demangest suggests, refers to the case of a gift by a third person of a legacy to a slave, si liber factus fuerit, in a testament of which the testator had been instituted heir.

This beneficiaum separationis, it may be mentioned, the right to have the goods of the heir separated from those of the testator, was sometimes accorded, in cases having nothing to do with a heres necessarius, in favour of the creditors of the testator. The heir might be insolvent, and then it was for their interest that the testator’s property should be kept distinct. (D. xiii. 6. 1. 17.)

2. Sui autem et necessarii heredes sunt veluti filius, filia, nepos nepotisque ex filio et deinceps ceteri liberi, qui modo in potestate morientis fuerint. Sed ut nepos nepisque sui heredes sint, non sufficit, eum esse in potestate avit mortis tempore fuisse, sed opus est, ut pater ejus vivo patre suo desiderit suus. heres esse, aut morte interceptus aut qualibet alia ratione liberatus potestate: tunc enim nepos nepotis in locum patris sui succedit. Sed sui quidem heredes ideo appellantur, quia domestici heredes sunt et vivo quoque patre quodammodo domini existimantur. Unde etiam, si quis intestatus mortuus sit, prima causa est in successione liberorum. Necessarii vero ideo dicuntur, quia omnimodo, sive velint sive nolint, tam ab intestato quam ex testa-

2. Heirs are sui et necessarii, when they are, for instance, a son, a daughter, a grandson or granddaughter, by a son, or other direct descendants, provided they are in the power of the deceased at the time of his death. That grandchildren should be sui heredes, it is not enough that they were in the power of their grandfather at the time of his decease, but it is also requisite that their father should have ceased to be a suis heres in the lifetime of his father, having been either cut off by death, or otherwise freed from paternal authority; for then the grandson or granddaughter succeeds into the place of their father. Sui heredes are so called because they are family heirs, and, even in the lifetime of their father, are considered owners of the inheritance in a certain degree. Hence, in case of a person dying intestate his
mento heredes sunt. Sed his prae tor permissit voluntibus abstinerse se ab hereditate, ut potius parentis quam ipserum bona similiter a creditoribus possideantur.

There is no difficulty in understanding either who were sui heredes, or what was the position they occupied with reference to the inheritance. If the paterfamilias had no power of making a testament, those persons in his power, who became sui juris at his death, would necessarily have had the inheritance at his decease; they were in a manner, as the text says, owners during his lifetime of the inheritance, which must actually come into their possession at his death. And, although testaments were allowed to alter the legal succession, the rights of those who had this interest in the inheritance were so far guarded that it was necessary expressly to disinherit them in order to deprive them of their interest; while, on the other hand, if the testator appointed any one of them as his heir, he was considered thereby to exercise his patria potestas, so that the sui heres could not exercise any option as to accepting or refusing the inheritance, and was a heres necessarius, exactly as he was if he succeeded ab intestato, until the prae tor interfered to enable him to escape the burden. In every case the sui heres took the inheritance or his share in it, and without any act or exercise of his own will; if he was insane or under the age of puberty, no authority was needed to enable him to accept it, and he never had to enter formally on an inheritance that belonged to him immediately the paterfamilias died, unless he was instituted by the paterfamilias only conditionally, and then the inheritance belonged to him immediately on the condition being fulfilled. If the grandson, instituted while his father was disinherited, was in the power of the deceased at the time of his death, he became sui heres et necessarius, but becoming, on the testator’s death, in the power of his own father, immediately placed his father in the position he himself occupied—patrem suum sine additione heredem faciet et quidem necessarium. (D. xxix. 2. 6. 5.)

The inheritance was, according to the notions of early law, the property not so much of the individual, as of the family, and so the term sui heredes means persons who took an inheritance that was their own, who were heirs not of the paterfamilias, but of themselves, and being, as Cujacius expresses it by a Greek equivalent, αὐτοκληρονόμοι, took what thus belonged to them already, and only received possession of that over which, as the
text says, they had even in the lifetime of the parent had a kind of ownership.

As the text informs us, the prætor interposed to prevent its being in every case obligatory on the suus heres to accept the inheritance; he was only treated as an heir if he intermeddled with the inheritance; and until he had in some way shown his intention of doing so, the prætor refused to permit any action to be brought against him as suus heres by the creditors of the deceased. The beneficium abstinendi, as this power of abstaining was termed, differed from the beneficium separationis, accorded to slaves, by no express demand being necessary, as it always existed in the absence of express intention to accept the inheritance, and also by its being a protection to the suus heres against all actions whatever brought against him in his capacity of heir, while the slave was liable to the amount of the property of the deceased.

The suus heres who had availed himself of this privilege did not thereby cease to be heir. He could afterwards within three years accept the inheritance if the goods were not sold by the creditors. (D. xxviii. 8. 8; C. vi. 31. 6.)

The suus heres might thus, under the prætorian system, abstain from taking the inheritance; but, until his position was changed by Justinian (as noticed in the sixth paragraph), if he entered he took upon himself all the burdens of the inheritance. He had to satisfy the creditors of the deceased, whether the inheritance sufficed or not, and to pay legatees and discharge fideicommissa (with the deduction of the Falcidian fourth) so far as the inheritance was sufficient. If there was more than one heir, each co-heir was, under the law of the Twelve Tables, regarded as answerable for the same proportion of the debts as he took of the inheritance. (D. xxxi. 1. 33; C. iii. 36. 6.)

8. Ceteri, qui testatoris juri subjecti non sunt, extranei heredes appellantur. Itaque liberi quaque nostri, qui in potestate nostra non sunt, heredes a nobis instituti, extranei heredes videntur. Quid de causa et qui heredes a materi institutur, sodem numero sunt, quia feminine in potestate liberos non habent. Servus quoque a domino heres institutus est post testamentum factum ab eo manumissus sodem numero habetur.

8. All those who are not subject to the power of the testator are termed extranei heredes: thus, children, not within our power, whom we institute heirs, are accordingly extranei heredes. So, too, are children instituted heirs by their mother, for a woman has not her children under her power. A slave also, whom his master has instituted heir and manumitted after the testament has been made, is considered a heres extraneus.

Gal. ii. 161.

4. In extraneis heredibus illud observatur, ut sit cum eis testamenti factio, sive ipsi heredes instituantur, sive hi, qui in potestate eorum sunt. Et id dubus temporibus inspiciatur, testamenti quidem facti, ut constitut.

4. As to extranei heredes, the rule is that there must be testamenti factio with them, whether they are instituted heirs themselves, or whether those under their power are instituted. And this is required at two several
rit institutio, mortis vero testatoris, ut effectum habeat. Hoc amplius et cum addit hereditatem, esse debet cum eo testamenti factio, sive pure sive sub condicio heres institutus sit: nam jus hereditis eo vel maxime tempore inapiciendum est, quo acquirit hereditatem. Medio autem tempore inter factum testamentum et mortem testatoris vel conditionem institutionis existentem mutatio juris herediti non nocet, quia, ut diximus, tris tempora inspici debent. Testamenti autem factionem non solum is habere videtur, qui testamentum facere potest, sed etiam qui ex alieno testamento vel ipse capere potest vel ali adquirere, licet non potest facere testamentum. Et ideo et furiosus et mutus et postumus et infans et filiusfamilias et servus alienus testamenti factionem habere dicuntur: licet enim testamentum facere non possunt, attamen ex testamento vel sibi vel ali adquirere possunt.

times: at the making of the testament, that the institution may be valid, and at the testator's death, that it may take effect. Further, at the time of entering upon the inheritance, testamenti factio ought still to exist with the heir, whether he is instituted simply or conditionally; for his capacity as heir is principally regarded at the time of acquiring the inheritance. But in the interval between the making of the testament and the death of the testator, or the accomplishment of the condition of the institution, the heir will not be prejudiced by change of statum; because it is the three points of time which we have noted that are to be regarded. Not only is a man who can make a testament said to have testamenti factio, but also any person who under the testament of another can take for himself, or acquire for another, although he cannot himself make a testament; and therefore insane and dumb persons, posthumous children, infants, sons in power, and slaves belonging to others, are said to have testamenti factio. For although they cannot make a testament, yet they can acquire by testament either for themselves or others.

D. xxviii. 5. 49. 1; D. xxviii. 1. 16. 1.

The necessity for the heir having testamenti factio at the time of the making of the testament proceeded from the ancient mode of making testaments. When, in the calata comitia, the testator orally announced who it was on whom he wished his legal existence, his persona, to devolve after his death, the person designated could not have accepted the devolution unless he had been in the enjoyment of those rights of citizenship implied in the testamenti factio; and when testaments were made per as et libram, it was equally necessary that the purchaser, that is, the heir, should have those rights of citizenship which would enable him to go through a sale by mancipation.

Vel condicio. The point of time to be looked to is not that when the testator died, but that when the rights of the heir accrued. If the testament was made pure, they accrued the moment the testator died; if made sub condicio, on the accomplishment of the condition.

It will be observed that the text says that it was immaterial whether the heir preserved his testamenti factio between the two periods of the making the testament and the accruing of his rights; if he lost it between the two later epochs, viz. the accruing of his rights and the entrance on the inheritance, he could not take,
and it would not avail him that he had recovered it at the time of entering on the inheritance. (D. xxviii. 2. 29. 5.)

The classes mentioned in the concluding portion of this paragraph might have the rights of citizenship, and only be accidentally prevented from exercising those rights.

5. Extraneci heredes may deliberate whether they will enter upon the inheritance or not. But, if one, who has the liberty of abstaining, intermeddles with the property of the inheritance, or an extraneus heres, who is permitted to deliberate, enters on the inheritance, it will not afterwards be in his power to renounce the inheritance, unless he shall be under twenty-five years; for the pretor, as in all other cases he relieves persons of this age who have been deceived, so too he does when they have rashly taken upon themselves a burdensome inheritance.

Gal. ii. 162, 168.

There was no fixed time within which it was necessary that the heir should decide whether to accept or reject the inheritance, excepting when the testator fixed the time himself by what was termed cretio. (See note to paragr. 7.) Those who were interested in his making a decision could compel him by action to do so, and the pretor then, if he wished, allowed him time to deliberate, never less than one hundred days. Justinian enacted that the time given should not exceed nine months, or, as a special favour from the emperor, a year. If he did not decide within the appointed time, he was taken to have rejected the inheritance, if the action to compel a decision was brought by substituted heirs or a heres ab intestato; to have accepted it, if the action was brought by legatees or creditors. If he died before the expiration of the time, and within a year of the first commencement of his right to enter on the inheritance, his heir could, during the unexpired remainder of the time, decide in his place. (C. vi. 30. 19.)

The mode by which the pretor interfered for the protection of minors was called restitutio in integrum. (See note on Bk. i. Tit. 23. pr.)

6. Sciedendum tamen est, divum Hadrianum etiam majori viginti quinque annis veniam dedisse, cum post aditam hereditatem grande esse alienum, quod adite hereditatis tempore latebat, emersisset. Sed hoc divus quidem Hadrianus speciali beneficio cuidam prestitit; divus autem Gordianus postea in militibus tantummodo hoc extendit: sed nostra benevolentia commune omni-

6. The Emperor Hadrian, however, once gave permission to a person above twenty-five years to relinquish an inheritance, when it appeared to be encumbered with a great debt, which was unknown at the time that he entered on the inheritance. But this was granted as a special favour to a particular person. The Emperor Gordian afterwards extended this privilege, but only to soldiers. But
bus subjectis imperio nostro hoc prestavit beneficium et constitutionem tam equissimam quam nobilem scripseit, cujus tenorem si observaverint homines, uest eis adire hereditatem et in tantum teneri, in quantum valere bona hereditatis contingist, ut ex hac causa neque deliberationis anxiium eis fiat necessarium, nisi omissa observatione nostrae constitutionis et deliberandum existimaverint et esse veteri gravaminis additionis suppressione maluerint.

we in our goodness have rendered this benefit common to all our subjects, having dictated a constitution as just as it is illustrious, by which, if heirs will attend to its provisions, they may enter upon their inheritance, and not be liable beyond the value of the goods; so that they need not have recourse to deliberation, unless, neglecting to conform to our constitution, they prefer to deliberate and submit themselves to the liabilities attending the entering on the inheritance under the old law.

GAL. ii. 168; C. vi. 30. 22.

Commentators have termed the privilege referred to here the beneficium inventarii. Within thirty days after the heir became acquainted with his rights, an inventory of the property might be begun, which was to be finished within ninety days from the same time. This inventory was to be made in presence of a tabellio, or public notary, and of any parties interested who might wish to be present, or else of three witnesses.

If the heir chose to avail himself of this privilege, he entirely separated the estate of the testator from his own; he could deduct anything that might be owing to him from it, and had to pay to it anything he might owe. He first paid the expenses of the funeral and of the inventory, and then all the creditors in the order in which they sent in their claims. If there was any surplus, he took it; if any deficiency, he was not liable. (C. vi. 30. 22.)

Justinian, by this sweeping change, entirely altered the position of the heir. He was no longer the representative of the deceased, bound to see that the debts of the deceased were paid. His estate and that of the testator were now distinct. He merely distributed the property which the deceased left, and if the deceased owed him anything he was entitled to pay himself as a creditor. Justinian did not, indeed, enact that every heir should hold this new character, but he took away the Falcidian fourth from an heir who did not make an inventory, and left him to pay not only the debts, but the legacies, even if the estate was insufficient for the purpose, so that heirs had every possible motive to accept the new position opened to them. (Nov. 1. 2. 2.)

7. Item extraneus heres, testamento institutus aut ab intestato ad legitimam hereditatem vocatus, potest aut pro herede gerendo vel etiam nuda voluntate suscipiendi hereditatis heres fieri. Pro herede autem gerere quis videtur, si rebus hereditariis tamquam heres utatur vel vendendo res hereditarias aut predia colendo locandove et quoquo modo, si voluntatem suam declarat vel re vel verbis de aedenda

7. An extraneus heres, instituted heir by testament, or called by law to a legal succession ab intestato, may become heir, either by doing some act as heir or even by the mere wish to accept the inheritance. And a man acts as heir if he treats any of the goods of the inheritance as his own, by selling any part, or by cultivating the ground, or letting it, or in any other way declares, either by act or word, his intention to enter on the in-
heriditate, dummodo sciat, eum, in cujus bonis pro herede gerit, testato intestatovre obiisse et se ei heredem esse. Pro herede enim gerere est pro domino gerere: veteres enim heredes pro dominis appellabant. Sicut autem nuda voluntate extraneus heres fuit, ita et contraria destinacione statim ab hereditate repellitur. Eum, qui mutus vel surdus natus est vel postea factus, nihil prohibet pro herede gerere et adquirere sibi hereditatem, si tamen intellegit, quod agitur.

GAI. ii. 166, 167, 169; D. xxix. 2. 5.

Besides the two modes here mentioned of ascertaining the entrance of the extraneus heres on the inheritance, namely, forming an intention to do so, and doing some act as heir, there was a mode, abolished by a constitution of Arcadius, Honorius, and Theodosius (A.D. 407), called cretio. Cretio appellata est, quia cornere est quasi decernere et constituere. (GAI. ii. 164.) The testator himself, in his will, fixed the time within which the heir was to decide whether he would accept the inheritance. The form ran thus: Titius heres esto cernitoque in diebus centum proximis qui- bus scieris poterisque. If the words quibus scieris poterisque were inserted, the time ran from the period when the heir became acquainted with his rights, and could avail himself of them; this was called the cretio vulgaris. If they were omitted, the time ran from the period when the rights accrued to him; this was called the cretio continua, because the time ran on continuously whether the heir knew of his rights or not. The heir could alter his decision at any time within the limited period. His decision was expressed, when made, by forms more solemn than when the aditio was made by a simple declaration of intention. (Vide GAI. in loc. cit. ULF. Reg. xxii. 27 et seq.)

The heir was said adire hereditatem whenever he in any way entered on the inheritance, whether by doing some act as heir (pro herede gerere) or by the mere intention to be heir (nuda voluntate). Of course this intention would be manifested in some way or other; but it was the formation, not the expression, of the intention that constituted the entrance on the inheritance. Properly speaking, one person could not enter on an inheritance for another; but there were necessarily exceptions, such as that a tutor might accept an inheritance in behalf of his infant pupil. No one could enter on part of the inheritance, nor could he enter conditionally, or for a certain time. Directly he did enter, he was, under the law before Justinian, clothed with the persona of the deceased, whom he represented as if he had succeeded immediately on his death. (D. xxix. 2. 54.)
Tt. XX. DE LEGATIS.

Post hæc videamus de legatis. Quæ pars juris extra propositam quidem materiam videtur: nam loquimur de his juris figuras, quibus per universitatem res nobis adquiruntur. Sed cum omnino de testamentis deque hereditibus, qui testamento instituuntur, locuti sumus, non sine causa sequenti loco potest hæc juris materia tractari.

We will now proceed to treat of legacies. This part of the law may not seem to fall within our present subject, namely, the discussion of those methods by which things are acquired per universitatem; but, as we have already spoken of all points concerning testaments and testamentary heirs, we may not improperly pass to the subject of legacies.

Gal. ii. 191.

A legacy, being a mode by which the property in one or more particular things is acquired, ought not, properly, to be discussed in the part of the Institutes devoted to the discussion of the modes of acquiring a universitas rerum.

In Roman law a legacy was that part of the inheritance which the heir is enjoined to pay or give over to a third person—Legatum quod legis modo, id est imperative, testamento relinquitur. (ULF. Reg. 24. 1.) Without an heir there could be no legacy; and therefore, if no instituted heir entered on the inheritance, the gift of the legacy was useless. The term was never applied, as in English law, to a direct bequest.

1. Legatum itaque est donatio quaedam de defuncto relictæ.

1. A legacy is a kind of gift left by a deceased person.

D. xxxi. 36.

2. Sed olim quidem erant legatorum genera quattuor: per vindicationem, per damnationem, sinendi modo, per preceptionem; et certa quaedam verba unique generi legatorum assignata erant, per quæ singula genera legatorum significabantur. Sed ex constitutionibus divorum principum sollemnitas hu­jusmodi verborum penitus sublata est. Nostra autem constitutione, quam cum magna faciem lucubratione, defunctorum voluntates validiores esse cupientes et non verbis sed voluntatibus eorum faventes, dispositut, ut omnibus legatis una sit natura et, quibuscumque verbis aliquid derelictum sit, liceat legataris id persequi non solum per actiones personales, sed etiam per in rem et per hypothecarium: cujus constitutionis perpensum modum ex ipsius tenore perfectissime accipere possibile est.

2. Formerly, there were four kinds of legacies, namely, per vindicationem, per damnationem, sinendi modo, and per preceptionem. There was a certain form of words proper to each of these, by which they were distinguished one from another. But these solemn forms have been wholly suppressed by imperial constitutions. We also, desirous of giving respect to the wishes of deceased persons, and regarding their intentions more than their words, have, by a constitution composed with great study, enacted that the nature of all legacies shall be the same, and that legatees, whatever may be the words employed in the testament, may sue for what is left to them, not only by a personal, but by a real, or an hypothecary action. The well-weighed scheme of this constitution may be easily seen by a perusal of its dispositions.

Gal. ii. 192–228; C. vi. 37. 21; C. vi. 48. 1.
Per vindicationem. The formula in this species of legacy ran thus: 'Hominem Stichum do lege,' or 'do;' or 'capito sumito, sibi habeto.' The legacy was said to be per vindicationem, because, immediately on the heir entering on the inheritance, the subject of the legacy became the property of the legatee ex jure Quiritium, who could accordingly claim it by vindicatio. The testator could only give, in this way, things of which he had the dominium ex jure Quiritium, both at the time of making the testament and of his death; excepting that such dominium at the time of death alone was sufficient when the subject of the legacy was anything appreciable by weight, number, or measure, as wine, oil, money, &c. (GAI. ii. 193–200.)

Per damnationem. The formula ran thus: 'Heres meus damnas esto dare;' or 'Dato, facito, heredem meum dare iubeo.' The legatee did not, by this legacy, become proprietor of the subject of the legacy; but he had a personal action against the heir to compel him to give (dare), to procure (prestare), or to do (facere), that which the terms of the legacy directed. Anything could be given by this legacy that could become the subject of an obligation, whether the property of the testator, the heir, or any one else. The rights it gave were, therefore, said to be the optimum jus legati (ULP. Reg. 24. 11). (GAI. ii. 200–208.)

Sinendi modo. The formula of this kind of legacy was: 'Heres meus damnas esto sine re Incium Titium sumere illum rem sibique habere.' (ULP. Reg. xxiv. 5.) The heir is to allow the legatee to take the thing given. This form, then, was applicable to anything that belonged to the testator or to the heir, but not to anything belonging to a third person. The legatee did not become the owner of the thing given until he took possession. If the heir refused to allow the legatee to take possession, the legatee might compel him to do so by the personal action termed 'Quicquid heredem ex testamento dare facere oportet.' (GAI. ii. 209–215.)

Per preceptionem. The formula ran: 'Lucius Titius illum rem precipito' (i.e. take beforehand). The proper application of this form was to a gift, made to one already instituted co-heir, of some part of the inheritance which he was to take as legatee before receiving his share as heir. The heir could enforce his claim to this something beyond his share by the action termed judicium familie eriscundae, i.e. for having the inheritance portioned out by a judge, who assigned the thing given by the legacy to the heir as legatee. It was only by a mistake in language that this form was applied to a gift to a person not an heir, and to a gift of something not forming part of the inheritance; but a gift made in this form to a person not heir was not void; for the senatusconsultum Neronianum, about A.D. 60, made every such legacy valid as a legacy per damnationem. Gaius mentions that the Proculians attempted to get over the difficulty where the word precipito was used to give a legacy to a person not heir, by reading 'precipito' as 'capito;' and this construction was apparently confirmed by a constitution of Hadrian. (GAI. ii. 216–222.)
Under the imperial legislation the value attached to these formulae was gradually lessened. By the senatusconsultum Neronianum it was enacted that any legacy given in a form of words not suited to the gift intended should be as valid as one given in the form most favourable to the legatee; ‘ut quod minus aptis verbis legatum est perinde sit ac si optimo jure legatum esset.’ (ULP. Reg. 24. 11; Gal. ii. 197. 218.) The formulae remained, but a mistake in their use could no longer injure the legatee; and in every case the legacy, however expressed, had the effect of a legacy given per damnationem. In A.D. 342 a constitution of Constantius and Constans abolished the use of formulae in all legal acts. (C. ii. 58. 1.) The division of legacies still theoretically remained, but the appropriate formulae were no longer in use. Finally Justinian, as we see in the text, enacted that all legacies should be of the same nature, and that the legatee might enforce the legacy by personal, real, or hypothecary actions, according to the nature of the gift.

3. Sed non usque ad sam constitutionem standum esse existimavimus. Cum enim antiquitatem intervenimus legata quidem stricte concludentem, fideicommissis autem, que ex voluntate magis descendentibus defunctorum, pinguiorem naturam indulgentem, necessarium esse duximus omnia legata fideicommissis exaequare, ut nulla sit inter ea differentia, sed quod deest legatis, hoc relecurur ex natura fideicommissorum et, si quid amplius est in legatis, per hoc crescat fideicommissi natura. Sed ne in primis legum cunabulis permixte de exponendo studio disolventibus quandam intrudcamus difficultatem, operae pretium esse duximus, interim separatim prins de legatis et postea de fideicommissis tractare, ut natura utrisque juris cognita, facile possint permissionem eorum eruditissimorum aetate et sapitioribus aetate accipere.

8. We have not, however, judged it expedient to confine ourselves within the limits of this constitution; for, observing that the ancients confined legacies within strict rules, but accorded a greater latitude to fideicommissa as arising more immediately from the wishes of the deceased, we have thought it necessary to make all legacies equal to fideicommissa, so that no difference may remain between them. Whatever is wanting to legacies they will borrow from fideicommissa, and communicate to them any superiority they themselves may have. But, that we may not raise difficulties, and perplex the minds of young persons at their entrance upon the study of the law, by explaining these two subjects jointly, we have thought it worth while to treat separately, first of legacies and then of fideicommissa, that, the nature of each being known, the student, thus prepared, may understand them with keener appreciation when mixed up the one with the other.

C. vi. 49. 2.

All that remained, after the changes noticed in the text, to distinguish legacies from fideicommissa, was the general character of the expressions used. If they were imperative, the gift was a legacy: if they assumed the form of a request, and were given precative, they were fideicommissa. If a gift was in form imperative, but it was not valid as a legacy, it was valid as a fideicommissum. If such a gift could be valid as a legacy, it was of course regarded as a legacy, and not as a fideicommissum.
A difference still remained with respect to the gifts of liberty to a slave. (Vid. Tit. 24. 2.) A direct legacy of liberty made the slave the libertus of the testator; a gift of liberty by a fideicommissum made the slave the libertus of the fideicommissarius.

4. Non solum autem testatoris vel heredis res, sed et aliena legari potest: ita ut heres cogatur redimere eam et prestatre vel, si non potest redimere, estimationem eius dare. Sed si talis res sit, cujus non est commercium, nec estimatio ejus debetur, sicut si campus Martium vel basilicam vel templum vel que publico usui destinata sunt, legaverit; nam nullius momenti legatum est. Quod autem diximus, alienam rem possese legari, ita intellegendum est, si defunctus scebat, alienam rem esse, non et si ignorasset; forsitan enim, si scisset alienam, non legasset: et ita divus Pius rescriptis. Et verius est, ipsum qui agit, id est legatum, probare oportere, scisse alienam rem legare defunctum, non heredom probare oportere, ignorasse alienam, quia semper necessitas probandi incumbit illi, qui agit.

4. A testator may not only give as a legacy his own property, or that of his heir, but also the property of others. The heir is then obliged either to purchase and deliver it, or, if it cannot be bought, to give its value. But, if the thing given is not in its nature a subject of commerce, or purchasable, the heir is not bound to pay the value to the legatee; as if a man should bequeath the Campus Martius, a basilica, temples, or any of the things appropriated to public purposes: for such a legacy is of no effect. But when we say that a testator may give the goods of another as a legacy, we must be understood to mean, that this can only be done if the deceased knew that what he bequeathed belonged to another, and not if he was ignorant of it; since, if he had known it, he would not perhaps have left such a legacy. To this effect is a rescript of the Emperor Antoninus. It is also the better opinion that it is incumbent upon the plaintiff, that is, the legatee, to prove that the deceased knew that what he left belonged to another, not upon the heir to prove that the deceased did not know it; for the burden of proof always lies upon the person who brings the action.

Gal. ii. 202; D. xxx. 89. 7-10; D. xxxi. 67. 8; C. vi. 37. 10; D. xxii. 3. 21.

A basilica was a building which was used as a court of law, and also as a resort of merchants and men of business.

There are some exceptions to the rule as to the burden of proof; e.g., in some cases where the plaintiff is a minor or a woman (D. xxii. 3. 25. 1). Thus in the action of a pupil against a magistrate (Bk. i. Tit. 24. 2), the burden of proof lies on the magistrate (D. xxvii. 8. 1. 13).

5. Sed et si rem obligatam creditoris aliquis legaverit, necesse habet heres luere. Et hoc quoque casu idem placet, quod in re aliena, ut its demum luere necesse habet heres, si scebat defunctus, rem obligatam esse: et ita divi Severus et Antoninus rescripsissent. Si tamen defunctus voluit legatum luere et hoc expressit, non debet heres eam luere.

5. If a testator gives as a legacy anything in pledge to a creditor, the heir is bound to redeem it. But in this case, as in that of the property of another, the heir is not bound to redeem it, unless the deceased knew that the thing was pledged; and this the Emperors Severus and Antoninus have decided by a rescript. But when it has been the wish of the deceased that the legatee should redeem the thing,
and he has expressly said so, the heir is not bound to redeem it.

D. xxx. 57.

6. If a thing belonging to another is given as a legacy, and becomes the property of the legatee in the lifetime of the testator, then, if it becomes so by purchase, the legatee may recover the value by an action founded on the testament; but if the legatee obtained it by any way of clear gain to him, as by gift, or by any similar mode, he cannot bring such an action, for it is a received rule, that two modes of acquiring, each being one of clear gain, can never meet in the same person with regard to the same thing. If, therefore, the same thing be given by two testaments to the same person, it makes a difference, whether the legatee has obtained the thing itself, or the value of it, under the first, for, if he has already received the thing itself, he cannot bring an action, since he has received it by a mode of clear gain to him; but, if he has received the value only, he may bring an action.

D. xxx. 108; D. xliv. 7. 17; D. xxx. 84. 2.

It may be observed, that if a person acquired the subject of a legacy by a causa lucrativa during the lifetime of the testator, and the legacy was made, not in his own favour directly, but was given to his slave, or a descendant in his power, he could recover the value of the thing given from the heir. In such a case the two causae lucrativae were not considered so to unite in one person as to violate the general rule, although, in fact, the result was the same as if the rule had been directly violated. (D. xxx. 108.)

In the beginning of this paragraph it is said that if the legatee acquired the thing during the lifetime of the testator by a causa lucrativa, he could not regain it or its value by an action. The vivo testatoris is merely an example; it would be the same if the legatee acquired the thing by a causa lucrativa at any time before receiving it by way of legacy. Another instance of the principle is given in the ninth paragraph.

7. A thing not in existence, but which one day will be in existence, may be properly given as a legacy, as, for instance, the fruits which shall grow on such a farm, or the child which shall be born of such a slave.

GAI. ii. 208.

8. Si eadem res duobus legata sit sive conjunctim sive disjunctim, si ambo perveniant ad legatum, scinditur inter eos legatum: si alter de-
A legacy might be void originally, when it was said to be taken *pro non scripto*, i.e. as if it had never been inserted; or it might be valid originally, and yet before the rights of the legatee were fixed (i.e., to use the technical term (see note on paragr. 20), before the *dies cedens*) the legatee might die, or refuse the legacy, or become incapable to take, when the legacy was called *irritum* or *destitutum*; or the rights of the legatee might be fixed, but before the legacy was actually delivered over to him, it might be taken away from him on account of something rendering him unworthy to receive it; the legacy was then called *ereptitium* (*qua ut indignis eripiantur*). If there were no co-legatees, the legacy, if *ereptitium*, went to the *fiscus*; in the two other cases the failure of the legacy was for the benefit of the heir. The legacies were burdens with which he might have been, but was not, charged.

But if there was a co-legatee the case was different. Co-legatees might be created, according to a division made by Paulus (D. 1. 16. 142), *re, re et verbis*, or *verbis*; *re* being equivalent to the *disjunctum* of the text, when the same gift was made separately to two or more persons; *re et verbis*, equivalent to the *conjunctum* of the text, when the same thing was given at once to two or more; and *verbis*, in which the joint legacy was only apparent, the gift being made at once to two or more, but their respective shares being assigned them, as *‘lego Titio et Seio ex aquis partibus’.*

The rights of co-legatees were very different at different periods of Roman law. I. Originally the interest of the co-legatee was determined by the formula under which the legacy was given. If it was *per vindicationem*, the right to the property in the whole thing given passed to each legatee. They had to divide it between them, but each had a right, as against the heir, to claim the whole. If one of them failed to take, the whole passed to the other. (Gal ii. 199.)

If it was given *per damnationem*, no right to the property passed, but each legatee was a creditor of the heir in respect of the thing given, and a difference was made according as the thing was given *conjunctum* or *disjunctum*. In the former case, each of the co-legatees, if there were two, was entitled to half only, and if either could not take, his half remained in the inheritance for the benefit of the heir. If the legacy was given *disjunctum*, then each had a claim.
against the heir for the whole, and if one got the thing from the heir, the other could get its value. (Gai. ii. 205.) If the legacy was given *sinendi modo*, and *conjunctim*, each could take a half only. If given *dissociantim*, according to some it was as if given *per damnationem*; according to others, if the heir allowed either co-legatee to take the thing, he had done his duty, and the co-legatee got nothing. (Gai. ii. 215.) If the legacy was given *per preceptim*, the effect as between co-legatees was the same as in the case of legacies given *per vindicationem*. (Gai. ii. 223.)

II. The *lex Julia de maritandis ordinibus* (B.C. 13) and the *lex Papia Poppæa* (A.D. 9), which are usually spoken of as one law, *lex Julia et Papia*, introduced great changes in testamentary law; the former to prevent unequal marriages, as of a senator with a *liberta*, and the latter to promote marriage and the birth of children. Two classes of persons, *celibes* and *orbi*, were affected with incapacities. They might be instituted or have legacies given them, i.e. the institution or gift was not void, but the benefit derivable from it was taken away from them and given to some one else. By *celibes* was meant a man between the ages of twenty and sixty, or a woman between the ages of twenty and fifty, who had not been married or was a widower or widow. (Ulp. Reg. 16. 1.) Men had a hundred days from the death of the testator in which they might marry, and thus avoid the penalties attaching to celibacy, and women were allowed two years from the death of a husband, and eighteen months from the time of divorce, in which to remarry. (Ulp. Reg. 14. and 17. 1.) By *orbus* was meant a man between twenty-five and sixty, and a woman between twenty and fifty, who had not a child living at the time of the accrual of the right to take under the testament. Adoptive children could not be counted, a *sensus consultum* having been passed to exclude them. The *lex Papia* fixed the time of accrual of rights under a testament, the *dies cedens*, as it was technically termed, at the date of the opening of the testament, instead of the date of the testator’s death, which had previously been the legal date.

The *celibes* lost all, and the *orbus* one-half, of what was given him, and this lapsed portion (*caducum, veluti ceciderit ab eo*, Ulp. Reg. 17. 1) was given to some one else. These *caduca* produced by the person to whom they were given not being capable of taking them were not the only interests dealt with by the *lex Papia*. If a gift was originally invalid, as if it was given to a person already dead at the date when the testament was made, the gift was looked on as if it had never been made at all, *pro non scripto*. With such gifts the *lex Papia* had nothing to do. But a gift might have been valid originally and then become invalid, as, e.g., it had been given to a person who died after the making of the testament and before the death of the testator. The old law prescribed how they should be treated, and gave them by accrual to co-heirs if given to an heir, or allowed them to fall in as part of the inheritance if given to a legatee. Such vacant things, however, were affected by the *lex Papia*. They were said to be *in causa caduci*; and the *caduca*
and the things in causa caduci devolved together to those who had the jus caduca vindicandi.

In the first place there were certain excepted persons, among others cognates of the testator up to the sixth degree (ULP. Reg. 16. 1), who were not affected by the lex Papia at all. They lost nothing if they were celibes or orbi; they were said to be solidi capaces, capable of taking all the testament gave them. But they did not take caduca under the special provisions of the lex Papia; therefore if not patres they could only get caduca by being made substituted heirs. (See note on Title 15.) Ascendants and descendants up to the third degree had greater privileges. They were solidi capaces, losing nothing by being celibes or orbi; they could themselves take caduca under the lex Papia; and they had, moreover, the jus antiquum, enjoying the rights of accrual of the old law. (ULP. Reg. 18.)

Apart from them it was the patres (i.e. persons having a husband or wife and one child living), mentioned in the testament, who took the caduca and the things in causa caduci, legatees taking before heirs. If there were no persons answering to this description, the aerarium, or treasury of the people, as opposed to the fiscus, or treasury of the emperor, took them. But the object of the law was not to get money for the treasury, but to reward marriage and the birth of children, and this is why testators were allowed to substitute heirs (who, of course, unless near relations or patres, could not take) so as to prevent the aerarium taking.

Where there were co-legatees, the caduca of co-legatees were given, in the first place, to co-legatees who were patres; but it was only those joined re et verbis, and those joined verbis, who had to be considered for this purpose. For those joined re were each entitled to the whole thing, and so any one co-legatee capable of taking was entitled to the whole by the form of the gift. If there were no co-legatees who were patres, the legacies went to the heirs who were patres. If there were none, then to legatees generally who had children. If none had children, then to the aerarium. (GAI. ii. 206, 207, 286.) Any legacy given by the lex Papia Poppea might be refused; if accepted, it passed with all the burdens attaching to it. Caduca cum suo onere fiunt. (ULP. Reg. 17. 2.) By a constitution of Caracalla (ULP. Reg. 17. 2), all caduca were given to the fiscus, the distinction between the aerarium and the fiscus having ceased to exist.

III. Constantine abolished the law of incapacity arising from celibacy and orbitas. (C. viii. 58.) And Justinian did away with all the law of caduca springing out of the lex Papia Poppea. The distinction between the kinds of legacies being no longer in existence, new provisions on the subject were made. (C. vi. 51.) The right to bring a real action was to attach to every legacy; and co-legatees were placed in the position they would have occupied before the lex Papia Poppea; but it was enacted that in every case of a gift to a co-legatee failing, an accrual should take place to the other or others joined with him. If they were joined re, the accrual
was said to be obligatory on those conjoined; but the burdens of the legacy did not pass with it. Really there was no accrual at all; the co-legatees were in the same position as if the gift had only been made to one. If the co-legatees were joined re et verbis, the accrual was voluntary, but the burdens of the legacy passed with it. The co-legatees were looked upon as having really distinct interests, and therefore, if the gift to one failed, the others had something to receive. But, at the same time, they took the share they gained, with all its burdens; it might, for instance, be encumbered with a fideicommissum. Legatees joined only verbis were not, properly speaking, co-legatees at all, and Justinian does not permit any accrual between them. There was thus a clear distinction made between legacies given jointly to legatees re et verbis and those given verbis. In both distinct interests were in effect given to all the legatees; but in the former case these interests were so united, that, through the failure of the legacy of one legatee, his interest accrued to those joined with him.

If the rights of a co-legatee were once fixed, then even if he died before he received his legacy, the accrual on any failure still took place for his benefit, or rather that of his representatives, and was said to be given to his pars or share. (D. vii. 1. 33. 1.)

9. Si cui fundus alienus legatus fuerit et emerit proprietatem detracto usufructu et ususfructus ad eum pervenerit et postea ex testamento agat, recte eum agere et fundum petere Julianus ait, quia usufructus in petitione servitutis locum optinet; sed officio judicis contineri, ut deducto usufructu jubeat estimationem prestari. 9. If a testator gives as a legacy land belonging to another, and the legatee purchases the bare ownership minus the usufruct, and the usufruct comes to him, and he afterwards brings an action under the testament, Julian says that an action claiming the land is well brought, because, in this claim, the usufruct is regarded as a servitude only. But it is the duty of a judge, in this case, to order the value of the property, deducting the usufruct, to be paid.

D. xxx. 82. 2. 3; D. l. 16. 25.

A fundus, or landed estate, is left by legacy; the legatee buys the naked ownership, but receives by a causa lucrativa (this is expressed by pervenerit) the usufruct. He is, of course, entitled to receive the value of what he has bought, but not of that which has already come to him by a causa lucrativa. Supposing he wishes to recover by action the value of the naked ownership from the heir, he can only demand exactly that which was given him by the testament. He therefore asks for the fundus; but the fundus includes both the naked ownership and the usufruct. Will he not, then, be asking too much, and thus fail in his action from what was termed plus petitia? (See Bk. iv. Tit. 6. 33.) Julian answers that he will not, because in every demand of a fundus the plaintiff must necessarily ask for it, subject to all its servitudes. Usufruct was a servitude, and therefore, in demanding the fundus from the heir, he does not demand the usufruct, if the fundus is subject to such a servitude.
10. Sed si rem legatarii quis ei legaverit, inutile legatum est, quia quod proprium est ipsius, amplius ejus fieri non potest: et licet alienaverit eam, non debutur nec ipsa nec aestimatio ejus.

10. If a testator gives as a legacy anything that already belongs to the legatee, the legacy is useless; for what is already the property of a legatee cannot become more so. And, although the legatee has parted with the thing bequeathed, he would not be entitled to receive either the thing itself or its value.

D. xxx. 41. 2.

Et licet alienaverit eam. This is an application of what was called the rule of Cato, regula Catoniana (perhaps Cato Major), viz. Quod, si testamenti facti tempore decessisset testator, inutile foret, id legatum quandocumque decesserit non valere (D. xxxiv. 7. 1. pr.), i.e. a legacy invalid when the testament was made, could never become valid.


11. If a testator gives a thing belonging to himself, as if it was the property of another, the legacy is valid; for its validity is decided by what is the real state of the case, not by what he thinks. And if the testator imagines that what he gives belongs already to the legatee, yet, if it does not, the legacy is certainly valid, because the wish of the deceased can thus take effect.

D. xli. 2. 4. 1.

Quasi alienam: in the converse case the legacy is bad (par. 4). The words ‘plus valet quod,’ &c., are not the statement of a general rule of law, but merely of what happens under the particular circumstances referred to. Under other circumstances, exactly the opposite is laid down. Ulpian says, for instance, that a person thinking himself a necessarius heres, but really not being so, could not repudiate the inheritance, nam plus est in opinione quam in veritate. (D. xxix. 2. 15.)

12. Si rem suam legaverit testator posteaque eam alienaverit, Celsius existimat, si non adimendi animo vendidit, nihil minus debere, idque divi Severus et Antoninus rescripsunt. Idem rescripsunt, eum, qui post testamentum factum predia, quae legata erant, pignori dedit, ademisse legatum non videri et ideo legatarium cum herede agere posse, ut predia a creditore iantur. Si vero quis partem rei legate alienaverit, para, que non est alienata, omnimodo debutur, pars autem alienata in debetur, si non adimendi animo alienata sit.

12. If a testator gives his own property as a legacy, and afterwards alienates it, it is the opinion of Celsius that the legatee is entitled to the legacy, if the testator did not sell with an intention to revoke the legacy. The Emperors Severus and Antoninus have published a rescript to this effect. And they have also decided by rescript, that if any person, after making his testament, pledges immovableables which he has given as a legacy, he is not to be taken to have thereby revoked the legacy; and that the legatee may, by bringing an action against the heir, compel him to redeem the property. If, again, a part of the thing given as a legacy is alienated, the legatee is of course still entitled
to the part which remains unalienated, but is entitled to that which is
alienated only if it appears not to have been alienated with the intention
of taking away the legacy.

Gai. ii. 196; D. xxxii. 11. 12; C. vi. 87. 8; D. xxx. 8. pr.

Gaius informs us that the opinion confirmed by Severus and
Antoninus was not that generally entertained when he wrote.
When the legacy was given per vindicationem, it seemed impossible
that if the thing was alienated the legatee could take anything;
and even if it was per damnationem, though there was nothing in
the nature of the legacy to prevent the legatee making a valid
claim (licet ipso jure debeatur legatum), it was considered that he
might be repelled by an exception, because he would be acting
against the wishes of the deceased. (Gai. ii. 198.)

18. Si quis debitori suo liberatio-
em legaverit, legatum utile est et
neque ab ipso debitore neque ab
herede ejus potest heres petere nec
ab alio, qui hereditis loco est: sed et
potest a debitore conveniri, ut liberet
eum. Potest autem quis vel ad
tempus jubere, ne heres petat.

18. If a testator gives as a legacy
to his debtor a discharge from his
debt, the legacy is valid, and the heir
cannot recover the debt from the
debtor, his heir, or any one in the place
of his heir. The debtor may by action
compel the heir to free him from his
obligation. A man may also forbid his
heir to demand payment of a debt dur-
ing a certain time.

D. xxxiv. 8, pr. and 8; D. xxxiv. 8. 1.

The debt was not extinguished by the legacy of liberatio.
But if the heir sued the debtor, then the debtor could repel him
by the plea of fraud (exceptione doli mali), and, if the debtor
wished, he could, by suing under the testament, compel the heir
to release the debt, by consent only, if the obligation had been
made in that manner, by acceptilatio, i.e. by the heir acknowledg-
ing the receipt of the thing owed (see Bk. iii. Tit. 29. 1), if it had
not.

A discharge from debt might be made indirectly by giving as a
legacy to the debtor the chirographum, or bond by which he was
bound; it would be valid quasi pro fideicommissio. (D. xxxiv. 3.
3. 1, 2.)

Vel ad tempus. The effect of such a legacy was, that if the heir
sued the legatee before the time had expired, he could be repelled
by an exception of dolus mali.

14. Ex contrario si debitori cre-
ditori suo quod debet, legaverit,
inutile est legatum, si nihil plus est
in legato quam in debito, quia nihil
amplius habet per legatum. Quodsi
in diem vel sub condicione debitum
si pure legaverit, utile est legatum
proper representationem. Quodsi
vivo testatore dies venerit aut con-
dicio extiterit, Papinianus scriptit,
utile esse nihil minus legatum,
quia semel constitut. Quod et ve-

14. Conversely, a legacy given by
a debtor to his creditor of the money
which he owes him, is ineffectual if it
includes nothing more than the debt
did, for the creditor thus receives no
benefit from the legacy. But if a
debtor gives absolutely as a legacy to
his creditor what was due only on the
expiration of a term or on the accom-
plishment of a condition, the legacy is
effectual, because it thus becomes due
before the debt. Papinian decides,
rum est: non enim placuit sententia existimantium, extinctum esse legatum, quis in ea causam pervenit, a qua incepere non potest.

that if the term expires, or the condition is accomplished, in the lifetime of the testator, the legacy is nevertheless effectual, because it was once good; which is true. For we reject the opinion that a legacy once good afterwards becomes extinct, because circumstances have arisen which would have prevented its being originally valid.

D. xxxv. 2. 1. 10; D. xxxv. 2. 5; D. xxxi. 82. pr.

15. Sed si uxori maritus dotem legaverit, valet legatum, quia plenius est legatum quam de dote actio. Sed si quam non acciperit dotem legaverit, divi Severus et Antoninus rescripserunt, si quidem simpliciter legaverit, inutile esse legatum; si vero certa pecunia vel certum corpus aut instrumentum dotis in praelegando demonstrata sunt, valere legatum.

15. If a man gives as a legacy to his wife her dos, the legacy is valid, for the legacy is more beneficial than the action she might maintain for the recovery of her dos. But if he bequeaths to his wife her dos, which he has never actually received, the Emperors Severus and Antoninus have decided by a rescript, that if the dos is given without any specification, the legacy is void; but if in the terms of the gift a particular sum or thing, or a certain sum mentioned in the dotal act, is specified as to be received as a legacy before it could be received as dos, the legacy is valid.

D. xxxiii. 4. 1. 2, 7, 8.

In the de dote, or, as it was otherwise called, the rei uxoriae actio, certain delays in the restitution of the dowry were permitted; and sums expended for the improvement of the property of the wife might be set off against the claim. The legacy had to be paid without delay, and no set-off was admissible. It was from the dowry being thus restored, when made the subject of a legacy, sooner than when the action was brought, that the expression prælegare dotem was used; the dos was given by legacy (legare) sooner (pre) than it could otherwise be obtained.

By the words 'certa pecunia,' &c., is meant that if the testator said, 'I give to my wife the sum she brought me as dowry,' and she had not brought anything, the legacy would be useless; but if he said, 'I give her the 100 aurei she brought me,' then the words referring to her having brought them would be only a falsa demonstratio, that is, an unnecessary particularity of expression, which would be passed over as if not written. (C. vi. 44. 3.)

Instrumentum dotis. So, if the testator said, 'I give the property mentioned in the act of dowry,' if there were no act of dowry, the gift would be useless; but if he said, 'I give such or such a particular thing mentioned in the act of dowry,' if there was no act of dowry, the wife would receive the thing specified, and the words, 'mentioned in the act of dowry,' would be treated as superfluous.

16. Si res legata sine facto here-dis perierit, legatario decedit. Et si servus alienus legatus sine facto

16. If a thing given as a legacy perishes without the act of the heir, the loss falls upon the legatee. And,
hereditis manumissus fuerit, non tenetur heres. Si vero hereditis servus legatus fuerit et ipse eum manumiserit, teneri eum, Julianus scripsit, nec interest, scrierit an ignoraverit, a se legatum esse. Sed et si alii donaverint servum et is, cui donatus est, eum manumiserit, teneritur heres, quamvis ignoraverit, a se eum legatum esse.

if the slave of another, given as a legacy, should be manumitted without the act of the heir, the heir is not answerable. But if a testator gives as a legacy the slave of his heir, who afterwards manumits that slave, Julian says that the heir is answerable, whether he knew or not that the slave was given away from him as a legacy. And it would be the same if the heir had made a present of the slave to any one who had enfranchised him: the heir, though ignorant of the legacy, would be answerable.

D. xxx. 85; D. xxx. 112. 1.

The manumission, of course, is good; it is the aestimatio in respect of which the heir is bound.

17. Si quis ancillas cum suis natis legaverit, etiam si ancillae mortuae fuerint, partus legato cedunt. Idem est, siordinarioriservum cum vicariis legati fuerint, ut, licet mortui sint ordinarii, tamen vicarii legato cedant. Sed si servum cum peculio fuerit legatus, mortuo servvo vel manumissione vel alienato, et pecullii legatum extinguitur. Idem est, si fundus instructus vel cum instrumento legatus fuerit: nam fundo alienato et instrumenti legatum extinguitur.

17. If a testator bequeaths his female slaves and their offspring, although the mothers die, the issue goes to the legatee. And it is the same if ordinary slaves are bequeathed together with vicarial, so that although the ordinary slaves die, yet the vicarial slaves will pass by virtue of the gift. But, where a slave is bequeathed with his peculium, and afterwards dies, or is manumitted, or alienated, the legacy of the peculium becomes extinct. It is the same if the testator gives as a legacy, land 'provided with instruments of use or ornament,' or 'with its instruments of culture.' If the land is alienated, the legacy of the instruments is extinguished.

D. xxxiii. 8. 1, 2, 8, 4; D. xxxiii. 7. 1.

An ordinarius servus was a slave who had a special office in the establishment, as cook, barber, baker, &c. The vicarii were his attendants, and were generally reckoned as part of his peculium. But in the case of this legacy, the law considered them as having an independent existence (propter dignitatem hominis), and not merely as accessories to the ordinarii. So, the children of a female slave are not treated as mere accessories to her. (See Tit. 1. 37.) Had they been so, they could not have passed without the principal to which they were attached.

Fundus instructus is land, with everything on it, whether for use or ornament; fundus cum instrumento, land, with the instruments of its culture only. (D. xxxiiii. 7. 12. 27.)

18. Si grex legatus fuerit posteaque ad unam ovem pervenerit, quod superfuerit, vindicari potest.

18. If a flock is given as a legacy, and it is afterwards reduced to a single sheep, the legatee can claim by real action what remains.

D. xxx. 22.
He may claim the remainder, that is the one sheep left, although one sheep does not form a flock.

19. Grege autem legato etiam eae oves, quae post testamentum factum gregi adiciuntur, legato cedere, Julianus ait: esse enim gregis unum corpus ex distantibus capitibus, sicuti adium unum corpus est ex coherentibus lapidibus: seditus denique legatis, columnas et marmora, quae post testamentum factum adjecta sunt, legato cedere.

19. If a flock is given as a legacy, any sheep that may be added to the flock after the making of the testament will, according to Julian, pass to the legatee. For a flock is one body, consisting of several different heads, as a house is one body, composed of several stones joined together. So, when a building is given as a legacy, any marble or pillars which may be added after the testament is made will pass by the legacy.

D. xxx. 21.

20. Si peculium legatum fuerit, sine dubio quidquid peculio accedit vel decedit vivo testatore, legatarii luero vel damno est. Quodsi post mortem testatoris ante editam hereditatem servus adquiserit, Julianus ait, si quidem ipsi manumissio peculii legatum fuerit, omne, quod ante editam hereditatem adquisitum est, legatario cedere, quia dies hujus legati ab adita hereditate cedit: sed si extraneo peculium legatum fuerit, non cedere ea legata, nisi ex rebus peculiariiibus auctum fuerit. Peculium autem nisi legatum fuerit, manumissio non debitur, quamvis si vivus manumiserit, sufficit, si non adimatur: et ita divi Severus et Antoninus rescrispserunt. Idem rescrispserunt, peculio legato, non videri id relictum, ut petitionem habeat pecuniae, quam in rationes dominicas impondit. Idem rescrispserunt, peculium videri legatum, cum rationibus redditias liber esse jussus est et ex eo reliquis inferre.

20. If a peculium is given in a legacy, it is certain that if it is increased or diminished in the lifetime of the testator, it is so much gained or lost to the legatee. And if a slave acquires anything between the death of the testator and the time of the heir entering on the inheritance, Julian makes this distinction: if it is to the slave himself that the peculium, together with his enfranchisement, is given, then all that is acquired before the heir enters on the inheritance goes to the legatee, for the right to such a legacy is not fixed until the inheritance is entered on. But if it is to a stranger that the peculium is given, then anything so acquired will not pass to the legatee, unless the acquisition was made by means of something forming part of the peculium. His peculium does not go to a slave manumitted by testament, unless expressly given to him; although, if a master in his lifetime manumits his slave, it is enough if he does not expressly take the peculium away from him; and to this effect the Emperors Severus and Antoninus issued a rescript. They have also decided by rescript, that when his peculium is given as a legacy to a slave, this does not entitle him to demand what he may have expended for the use of his master. The same emperors have further decided by rescript, that a slave is to be considered to have had his peculium given him by legacy when the testator says he shall be free as soon as he has brought in his accounts, and made up any deficiency out of his peculium.

D. xxxiii. 8. 8. 8; D. xxxiii. 8. 6. 4, 5; D. xxxiii. 8. 8. 7; D. xv. 1. 58.

Dies cedit, 'the day begins,' and dies venit, 'the day is come,' are the two expressions in Roman law which signify the vesting or
fixing of an interest, and the interest becoming a present one. *Cedere diem* (says Ulpian, D. 1. 16. 213) *significat incipere debeti pecuniam*; *venire diem significat sum diem venisse, quo pecunia peti potest*. *Cedit dies* may therefore be translated, 'the time when the right to the thing is fixed;' *venit dies*, 'the time when the thing may be demanded.' For instance, if A buys a horse of B, without any terms being attached to the purchase, the right of B in the purchase-money is fixed at once, and also he may at once demand it, *et cessit et venit dies*. If A agrees that the purchase-money shall be paid by instalments, then *dies cessit*, B has a fixed interest in the money; but the *dies* can only be said *venisse* as each instalment falls due, and with regard only to the portion becoming due. If, again, A only buys it on condition that C will lend him the money, then, until C has done so, *neque cessit neque venit dies*, B has no fixed interest in, or right to, the purchase-money until the condition is accomplished. With regard to legacies, the *dies cedens*, the time at which the eventual rights of the legatee were fixed, was the day of the testator's death, excepting when the vesting or fixing of these rights was suspended by a condition in the testament itself. The *dies veniens*, the time when the thing given could be demanded, was not till the heir entered on the inheritance, and there was thus some one of whom to make the demand; if the legacy was given after a term, or on a condition, the demand, of course, could not be made (*dies non venit*) until the term had expired, or the condition was fulfilled.

An alteration was made by the *lex Papia Poppaea* in fixing the *dies cedens* at the day when the testament was opened, not at that when the testator died (see note to paragr. 8); but this had been done away with, and the old law was in force under Justinian (C. vi. 51. 1. 1.)

The legatee had the thing given exactly as it was at the time of the *dies cedens*. He took it, with all the gains and losses that had accrued to it since the date of the testator's death, and directly his rights were fixed, they were transmissible to his heirs.

But if a testator gave his liberty to one of his slaves as a legacy, there was in this case an exception to the rule that the *dies cedens* dates from the death of the testator. If the gift of liberty was given to a slave as a legacy, he could not begin to acquire for his own benefit until an heir had entered on the inheritance, as it was requisite there should be some one to free him. The *peculium*, therefore, if given to him, would be such as it was when the heir entered on the inheritance; while, if the *peculium* was given to a stranger, it would be such as it was at the death of the testator, excepting when the *peculium* was augmented by things derived from itself (*ex rebus peculiariibus*), as, for instance, if sheep or cattle, forming part of the *peculium*, had young.

There was another case, that of personal servitudes, in which the *dies cedens* dated from the entrance on the inheritance, not from the death of the testator. These servitudes were exclusively attached
to the person of the legatee, and as they were not transmissible to his heirs, there could be no interest in them until the actual enjoyment of them was commenced.

When the master enfranchised his slave himself, he was present to demand the peculium, and if he did not, it was considered evident that he intended the slave to keep it. Not so in a legacy of liberty, in giving which the master might so easily forget the peculium that some expressions were required to show that he remembered it, and wished to give it to the slave.

The terms of the second rescript referred to in the text are given by Ulpian (D. xxxiii. 8. 6. 4).

21. Tam autem corporales res quam incorporales legari possum. Et ideo quod defuncto debetur, potest aliqui legari, ut actiones suas heres legatario prestet, nisi exegerit vivus testator pecuniam; nam hoc casu legatum extinguitur. Sed et tale legatum valet: 'damnas esto heres domum illius reficere' vel 'illum sale alieno liberare.'

21. Things corporeal and incorporeal may be equally well given as a legacy. Thus, the testator may give a debt due to him, and the heir is then obliged to use his actions for the benefit of the legatee, unless the testator in his lifetime exacted payment, for in this case the legacy would become extinct. Such a legacy as this is also good: 'Let my heir be bound to rebuild the house of such a one,' or 'to free him from his debts.'

D. xxx. 41. pr.; D. xxx. 39. 8. 4.

The legacy of a debt due to the testator was usually called legatum nominis. (See D. xxx. 44. 6.) Of course the legatee could sue for it only in the name of the heir.

22. Si generaliter servus vel alia res legatur, electio legatarii est, nisi aliud testator dixerit.

22. If a testator gives a slave or anything else as a legacy, without specifying a particular slave or thing, the choice belongs to the legatee, unless the testator has expressed the contrary.

D. xxx. 106. 2.

The jurists took care to lay down, with respect to what was called a legatum generis, that the class of objects must not be one too wide. Legatum nisi certe rei sit et ad certam personam deferatur, nullius est momenti. (Paul. Sent. iii. 6. 13.) For instance, the gift of 'an animal' would have seemed rather intended to mock than to benefit the legatee; so the gift of a house if the testator had no houses, magis derisorium quam utile legatum. (D. xxx. 71.)

Before Justinian, it depended on the formula with which the legacy was given whether the choice of the particular thing to be given to the legatee belonged to the heir or the legatee. In a legacy per vindicationem it belonged to the latter; there was a real action in which the legatee must specify the particular thing that he claims. In a legacy per damnationem it belonged to the heir; there was only a personal action against the heir as debtor, and the debtor might discharge the obligation in the way most beneficial to himself. (Ulp. Reg. 24. 14.)
The main difference between a *legatum generis* and a *legatum optionis* was that in the latter the legatee could choose the best of the kind in the possession of the testator; in the former the legatee could not choose the best, nor the heir the worst. (D. xxx. 37.)

23. *Optionis legatum, id est ubi testator ex servis suis vel alius rebus optare legatarium jussaret, habebat in se conditionem, et ideo nisi ipse legarius vivus optaverat, ad heredem legatum non transmittetbat. Sed ex constitutione nostra et hoc in meliorem statum reformatum est et data est licentia et heredi legatarii optare, licet vivus legarius hoc non fecit. Et diligentiore tractatu habito, et hoc in nostra constitutione additum est, sive plures legatarii existant, quibus optio relictä est, et dissentiant in corpore eligendo, sive unius legatarii plures heredes, et inter se circa optandum dissentiant, alio elius corpus eligere cupiente, ne pereat legatum (quod plerique prudentiam contra benevolentiam introducebant), fortunam esse hujus optionis judicem et sorte esse hoc dirimendum, ut, ad quem sors perveniat, illius sententia in optione præcellat.

D. xli. 9. 8; D. xxxvi. 2. 12. 8; C. vi. 48. 3. pr. and 1.

When once the *dies cedens* had fixed the rights of the legatee, he could transmit to his heirs all the rights he had himself. To this the Roman lawyers considered the *legatum optionis* an exception, as intended to be personal to the legatee himself. Justinian decides that the exception shall not exist. (C. vi. 43. 3. 1.) We must distinguish the *legatum generis*, where an object, though an uncertain one, was given, from the *legatum optionis*, where only the right to select an object was given. The former was never treated as an exception to the general rule of the *dies cedens*. (D. xxxiii. 5. 19.)

A testator might also leave as a legacy a part, as e.g. the half, of the inheritance (Tit. 23. 5. note); but still the heir took the whole inheritance as heir, and then had to divide it with the *legatorius partarius*, although the legatee was really not getting a particular thing, but a share of a universal succession. (GAI. ii. 254.)

24. Legari autem illis solis potest, cum quibus testamenti factio est.

D. xli. 8. 7.
25. Incertis vero personis neque legata neque fideicommissa olim relinquiqui concessum erat: nam nec miles quidem incertae personae poterat relinquere, ut divus Hadrianus rescripsit. Incerta autem persona videbatur, quam incerta opinione animo suo testator subiciebat, veluti si quis ita dicat: 'quicumque filio meo in matrimonium filiam suam collocaverit, ei heres meus illum fundum dato:' illud quoque, quod his relinquebatur, qui post testamentum scriptum primi consules designati erunt, sequentia personarum legari videbatur: et demum multae aliae hujusmodi species sunt. Libertas quoque non videbatur posse incertae personae dari, quis placet nominatim servos liberari. Tutor quoque certus dari debeat. Sub certa vero demonstratione, id est ex certis personis incertae personae recte legabatur, veluti 'ex cognatis meis, qui nunc sunt, si quis filiam meam uxorem duxerit, ei heres meus illam rem dato.' Incertis autem personis legata vel fideicommissa relictæ et per errorem soluta repeti non posse, sacrís constitutionibus cautæ erat.

25. Formerly it was not permitted that either legacies or fideicommissa should be given to uncertain persons, and even a soldier could not leave anything to an uncertain person, as the Emperor Hadrian decided by rescript. By an uncertain person was meant one who was not present to the mind of the testator in any definite manner, as if he should say: 'Whoever shall give his daughter in marriage to my son, to him let my heir give such a piece of land.' So, if he had left anything to the persons first appointed consules after his testament was written, this also would have been a gift to uncertain persons; and there are many other similar examples. Freedom likewise could not be conferred upon an uncertain person, for it was necessary that all slaves should be enfranchised by name. A person too named as tutor was required to be certain. But a legacy given with a certain description, that is, to an uncertain person among a number of persons certain, was valid, as: 'Among my existing cognati, if any one shall marry my daughter, let my heir give him such a thing.' But, if a legacy or fideicommissum to uncertain persons had been paid by mistake, it was provided by the constitutions, that such persons could not be called on to refund.

GAL. ii. 288, 289.

Neque fideicommissa. It was by a senatusconsultum, in the time of Hadrian, that the law was thus settled with respect to fideicommissa. (GAL. ii. 287.) Previously, a gift by way of fideicommissum to an uncertain person had been valid.

The lex Furia Caninia (GAL. ii. 239) required that slaves to whom freedom was given by testament should be expressly named, jubet nominatim servos liberari.

26. Postumo quoque alione inutiliter legabatur: est autem alius postumus, qui natut inter suos heredes testatoris futurus non est: ideoque ex emancipato filio conceptus nepos extraneus erat postumus avo.

26. Formerly, too, a legacy to a posthumous stranger was ineffectual. A posthumous stranger is any one who, on being born, would not be numbered among the sui heredes of the testator; and so a posthumous grandson, the issue of an emancipated son, was a posthumous stranger with regard to his grandfather.

GAL. ii. 241.
We have already seen (see Tit. 13. 1) how the rigour of this principle came to be modified with respect to a posthumous suus heres. It was as an incerta persona that the posthumous child was originally excluded from taking either as heir or legatee. (Gai. ii. 242.)

27. Sed nec hujusmodi species penitus est sine justa emendatione derelicta, cum in nostro codice constitutio posita est, per quam et huic parti medevimus non solum in hereditatibus, sed etiam in legatis et fideicommissis: quod evidentur ex ipsius constitutionis lectione clarescit. Tutor autem nec per nostram constitutionem incertus dari debet, quis certo judicio debet quis pro tutela sua posteritati caveare.

27. These points have not, however, been left without proper alteration, for a constitution has been placed in our code by which the law has been altered, not only as regards inheritances, but also as regards legacies and fideicommissa. This alteration will appear from the constitution itself. But not even by our constitution is the nomination of an uncertain tutor permitted, for it is incumbent upon every father to take care that his posterity have a tutor by a determinate appointment.

C. vi. 48.

There was, probably, a constitution treating of this subject inserted in the first Code (see Introd. sec. 29), which was not given in the Code we now have.

28. Postumus autem alienus heres institut in et antea poterat et nunc potest, nisi in utero ejus sit, quae jure nostra uxor esse non potest.

28. Yet a posthumous stranger could formerly, and may now, be appointed heir, unless it appears that he has been conceived by a woman who by law could not have been married to his father.

Gai. ii. 242, 287; D. xxviii. 2. 9. 1, 4.

Posthumous children, who, on birth, would not be among the testator's sui heredes (this is the meaning of alienus), could not be instituted heirs under the civil law; but the pretor gave them, if instituted, the possessio bonorum. Justinian permitted their institution. (See Bk. iii. Tit. 9. pr.)

Nisi in utero ejus sit, that is, unless the posthumous child is the child of the testator, and of a woman whom the testator cannot marry.

29. Si quis in nomine, cognomine, praenomine legatarii erraverit testator, si de persona constat, nihil minus valet legatum. Idem in hereditibus servatur: et recte; nomina enim significandorum hominum gratia reperta sunt, qui si quolibet alio modo intellegantur, nihil interest.

29. Although a testator may have mistaken the nomen, cognomen, or praenomen of a legatee, yet, if it is certain who is the person meant, the legacy is valid. The same holds good as to heirs, and with reason; for the use of names is but to point out persons; and, if they can be distinguished by any other method, it is the same thing.

30. Huius proxima est illa juris regula, falsa demonstratione legatum non peremi, veluti si quis ita

30. Closely akin to this is the rule of law, that a legacy is not rendered void by a false description. For in-
legaverit 'Stichum servum meum vernam do lego:' licet enim non vera, sed emptus sit, si de servo tamen constat, utile est legatum. Et convenienter si ita demonstraverit 'Stichum servum, quem a Seio emi,' sitque ab alio emptus, utile legatum est, si de servo constat.

stance, if the testator was to say, 'I give as a legacy Stichus born my slave;' in this case, although Stichus was not born in the family, but bought, yet, if it is certain who is meant, the legacy is valid. And in the same way if a testator marks out the particular slave in this way: 'I give Stichus my slave, whom I bought of Seius;' yet, although he was bought of another, the legacy is good, if no doubt exists as to the slave intended to be given.

D. xxxv. 1. 17. pr. and 1.


81. Much less is a legacy rendered invalid by a false reason being assigned for giving it; as, if a testator says, 'I give my slave Stichus to Titius, because he took care of my affairs in my absence;' or, 'because I was acquitted upon a capital accusation by his undertaking my defence.' For although Titius has never taken care of the affairs of the deceased, and although the testator was never acquitted by means of Titius defending him, the legacy will be valid. But it is quite different if the reason has been assigned under the form of a condition, as, 'I give to Titius such a piece of ground, if he has taken care of my affairs.'

D. xxxv. 1. 17. 2, 8.

Ulpian shortly sums up the law of this and the previous paragraph by the rule 'Neque ex falsa demonstratione, neque ex falsa causa legatum infirmatur.' (ULP. REG. 24. 19.)

Of course if the reason for making the legacy was so given as to constitute a condition, the legacy was only valid if the condition had been accomplished.

82. An servo heredis recte legamus, quieritur. Et constat, pure inutiliter legari nec quidquam proferere, si vivo testatore de potestate heredis exierit, quia quod inutile forest legatum, si statim post factum testamentum deceisseset testator, hoc non debet ideo valere, quia diutius testator vixerit. Sub condicione vero recte legatur, ut requiramus, an, quo tempore dies legati cedit, in potestate heredis non sit.

82. The question has been raised whether a testator can give a legacy to the slave of his heir; and it is evident that such a legacy, if given absolutely, is quite ineffectual, nor is it at all helped by the slave having been freed from the power of the heir in the lifetime of the testator; for a legacy which would have been void if the testator had expired immediately after he had made the testament, ought not to become valid merely because he happened to live longer. But a testator may give the legacy to the slave under a condition, and then we have to inquire whether, at the time when the right to the legacy vests, the slave has ceased to be in the power of the heir.
This paragraph is based on the *regula Catoniana* (see note on paragraph 10), though no express allusion to it is made. As to the doubts entertained on the subject, see Gal. ii. 244.

33. *Ex diverso herede instituto servo, quin domino recte etiam sine condicione legetur, non dubitatur. Nam et si statim post factum testamentum decesserit testator, non tamen apud eum, qui heres sit, dies legati cedere intellegitur, cum hereditas a legato separata sit et possit per eum servum alius heres efficir, si prius, quam jussu domini aedat, in alterius potestatem translatus sit, vel manumissus ipse heres efficitur; quibus casibus utile est legatum: quod si in eadem causa permanerit et jussu legatarii adierit, evanescit legatum.*

38. On the other hand, it is not doubted, but that if a slave is appointed heir, a legacy may be given to his master even unconditionally; for, although the testator should die immediately after making the testament, still the right to the legacy is not taken to vest in him who is heir; for the inheritance is separated from the legacy, and another may become heir by means of the slave, if he should be transferred to the power of a new master, before he has entered upon the inheritance at the command of the master, who is the legatee; or the slave himself, if enfranchised, may become heir; and, in these cases, the legacy would be good. But, if the slave should remain in the same state, and enter upon the inheritance by order of the legatee, the legacy is at an end.

Gal. ii. 245.

The eventual right to the legacy vests in the legatee from the date of the testator’s death, but the right to claim the legacy does not accrue to the legatee until the heir has entered on the inheritance. It is the legatee, not the heir, in whom the eventual right vests. Now, if the slave, in the case discussed in the text, entered on the inheritance by the command of his master, the legatee, the master, through the slave, would be heir and also legatee, and so the legacy would merge, or fade away (*evanescit*), in the inheritance. But until the inheritance is entered on, the legatee keeps his position of having a vested right in the legacy, and it may happen that the slave will not then hold such a character as will cause this merger of the legacy in the inheritance. He may have been emancipated, and will then take as heir for himself, or he may have been transferred to another master, and will take for his new owner.

84. *Ante heredis institutionem inutiliter antea legabatur, scilicet quia testamenta vim ex institutione heredum accepient et ob id veluti caput atque fundamentum intellegitur totius testamenti heredis institutio. Pari ratione nec libertas ante heredis institutionem dari poterat. Sed quia incivile esse putavit, ordinem quidem scripture sequi (quod et ipsi antiquitatibus varianda visum), sperni autem testatoris voluntatem; per no-

84. Formerly, a legacy placed before the institution of the heir was ineffectual, because a testament receives its efficacy from the institution of the heir; and it is thus that the institution of the heir is looked on as the head and the foundation of the whole testament. So, too, freedom could not be given before the institution of the heir. But we have thought it unreasonable that the mere order of writing should be attended to—a thing of which the ancients themselves seem to have
stram constitutionem et hoc vitium emendavimus, ut liceat et ante heredis institutionem et inter medias heredum institutiones legatum relinquere et multo magis libertatem, cujus usus favorilior est.

greatly disapproved—and that the intentions of the testator should be thus set at naught. We have, therefore, by our constitution, amended the law on this point; so that a legacy, and much more a grant of liberty, which is always favoured, may now be given before the institution of an heir, or among the institutions of heirs where more than one.

GAI. ii. 229, 280; C. vi. 28. 24.

The nomination of a tutor, as not constituting any burden on the inheritance, had already been considered by the Proculians to be an exception to the rule, that nothing in a testament could be valid that preceded the institution of the heir. (GAI. ii. 231.)

35. Post mortem quoque heredis aut legatarii simili modo inutiliter legabatur: veluti si quis ita dicit: ‘Cum heres meus mortuus erit, do lego.’ Item ‘pridie quam heres aut legatarius morietur.’ Sed simili modo et hoc correximus, firmitatem hujusmodi legis ad fideicommissorum similitudinem praestantes, ne vel in hoc casu deterior causa legatorum quam fideicommissorum inveniatur.

35. So, too, a legacy made to take effect after the death of an heir or legatee, was ineffectual; as, if a testator said, ‘When my heir is dead, I give as a legacy,’ or thus, ‘I give as a legacy on the day preceding the day of the death of my heir, or of my legatee.’

But we have corrected the ancient rule in this respect, by giving all such legacies the same validity as fideicommissa; so that, even in this case, the position of legacies may not be found inferior to that of fideicommissa.

GAI. ii. 282; C. iv. 11.

Gaius remarks, that the second of these forms, Pridie quam, though objected to because the time when the right was fixed could not be known until the heir was dead, was not objected to on any very good ground. For all that the principles of law forbade was, that the interest should not be fixed until after the death of the heir, for then it would have been the heir’s heir, and not the heir, that was charged; and that it should not be fixed until after the death of the legatee, for if he had no vested interest in his life, he could have nothing to transmit. But a legacy made so as to give a fixed right the day before either of their deaths, was not open to the same objections.

36. Pœnæ quoque nomine inutiliter legabatur et adimebatur vel transferebatur. Pœnæ autem nomi ne legari videtur, quod coercendii heredis causa reliquitur, quo magis is aliquid faciat aut non faciat: veluti si quis ita scripsisset: ‘Heres meus si filiam suam in matrimo nium Titio collocaverit’ (vel ex diverso ‘si non collocaverit’), ‘dato decem aureos Seio,’ aut si ita scripsisset: ‘Heres meus si servum Stichum alienaverit’ (vel ex diverso ‘si non

36. Also formerly, if a testator had given, revoked, or transferred a legacy by way of penalty, he would have done so ineffectually. A legacy is considered as given by way of a penalty, when it is intended to constrain an heir to do or not to do something; as, if a testator has said, ‘If my heir gives his daughter in marriage to Titius,’ or ‘if he does not give her in marriage to Titius, let him pay ten aurei to Seio;’ or thus, ‘If my heir shall alienate my slave Stichus,’ or ‘if my heir shall not
alienaverit'), 'Titio decem sureos dato.' Et in tantum haec regula observabatur, ut perquam pluribus principalibus constitutionibus significet, nec principem quidem agnosceret, quod ei pœne nomine legatum sit. Nec ex militia quidem testamento talia legata valebant, quamvis alius militum voluntates in ordinandis testamentis valide observantur. Quin etiam nec libertatem pœne nomine dari posse placebat. Eo amplius nec hereditem pœne nomine adici posse Sabinum existimabat, veluti si quis ita dicat: 'Titius heres esto: si Titius filiam suam Seio in matrimonium collocaverit, Seius quoque heres esto'; nihil enim intererat, qua ratione Titius coereceatur, utrum legati datione an coheredis adjicione. At hujusmodi scrupulositas nobis non placuit et generaliter ea, que reliquinuntur, licet pœne nomine fuerint relictas vel ademptas vel in alicis translata, nihil distare a ceteris legatis constitutis vel in dando vel in adimendo vel in transfertendo: exceptis his videlicet, que impossibilium sunt vel legibus interdicia aut alias probrosa: hujusmodi enim testatorum dispositiones valere, secta temporum meorum non patitur.

GAI. ii. 285, 286, 248; C. vi. 41.

It is rather difficult to say how this rule sprang up in Roman law, or how the gift of a legacy pœne nomine differed from an ordinary condition. Theophilus, in his Paraphrase, gives as one reason that a legacy ought to spring from a feeling of kindness to the legatee, and not be used as a means to punish another. For want of a better reason, we may be content with this.

The sections of this Title may be arranged under five heads. The first treats of the definition and general notions of a legacy (paragr. 1, 2, 3, 8); the second treats of the objects given as legacies (paragr. 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 21, 22, and 23); the third treat of the persons to whom legacies can be given (paragr. 24, 25, 26, 27, 28, 32, and 33); the fourth of rules as to the position, terms, and construction of legacies (paragr. 29, 30, 31, 34, 35, and 36); and the fifth, of the loss, diminution, or increase of things given as legacies (paragr. 16, 17, 18, 19, 20).

Trt. XXI. DE ADEMPTIONE LEGATORUM.

Ademptionis legatorum, sive eodem testamento adimantur sive codicillis, The revocation of a legacy, whether made in the same testament or in a
firma est, sive contrariis verbis fiat adempitio, veluti si, quod ita quis legaverit 'do lego,' ita adimatur 'non do non lego,' sive non contrariis, id est alis quibuscumque verbis.

codicil, is valid, and may be made in terms contrary to those of the gift, as when a testator gives in these terms, 'I give as a legacy,' and revokes it by saying, 'I do not give as a legacy;' or in terms not contrary, that is, in any other form of expression.

D. xxxiv. 4. 8. 11.

It was considered necessary, in the times when weight was attached to the formula under which the legacy was given, that the legacy should be revoked by words exactly opposite (contrariis verbis) to those by which it was given, as in a legacy per vindicationem the revocation ought to have been by the words 'non do non lego.' (ULP. Reg. 24. 29.)

The text only speaks of direct revocation of legacies by an express declaration of the testator's wishes in some testamentary document; but it was also revoked by the mere wish of the testator (nuda voluntate, D. xxxiv. 4. 3. 11) that it should be revoked being in any way declared. In such a case the legacy was not, strictly speaking, taken away; but the legatee who brought an action for it might be repelled by an exception of dolus malus. We have seen, in the last Title (paragr. 12), that a sale of the thing given as a legacy was held to be or not to be a revocation of the legacy, according as the testator intended or did not intend that such should be its effect.

A legacy was also considered to be revoked by implication if something occurred after it was given which made it impossible to believe that the testator could have continued to wish the legatee to profit by his bounty; as, for instance, if a notorious and deadly enmity sprang up between them. (D. xxxiv. 4. 3. 11.)

1. Transferri quoque legatum ab alio ad alium potest, veluti si quis ita dixerit: 'hominem Stichum, quem Titio legavi, Seio do lego,' sive in eodem testamento sive in codicillis hoc fecerit: quo casu simul Titio adimi videtur et Seio dari.

1. A legacy may also be transferred from one person to another; as, 'I give as a legacy to Seius my slave Stichus, whom I have given as a legacy to Titius,' whether this be done in the same testament or in codicils; and in this case it seems that at the same time a legacy is taken from Titius and given to Seius.

D. xxxiv. 4, 5.

The translation had two effects: it took away a legacy from one person and gave it to another; but it might have either effect without the other. The original legatee might be dead, and thus the legacy useless, and yet the gift to the new legatee would be valid; or the new legatee might subsequently die, or he might not have testamenti factio with the testator, and yet the legacy would be lost to the original legatee. (D. xxxiv. 4. 20.)
Tit. XXII. De lege Falcidia.

Superest, ut de lege Falcidia dispiciamus, qua modus novissime legis impositus est. Cum enim olim lege duodecim tabularum libera erat legandi potestas, ut liceret vel totum patrimonium legatis erogare (quippe sa lege ita cautum esset: 'uti legasset suae rei its, jus esto'): visum est hanc legandi licentiam coartare, idque ipsorum testatorum gratia provisum est ob id, quod plerumque intestati moriebantur, recusantibus scriptis heredibus pro nullo aut minimo lucro hereditates adire. Et cum super hoc tam lex Furia quam lex Voconia late sunt, quarum neutra sufficiens ad rei consummationem videbatur: novissime late est lex Falcidia, qua cædatur, ne plus legare liceat, quam dostrantem tormonorum honorum, id est ut, eive unus heres institutus esset sive plures, apud eum cesse pars quarta remaneret.

It remains to speak of the lex Falcidia, by which legacies have received their latest limitations. By the law of the Twelve Tables, a testator was permitted to dispose of his whole patrimony in legacies; for the law said, 'As a man has disposed of his property, so let the law be; ' but it was thought proper to restrain this license even for the benefit of testators themselves, because they frequently died intestate, the heirs they instituted refusing to enter upon an inheritance from which they could receive little or no profit. With this object the lex Furia and the lex Voconia were passed; and lastly, as neither of these was found adequate to the purpose, the lex Falcidia was enacted, which forbids a testator to give more in legacies than three-fourths of all his property; so that, whether there be one or more heirs instituted, there must remain to him, or them, at least one-fourth part of the whole.

Gal. ii. 224-227.

The lex Furia testamentaria, which must not be confounded with the lex Furia or Fustia Caninia, restraining the testamentary manumission of slaves (Bk. i. Tit. 7), was a plebiscitum, probably of the year 571 a.u.c. Gaius thus acquaints us with its provisions:—'Qua, exceptis personis quibusdam (see ULP. Reg. xxviii. 7), ceteris plus mille assibus legatorum nomine mortuus causa capere permium non est: ' more than 1,000 asses could not be given as a legacy. The law failed to effect its object, as the testator was not restrained in the number of legacies he might give, but only in the amount of each legacy. (Gal. ii. 225.)

The lex Voconia, also called testamentaria, was a plebiscitum, of which the year 585 a.u.c. is given as the date. Gaius says of it, 'Qua cautum est, ne cui plus legatorum nomine mortuus causa capere liceret, quam heredes caperent: ' no legatee was to have more than each heir had. This law also failed in its object; as, by multiplying the number of legatees and giving each a trifling amount, the sum received by the heirs, which would be equally small, might be too trifling to make it worth their while to enter on the inheritance. (Gal. ii. 226.)

The lex Falcidia (see note on Tit. 18. 3) was a plebiscitum passed in the year 714 a.u.c. Its principles were extended to fideicommissa by the senatusconsultum Pegasium (see next Title, paragr. 5), to fideicommissa imposed on heredes ab intestato by a rescript of Antoninus Pius (D. xxxv. 2. 18); to donations mortis
causa by a rescript of Severus and Antoninus (C. vi. 50. 5); and lastly, to donations between husband and wife (C. vi. 50. 12). The mode in which the heir would avail himself of the lex Falcidia would be by repelling, by an exception, the legatee who demanded the whole of his legacy, when less than the whole was due by the lex Falcidia.

The part reserved to the heir is spoken of by the jurists as quarta or Falcidia. The commentators more usually employ the full term quarta Falcidia.

1. Et cum quasitum esset, duobus heredibus institutis, veluti Titio et Seio, si Titii pars ant tota exhausta sit legatis, que nominatim ab eo data sunt, aut supra modum onerata, a Seio vero aut nulla relict a sint legata, aut que partem ejus dumtaxat in partem dimidiam minus, an, quia is quartam partem totius hereditatis ant amplius habet, Titio nihil ex legatis, quae ab eo relict a sunt, retinere liceret: placuit, ut quartam partem sua partis salvas habeat, possit retinere: etenim in singulis heredibus ratio legis Falcidiae ponenda est.

1. When two heirs are instituted, as Titius and Seius, a question has been raised: supposing the share of Titius in the inheritance is either entirely absorbed, or very heavily burdened with legacies specifically charged upon it, while the share of Seius is wholly free, or has legacies charged on it only up to half its amount, in such a case does the circumstance of Seius having a clear fourth or more of the inheritance prevent Titius from retaining, out of the legacies charged upon his share, enough to secure a fourth part of his own moiety to himself? It has been decided that Titius may retain the fourth of his own share, for the calculation of the lex Falcidia is applicable to each heir separately.

D. xxxv. 2. 77.

The testator is here supposed to give a distinct share of his inheritance to two different persons, and to burden one share with legacies while leaving the other free. The heir whose share is burdened is entitled to have a clear fourth of his share, although the legatees would be getting less in the whole than three-fourths of the inheritance. The reason was probably this:—Under the old civil law, if one heir refused to enter, his share accrued to the co-heir who did enter free of all burdens (sine onere). Unless, therefore, the heir whose share was burdened had been induced by the right of retaining the Falcidian fourth to enter, he would have refused to enter, and his share would have accrued sine onere to the co-heir, and the legatees would have got nothing. Under the leges caducarum the accrual took place cum onere; but even then, although, if the free share accrued to the owner of the burdened share, the two were taken as one for the benefit of the legatees, and the heir who took both could take nothing more than a fourth of the two conjoined, if the legacies were sufficient to exhaust the remainder, yet, if the burdened share accrued to the owner of the free share, he kept his free share unimpaired, and was allowed to keep a clear fourth of the burdened share. (D. xxxv. 2. 78.)

2. Quantitas autem patrimonii, ad quam ratio legis Falcidiae red.
igitur, mortis tempore spectatur. Itaque si verbi gratia in, qui centum aureorum patrimonium habebat, centum aureos legaverit, nihil legatoris prodest, si ante aditam hereditatem per servos hereditarios aut ex partu ancilarum hereditariarum aut ex fetu pecorum tantum accesserit hereditati, ut, centum aureis legatorum nomine erogatis, heres quartam partem hereditatis habiturus sit, sed necesse est, ut nihil minus quarta pars legatis detrahabatur. Ex diverso si septuaginta quinque legaverit et ante aditam hereditatem in tantum decreverint bona incendiis forte aut naufragis aut morte servorum, ut non amplius quam septuaginta quinque aureorum substantia vel etiam minus relinquatur, solida legata debentur. Nec ea res damnosa est heredi, cui liberum est non adire hereditatem: quae res efficit, ut necesse sit legatoris, ne destituto testamento nihil consequantur, cum herede in portione pacisci.

the estate at the time of the testator’s death. Thus, for instance, if he, who is worth a hundred aurei at his decease, bequeaths the whole hundred in legacies, the legatees receive no advantage, if the inheritance, before it is entered upon, should so increase by the labour of its slaves, the birth of children to female slaves, or the produce of cattle, that, after a full payment of the one hundred aurei in legacies, a clear fourth of the whole estate would remain to the heir, for the legacies notwithstanding would still be liable to a deduction of one-fourth. Conversely, if the testator has given only seventy-five aurei in legacies, then although, before the entrance of the heir, the estate should so decrease by fire, shipwreck, or the loss of slaves, that its whole value should not be more then seventy-five aurei or less, yet the legacies would still be due without deduction. Nor is this prejudicial to the heir, who is at liberty to refuse to enter on the inheritance, but it obliges the legatees to come to terms with the heir, so as to let him get a part, lest, if the testament is abandoned, they may lose the whole.

D. xxxv. 2. 78. pr.

The calculation under the lex Falcidia was made at the time of the testator’s death, in accordance with the rule by which the dies cedens for most legacies was fixed at that time. It was, moreover, made then, even if the dies cedens was fixed at some other time. Between the death of the testator and the time of the heir entering on the inheritance, the estate might be so deteriorated as to make it disadvantageous to the heir to enter; and in order to persuade him to do so, the legatees would have to enter into a compromise with him.

3. Cum autem ratio legis Falcidiae ponitur, ante deductur esse alienum, item funeris impensa et pretia servorum numimissorum, tunc deinde in reliquo ita ratio habetur, ut ex eo quarta pars apud heredes remaneat, tres vero partes inter legatares distribuantur, pro ratsalicet portione ejus, quod cuique eorum legatum fuerit. Itaque si fingamus, quadringentes aureos legatos esse et patrimonii quantitatem, ex qua legata ergodi oportet, quadringentorum esse, quarta pars a singulis legatarii detrahi debet.

3. When the calculation of the lex Falcidia is made, the testator’s debts, his funeral expenses, and the price of the manumission of slaves, are deducted, then what remains is divided, so that a fourth part remains for the heir, and the other three parts are divided among the legatees in proportion to the amount of their respective legacies: for example, let us suppose that four hundred aurei have been given in legacies, and the estate out of which the legacies are to be paid is worth no more, each legatee must have a fourth part sub-
Quodsi trecentos quinquaginta legatos fingamus, octava debet detrahi. Quodsi quingentos legaverit, initio quinta, deinde quarta detrahi debet: ante enim detrahendum est, quod extra bonorum quantitatem est, deinde quod ex bonis apud heredem remanere oportet.

tracted from his legacy; but, if we suppose that the testator gave in legacies three hundred and fifty aurei, then an eighth ought to be deducted. And if he gave five hundred aurei in legacies, first a fifth must be deducted, and then a fourth. For that which exceeds the real value of the goods of the deceased must first be deducted, and then that which is to remain to the heir.

D. xxxv. 2. 1. 19: D. xxxv. 2. 39; D. xxxv. 2. 73. 5.

Octava debet detrahi, i.e. one eighth of the whole, or fifty aurei, must be deducted from the whole sum given to the different legatees, the sum to be deducted from each share being in proportion to the relative amount of that share. Each share would be diminished by one-seventh.

The lex Falcidia did not apply to military testaments. (D. xxxv. 2. 17.)

Under the new system regarding heirs invented by Justinian (see Tit. 19. 6) the heir entering with an inventory took the Faldician fourth, unless the testator had expressly forbidden that he should take it; but the testator was now at liberty to deprive the heir of the Faldician fourth, which previously he had not been. (Nov. 1. 2. 2.)

Tr. XXIII. DE FIDEICOMMISSARIIS HEREDITATIBUS.

Nunc transeamus ad fideicommissa. Let us now pass to fideicommissa; et prius de hereditatibus and first we will treat of fideicommissary inheritances.


Fideicommissera, that is, trusts, might be compared to the institution of heirs, if the trust embraced the whole inheritance, and to the gift of legacies, if it embraced only a part. In the former case they were termed by the jurists fideicommisariarum hereditates: in the latter, fideicommissera singularum rerum. The text proceeds to speak of the fideicommisariarum hereditates.

The word fideicommisum has been generally retained in the translation, instead of trusts, because, as fideicommisissa include only trusts carrying out the last wishes of a deceased person, the word trusts, which is used much more widely in its application, might lead to confusion.

Ulpian gives (Reg. 25. 1) the following definition of a fideicommisum: 'Quod non civilibus verbis, sed procutio velinquitur; nec ex rigore juris civilis profiscitur, sed ex voluntate datur relinquentibus.'

1. Scientium itaque est, omnia 1. At first fideicommissna were of fideicommisson primum temporibus in- little force; for no one was com-
firma esse, quia nemo invitus cogebatur prestare id, de quo rogatus erat: quibus enim non poterat hereditates vel legata reliquere, si relinquebant, fidei comitabebant eorum, qui capere ex testamento poterant: et ideo fideicommissa appellata sunt, quia nullo vinculo juris, sed tantum pudore eorum, qui rogabantur, continebantur. Postea primus divus Augustus semel iterumque gratia personarum motus, vel quia per ipsius salutem rogatus quis diceretur, aut ob insignem quorundam perfidiam jussit consultibus auctoritate suam interponere. Quod quia justum videbat et popolare erat, paulatim conversum est in aedium jurisdicio- nem: tantusque favor eorumactus est, ut paulatim etiam pretor proprius crearetur, qui fideicommissis jus diceret, quem fideicommissarium appellabant.

The freedom given by the introduction of obligatory trusts was singularly wide. A testator at the time of the introduction of fideicommissa, in order to give anything, was obliged to do so by a regular testament, to adopt prescribed formulæ, to use the Latin tongue. He could not give anything to a peregrinus, to a person proscribed, to a posthumous stranger, or to an uncertain person. The system of fideicommissa enabled him to give to almost any one he liked, and that in words the least formal, and even without a testament at all. (D. xxxii. 11. pr. and 21. pr.) The heredes ab intestato, if charged with a fideicommissum by the person to whose property they succeeded, were obliged to fulfil it (see par. 10). A man might give his whole inheritance by a fideicommissum to a woman whom he was prevented by the lex Voconia from instituting as heir (Gal. ii. 274); and Latini Juniani (see Bk. i. Tit. 5. 3) could take fideicommissa, though not inheritances or legacies. (Gal. ii. 275.) The license given to fideicommissa was, indeed, diminished by different enactments, and they were gradually placed more and more on the footing of legacies. Thus by one senatusconsultum, passed in the time of Hadrian, the power of giving a fideicommissum to a peregrinus (Gal. ii. 285), by another the power of giving one to a posthu- mous stranger or uncertain person, was taken away. (Gal. ii. 287.) Again, the senatusconsultum Pegasiannum subjected fidei- commisssa to the rules of the lex Papia Poppea (Gal. ii. 286);
and a testamentary tutor could never be appointed by a fideicom- 
missum. (Gal. ii. 289.) Fideicommissa were, indeed, 
always something beside and foreign to the nature of Roman law. 
Augustus merely ordered that, in a case of great hardship, the 
consul should interfere. Then a magistrate was created whose 
business it was to interfere in cases which wanted it; but there 
was nothing like an action at law to enforce fideicommissa. 
(Ulp. Reg. 25. 12.) The fideicommissarius applied for aid as 
having equity on his side; and if the magistrate chose to inter-
fere, the regular course of the law was stayed, and the trust en-
forced. The proceeding was always extra ordinem (Gal. ii. 278), 
and the jurisdiction was exercised throughout the year, while 
legacies could only be claimed on days cum res aguntur, of 
which, under Marcus Aurelius, there were 230 in the year. 
(Gal. ii. 279; Demangeat, i. 790.) 
The fideicommissum itself did not, like a legacy, directly 
transfer the property in an inheritance or in any particular thing, 
and of course did not give any right to a real action. The giving 
up of the inheritance was, however, effected by the mere consent 
of the heir, even before tradition.

2. Imprimis igitur scindendum est, 
opus esse, ut aliquis recto jure te-
stamento heres instituat, etque 
fidei committatur, ut eam heredita-
tem sibi instituat: aliquin inutili 
est testamentum, in quo nemo heres 
instituit. Cum igitur aliqui scri-
pserit: 'Lucius Titius heres esto,' 
potest adicer: 'rogo te, Luci Titi, 
us, cum primum possis hereditatem 
meam adire, eam Gaio Seio reddas, 
restituas.' Potest autem quisque et 
de parte restituentur heredem rogare: 
est liberum est vel pure vel sub con-
dicione relinquerre fideicommissum 
vel ex die certo.

2. We must first observe that some 
one must be duly appointed heir in 
the testament; and then it must be 
entrusted to his good faith to give over 
the inheritance to some other person; 
for otherwise the testament is ineffect-
ual, as being one in which no one is 
instituted heir. And, therefore, when 
a testator has said, 'Let Lucius Titius 
be my heir,' he may add, 'and I request 
you, Lucius Titius, that, so soon as 
you can enter upon my inheritance, 
you will make over and give it up to 
Gaius Seius.' A testator may also re-
quest his heir to give over a part of 
the inheritance only, and may leave 
the fideicommissum absolutely or con-
ditionally; or from a certain day.

Gal. ii. 248, 250.

Of course, if there was no heir instituted, there could be no 
person to charge by testament with the trust (nemo fiduciarius); 
but the testator might charge the heredes ab intestato (par. 10).

The person who made the fideicommissum was termed the 
fideicommissum; the person requested to perform it, fiducia-
rius; and the person to be benefited by it, fideicommissarius.

3. Restituta autem hereditate, is 
qui dem, qui restituit, nihil minus 
heres permanet: is vero, qui recipit 
hereditatem, aliquando heredis alii 
quando legatae loco habeatur.

8. After an heir has restored the 
inheritance, he still continues heir. 
But he, who receives the inheritance, 
was formerly sometimes considered in 
the light of an heir, and sometimes in 
that of a legatee.

Gal. ii. 251.
In order to protect himself, the heir who remained liable to all actions of creditors against the inheritance had recourse to a fiction of law. He sold the inheritance to the fideicommissarius, and they entered into mutual agreements called empte et venditæ hereditatis stipulationes (Gal. ii. 252), by which the fiduciarius, though remaining in the eye of the law responsible for the charges upon the inheritance, was protected from ultimate harm by having a remedy against the fideicommissarius, who in his turn bargained that the fiduciarius would hand everything over. Thus Gaius says of the fideicommissarius, 'Olim nec heredis loco erat, nec legatarii: sed potius emportis.'

4. Et in Neronis quidem temporibus Trebellio Maximo et Anneo Seneca consulis consuls consuls consuls factum est, quo cautum est, ut, si cui hereditas ex fideicommissi causa restituta sit, omnes actiones, que jure civili heredi et in heredem com- pterent, ei et in eum darentur, cui ex fideicommisso restituta esset hereditas. Post quod senatusconsulturn prætor utiles actiones ei et in eum, qui receptit hereditatem, quasi heredi et in heredem dare copit.

GAL ii. 258; D. xxxi. 1. 2.

The senatusconsultum Trebellianum (A.D. 62) did away with the necessity of any such fiction as that of a sale. The fideicommissarius stepped at once into the place of the heres institutus. All the actions belonging to the inheritance were given him in the shape of actiones utiles. (See Introd. sec. 106.) If creditors sued the heres institutus, he had the exceptio restitute hereditatis; he might plead that he had given over the inheritance as he had been directed.

5. Sed quia heredes scripti, cum aut totam hereditatem aut pene totam plerumque restituere rogabantur, adire hereditatem ob nullum vel minimum lucrum recusabant atque ob id extinguebantur fidei- commissa; postea Vespasiani Augusti temporibus Pegaso et Pusione consulis senatoris censuit, ut ei, qui rogatus esset hereditatem restituere, perinde liceret quartam partem retinere, atque lege Falcidia ex legatis retinere conceditur. Ex singulis quoque rebus, que per fidei- commissum relinquuntur, eadem retentio permissa est. Post quod senatusconsultum ipse heres onera hereditaris sustinebat: ille autem, qui ex fideicommisso recept partem

5. But the instituted heirs, being in most cases requested to restore the whole, or almost the whole of an inheritance, often refused to accept it, as they would receive little or no advantage, and thus fideicommissa were frequently extinguished; and therefore, subsequently, during the reign of the Emperor Vespasian, in the consulsip of Pegasus and Pusio, the senate decreed, that an heir, who was requested to restore an inheritance, might retain a fourth, just as in the case of legacies he might by the Faldician law. And the same deduction is allowed in particular things, which are left by a fideicommissum. For sometime after this senatusconsultum the heir alone bore the charges of the inheritance;
hereditatis, legatarii partiarii loco erat, id est ejus legatarii, cui pars bonorum legabatur. Quae species legati partitio vocabatur, quia cum herede legatarius partiebatur hereditatem. Unde quae solabant stipulatones inter heredem et partiarium legatarium interponi, eodem interponebantur inter eum, qui ex fideicommissum receptit hereditatem, et heredem, id est ut et lucrum et damnum hereditarium pro rata parte inter eos commune sit.

and he who had received a share or part of an inheritance, under a fideicommissum, was regarded as a part legatee, that is, a legatee having a legacy of a share of the property, a species of legacy which was called partition, because the legatee took a part of the inheritance together with the heir. Thus the same stipulations which were formerly in use between the heir and partiairy legatee, were likewise made between the person who received the inheritance under the fideicommissum and the heir, that is, they stipulated they would share the benefits and the charges of the inheritance between them, in proportion to their respective interests.

GAI. ii. 254.

The senatusconsultum Trebellianum protected the fiduciarius from any harm; but it gave him no incitement to enter on the inheritance. Why should he take an inheritance which he had instantly to transfer to another? The trust might thus perish; and, to remedy this, the senatusconsultum Pegasianum (A.D. 73) permitted the heres instititus to retain a fourth, just as the lex Falcidia permitted in the case of legacies. Even the term quarta Falcidia was applied to the fourth retained by the fiduciarius heres. (D. xxxvi. 1. 16. 9.) The fideicommissarius in this respect became exactly like a legatee. As having a definite part of the inheritance, he was considered in the light of a legatee of a part of the inheritance, and, as the text says (par. 3), the fideicommissarius was, under the senatusconsultum Trebellianum, placed in the position of an heir, and under the senatusconsultum Pegasianum in that of a legatee.

A testator sometimes gave a legatee not a particular thing, but a certain share in his whole property. The legatee (then termed legatarius partarius) took, in this case, per universitatem; but he was not thereby made an heir, not having been formally instituted; and if there was no heir who entered on the inheritance, the legacy was extinguished. The claims of creditors against the inheritance were made exclusively against the heir, and the heir alone could recover sums due to the inheritance. Thus it was necessary that, if the heir paid a creditor, the legatee should account to him for a part of the payment proportionate to his share of the inheritance; while if the legatee wished that his share should be increased by the payment of a debt due to the inheritance, he could only effect this through the heir. Accordingly they made stipulations with each other, termed stipulatones partis et pro parte. By one of these stipulations the heir bound the legatee to pay a proportion of sums expended in satisfaction of claims against the inheritance; by the other the legatee bound the heir to account
to him for his share of sums received in satisfaction of debts owing to the inheritance. The fideicommissarius was on the footing of such a legatee under the senatusconsultum Pegasianum, and the stipulationes partis et pro parte were made between the heir and the fideicommissarius.

6. Ergo si quidem non plus quam dodrantem hereditatis scriptus heres rogatus sit restituerere, tunc ex Trebelliano senatusconsulto restituebatur hereditas et in utrumque actiones hereditarise pro rata parte dabantur: in heredem quidem jure civili, in eum vero, qui recipiebat hereditatem, ex senatusconsulto Trebelliano tamquam in heredem. At si plus quam dodrantem vel etiam totam hereditatem restituere rogatus sit, locus erat Pegasiano senatusconsulto, et heres, qui semel adierit hereditatem, si modo sua voluntate adierit, sive retinuerit quartam partem sive noluerit retinere, ipse universa onera hereditaria sustinebat. Sed qua quaerat retenta, quasi partis et pro parte stipulaciones interponebantur tamquam inter partiarium legatarium et heredem: si vero totam hereditatem restituerit, emptae et venditae hereditatis stipulaciones interponebantur. Sed si recusat scriptus heres adire hereditatem ob id, quod dicat, eam sibi suspectam esse quasi damnosam, cavetur Pegasiano senatusconsulto, ut desiderante eo, cui restituere rogatus est, jussu pretoris adeat et restituet hereditatem perindeque ei et in eum, qui recipit hereditatem, actiones dentur, acsi juris est ex Trebelliano senatusconsulto: quo casu nullis stipulationibus opus est, quia simul et hic, qui restituit, securitas datur et actiones hereditarie ei et in eum transferuntur, qui recipit hereditatem, utroque senatusconsulto in hae specie concurrente.

6. Therefore, if the instituted heir was not requested to restore more than three-fourths of the inheritance, he restored such part in accordance with the provisions of the senatusconsultum Trebellianum; and all actions which concern an inheritance, might be brought against each according to their respective shares—against the heir, by the civil law, and against him who received the inheritance, by the senatusconsultum Trebellianum, as though against an heir. But if the instituted heir was requested by the testator to restore the whole inheritance, or more than three-fourths, then the senatusconsultum Pegasianum became applicable; and the heir who had once entered on the inheritance, provided he did so voluntarily, was obliged to sustain all the charges of the inheritance, whether he had retained or had declined to retain his fourth. When the heir did retain a fourth part, what are called stipulations partis et pro parte were entered into, just as between a legatee of part and an heir; and, when the heir did not retain a fourth, then stipulations emptae et venditae hereditatis were entered into. But if the instituted heir refused to enter on the inheritance, alleging that he feared he should lose by doing so, it was provided, by the senatusconsultum Pegasianum, that, on the demand of him to whom he had been requested to restore the inheritance, he should, under an order of the pretor, enter on the inheritance, and give it over; and that all actions might be brought by or against him who received the inheritance, as in a case falling under the senatusconsultum Trebellianum. And in this case stipulations are not necessary, for the heir, who restores the inheritance, is secured, and all actions concerning an inheritance are transferred to and against him, by whom it is received, there being, in this instance, a concurrent application of both senatusconsulta.

GAL. i. 255–258.
The senatusconsultum Trebellianum was not abrogated by the Pegasianum. They applied to different cases. If the fourth was expressly reserved to the heres fiduciarius, he took the other three parts, and immediately restored or transferred them to the fideicommissarius, who had the position of heres fideicommissarius, and all the actions belonging to the inheritance, so far as his share extended. But if the fourth was not reserved, the senatusconsultum Pegasianum became applicable. The fiduciarius heres retained the fourth, and the fideicommissarius held the position of a legatee. The heres institutus might, however, not choose to retain the fourth. He might enter on the inheritance, and at once voluntarily transfer the whole to the fideicommissarius. The jurists were divided in opinion as to the senatusconsultum under which he then entered (D. xxxvi. 1. 45.) Gaius thinks it was under the Pegasianum, for the actiones hereditarie did not pass without stipulations. (GAI. ii. 257.) If he refused to enter on the inheritance, the praetor compelled him, by a power given in the senatusconsultum Pegasianum, and he was placed exactly in the same position as if he had entered under the senatusconsultum Trebellianum. He had no fourth reserved for him; and all actions passed at once to the fideicommissarius.

7. Sed quia stipulationes ex senatusconsulto Pegasiano descendentes et ipsi antiquitati displicuerunt et quibusdam casibus capitiosas eam homin excelsi ingenii Papinius appellavit et nobis in legibus maxis simplicitas quam difficultas placet, ideo omnibus nobis suggestis tam simulitudinibus quam differentiis utiusque senatusconsulti, placuit expolso senatusconsulto Pegasiano, quod postea supervenit, omnem auctoritatem Trebielliano senatusconsulto præstare, ut ex eo fideicommissario hereditates restituantur, sive habeat heres ex voluntate testatoris quartam sive plus sive minus sive penitus nihil, ut tunc, quando vel nihil vel minus quarta apud eum remaneat, liceat ei vel quartam vel quod desest, ex nostra auctoritate retinere vel repetere solutum, quasi ex Trebielliano senatusconsulto pro rata portione actionibus tam in heredem quam in fideicommissario competentibus. Si vero totam hereditatem sponte restituerit, omnes hereditarian actiones fideicommissario et adversus eum competunt; sed etiam id, quod praecipuum Pegasiani senatusconsulti fuerat, ut, quando recusabat heres scriptus sibi datam hereditatem adire, necessitas ei imponeretur
totam hereditatem volenti fideicommissario restituere et omnes ad eum et contra eum transirent actiones, et hoc transposuimus ad senatusconsultum Trebellianum, ut ex hoc solo et necessitas heredi imponatur, si ipso nolente adire fideicommissarius desiderat restitut sibi hereditatem, nullo nec damno nec commodo apud heredem manente.

by or against the fideicommissarius. And, as to the most important provision of the senatusconsultum Pegasi- anum, that, when an instituted heir refused to accept an inheritance, he might be constrained to restore it to the fideicommissarius if he demanded it, and that all actions should be transferred to and against him, we have transferred this provision to the senatusconsultum Trebellianum, by which alone this obligation is now laid upon the heir, when he himself refuses to enter on the inheritance, and the fideicommissarius is desirous that it should be restored, the heir in this case receiving neither gain nor loss.

Justinian unites the two senatusconsulta into one, giving them the name of the senatusconsultum Trebellianum. The heir is to retain a fourth, as under the senatusconsultum Pegasi anus, but actions are to be brought for or against the heir and the fideicommissarius in proportion to their shares, the fideicommissarius being thus in loco heredis as to his share, as under the senatusconsultum Trebellianum. If the heir would not enter, then he was compelled to do so, but was protected against all loss, as under the senatusconsultum Pegasi anus.

Repetere solutum. Before the legislation of Justinian, the heres could not re-demand the fourth, if he had once paid it over. (Paul. Sent. iv. 3, 4.)

8. Nibil autem interest, utrum aliquis ex asse heres institutus aut totam hereditatem aut pro parte restituere rogatur, an ex parte heres institutus aut totam partem aut parsis partem restituere rogatur: nam et hoc casu eadem observari praecipimus, quae in totius hereditatis restitutione diximus.

8. But it makes no difference whether the heir is instituted to the whole inheritance, and is requested to restore the whole or a part, or whether, being instituted to a part only, he is requested to restore that entire part, or a portion of it; for we enjoin that the same rules be observed in the latter case, as in case of restitution of the whole.

GAI. ii. 259.

9. Si quis una aliqua re deducta sive praecerta, qua quartam continent, veluti fundo vel alia re, rogatus sit restituere hereditatem, similis modo ex Trebelliano senatusconsulto restitutio fiat, perinde ac si quarta parte retenta rogatus esset relinquam hereditatem restituere. Sed illud interest, quod altero casu, id est cum deducta sive praecerta aliqua re restituitur hereditas in solidum ex eo senatusconsulto actiones transferuntur et res, quae remanet apud heredem, sine ullo onere hereditario apud eum manet, quasi ex legato ei

9. If an heir is requested by a testator to give up an inheritance, after deducting or excepting some particular thing, equivalent to a fourth of the whole, as a piece of land, or anything else, he will give it up under the senatusconsultum Trebellianum, exactly as if he had been requested to restore the remainder of an inheritance, after retaining a fourth. But there is this difference: in the first case, when an heir is requested to give up an inheritance, after deducting or excepting a particular thing, then, according to that senatuscon-
adquista, altero vero casu, id est cum, quarta parte retenta, rogatus est heres restitueare hereditatem et restituit, scindantur actiones et pro dodrante quidem transferantur ad fideicommissarium, pro quadrante remaneant apud heredem. Quin etiam lices in una re, qua deducta aut praecipe, restitucere aliquid hereditatem rogatus est, maxima pars hereditatis continetur, aequo in solidum transferuntur actiones et secum deliberare debet is, cui restitutur hereditas, an expediat sibi restitui. Eadem scilicet interveniunt et si duabus pluribusve rebus deductis praecipitave restitutere hereditatem rogatus sit. Sed et si certa summa deducta praecipitave, que quartam vel etiam maximam partem hereditatis continet, rogatus sit aliquid hereditatem restitutere, idem juris est. Que diximus de eo, qui ex asse heres institutus est, eadem transferimus et ad eum, qui ex parte heres scriptus est.

sultum, all actions are transferred to and against the fideicommissarius, and what remains to the heir is free from all incumbrances connected with the inheritance, as if acquired by legacy. In the second case, when an heir is requested to give up an inheritance after retaining a fourth to himself, all actions are proportionally divided; those which regard the three-fourths of the estate being transferred to the fideicommissarius, and those which regard the one-fourth remaining to the heir. And, even if an heir is requested to give up an inheritance, after making a deduction or exception of some particular thing, which comprises the greatest part of the whole inheritance, all actions are still transferred to the fideicommissarius, who ought then to consider whether it will be expedient or not, that the inheritance should be given up to him. All this applies equally, whether an heir is requested to give up an inheritance after a deduction or exception of two, or more, particular things, or of a certain sum of money, which may comprise a fourth or even the greatest part of the inheritance. What we have said of an heir who is instituted to the whole of an inheritance, applies equally to one who is instituted only to a part.

D. xxxvi. 1. 1. 16. 21; D. xxxvi. 1. 30. 8.

If the testator gave a particular object to the heres institutus which was equal in value to the fourth of the inheritance, the law considered this as a specific legacy given to the heres. The fideicommissarius took the whole inheritance except this part, and all the actions of the whole inheritance were transferred to him. If the particular object did not equal a fourth, Marcian says that the emperor would not suffer the heir to claim any addition. (D. xxxvi. 1. 30. 4.) Justinian retains the distinction between a particular object being given, and a general direction to retain a fourth. But he decides that if a particular object was given not equal in value to a fourth, the heir may retain enough to complete his fourth, and that all actions relating to the part so retained shall pass to him, and all others to the fideicommissarius. (Cod. vi. 50. 11.)

10. Preterea intestatus quoque moriturus potest rogare eum, ad quem bona sua vel legitimo jure vel honorario pertinent intelligit, ut hereditatem suam totam partemve ejus aut rem aliquam, veluti fundum, ho-

10. Moreover, a man about to die intestate may request the person, to whom he knows his estate will pass, either by the civil or pretorian law, to give up to a third person the whole inheritance, or a part of it, or any par-
Antoninus Pius extended the provisions of the *lex Falcidia* and consequently of the *senatusconsultum Pegasianum* (D. xxxv. 2. 18), and the jurists those of the *senatusconsultum Trebellianum*, to trusts imposed on heredes ab intestato. (D. xxxvi. 6. 1.)

11. Eum quoque, cui aliquid restituitur, potest rogare, ut id rursus aliud totum aut partem vel etiam aliud aliquid restituat.

11. A *fideicommissarius* may also himself be requested to give up to another either the whole or part of what he receives, or even something else.

The *fideicommissarius*, who was thus only a vehicle to pass on the inheritance to another *fideicommissarius*, could not retain a fourth for himself, if the heir had already retained a fourth. The object of the *lex Falcidia* was merely to secure an heir, not in all cases to give a fourth to the person who virtually had the inheritance; but when the heir entered on the inheritance by order of the prætor, and therefore did not retain a fourth, then the *fideicommissarius* stood in the place of the heir, so far as to be able to apply the *lex Falcidia*, as if representing the heir, against legateses, but not against a second *fideicommissarius*. (D. xxxvi. 1. 63. 11.)

12. Et quia prima *fideicommissorum cunabula* a *fide heredum* pendet et tam nomen quam substantiam acceperunt et ideo divus Augustus ad necessitatem juris ea destraxit: nuper et nos, eundem principem superare contendentes, ex facto, quod Tribonianus vir excelsus, questor saecii palatii, suggessit, constitutionem fecimus, per quam disposimus: si testator fidei heredis sui commisit, ut vel hereditatem vel speciale fideicommissum restituat, et neque ex scriptura neque ex quinque testium numero, qui in fideicommissis legitimus esse noscitur, res possit manifestari, sed vel pauciores quam quinque vel nemo penitus tesiis intervenerit, tunc sive pater hereditis sive aliquis quicunque sit, qui fidem elegit heredes et ab eo aliud restituit voluerit, si heres perhâdia tentus adimplere fidem rescusat negando, rem ita esse subsectam, si fideicommissarius jusjurandum ei detulerit, cum prius ipse
de calumniis juris verit, necesse eum haberet vel jusjurandum subire, quod nihil tale a testatore audiret, vel recusarem ad fideicommissum vel universitatis vel specialis solutionem coartari, ne deperaret ultima voluntas testatoris fidei heredis commissa. Eadem observari censemus et si a legatario vel fideicommissario alicui simili ter rectum sit. Quodsi est, a quo rectum dicitur, confiteatur quidem alicui a se rectum esse, sed ad legem substitutatem decurrit, omnino modo cogendus est solvere.

De calumnia juris verit, that is, he must swear beforehand that he is acting bona fide, and not inventing a ground of litigation.

Trt. XXIV. DE SINGULIS REBUS PER FIDEICOMMISSUM RELICTIS.

Potest autem quis etiam singulas res per fideicommissum relinquere, veluti fundum, hominem, vectem, argentum, pecuniam numeratam, et ipsum heredem rogare, ut alicui restituant, vel legatum per fideicommissarius non solam de ea re rogati potest, ut eam alicui restituant, quae ei relictum sit, sed etiam de alia, sive ipsius sive aliae sit. Hoc solo observandum est, ne plus quisquam rogaret alicui restitueren, quam ipse ex testamento ceperit; nam quod amplius est, inutiliter relinquatur. Cum autem alia res per fideicommissum relinquatur, necesse est ei, qui rogatur, aut ipsum redimere et prestare aut estimationem ejus solvere.

A person may also leave particular things by a fideicommissum, as a piece of land, a slave, a garment, gold, silver, pieces of money; and he may request either his heir to give them over, or a legatee, although a legatee cannot be charged with a legacy.

Gal. ii. 260, 271.

1. Potest autem non solum proprio testator res per fideicommissum relinquere, sed et hereditatis legatario aut fideicommissarii aut curulis belter alterius. Itaque et legatario et fideicommissarius non solam de ea re rogati potest, ut eam alicui restituant, quae ei relictum sit, sed etiam de alia, sive ipsius sive aliae sit. Hoc solo observandum est, ne plus quisquam rogaret alicui restitueren, quam ipse ex testamento ceperit; nam quod amplius est, inutiliter relinquatur. Cum autem alia res per fideicommissum relinquatur, necesse est ei, qui rogatur, aut ipsum redimere et prestare aut estimationem ejus solvere.

1. A testator may leave by fideicommissum, not only his own property, but also that of his heir, of a legatee, of a fideicommissarius, or of any other person; and that a legatee or fideicommissarius may not only be requested to give what has been left to him, but also something else, whether his own or the property of another. The only rule to be observed is, that no one shall be requested to give over more than he has received under the testament: for as to the excess the disposition is ineffectual. And, when the property of another is left by a fideicommissum, the person requested to give it over is obliged either to purchase and deliver the thing itself, or to pay its estimated value.

Ulpian (Reg. 25. 5) expresses the power of disposal by fidei-
commissum, by saying that everything could be disposed of in that way, that could be given by a legacy per damnationem.

Quod amplius est, inutiliter relinquitur. If, however, the thing which the fideicommissarius was to give belonged to himself, he was obliged to give it, whatever might be its value, if he accepted what was given to him by the fideicommissum, as he was considered to have had an opportunity of exercising his judgment, and not to have valued his own thing more highly than that which he received. (D. xl. 5. 24. 12.)

2. Libertas quoque servo per fideicommissum dari potest, ut heres eum rogetur manumittere vel legatarius vel fideicommissarius. Nec interest, utrum de suo proprio servo testator roget, an de eo, qui ipsius heredis aut legatarii vel etiam extranei sit. Itaque alienus servus redimi et manumitteri debet: quodsi dominus eum non vendat, si modo nihil ex judicio ejus, qui reliquit libertatem, percepit, non statim extinguitur fideicommissaria libertas, sed differtur, quia possit tempore procedente, ubi sequurque occasio re- dimendi servi fuerit, praestari libertas. Qui autem ex causa fideicommissae manumitterit, non testatoris sit libertus, etiam testatoris servus sit, sed ejus, qui manumitterit: at is, qui directo testamento liber esse jubetur, ipsius testatoris sit libertus, qui etiam orcinus appellatur. Nec alius ullus directo ex testamento libertatem habere potest, quam qui utroque tempore testatoris fuerit, et quo factore testamentum et quo moreretur. Directo autem libertas tune dari videtur, cum non ab alio servum manumitteri roget, sed velut ex suo testamento libertatem ei competere vult.

2. Freedom may also be conferred upon a slave by a fideicommissum: for an heir, legatee, or fideicommissarius may be requested to enfranchise him; nor does it signify whether it is of his own slave that the testator requests the manumission, or of the slave of his heir, or of a legatee, or of a stranger; and therefore, when a slave is not the testator’s own property, he must be bought and enfranchised. But, if the proprietor of the slave refuses to sell him, as he may, if he has taken nothing under the testament, yet the freedom given by the fideicommissum is not extinguished, but deferred only, as it may be possible in the course of time, on any occasion offering of purchasing the slave, to effect his enfranchisement. The slave who is enfranchised in pursuance of a fideicommissum, does not become the freedman of the testator, although he was the testator’s own slave, but he becomes the freedman of that person who enfranchises him. But a slave who receives his liberty directly from the testament becomes the freedman of the testator, and is said to be orcinus; and no one can obtain liberty directly by testament, unless he was the slave of the testator, both at the time of the testator’s making his testament, and also at that of his death. Liberty is given directly, when a testator does not request that freedom be given to his slave by another, but gives it himself by virtue of his own testament.

Gal. ii. 268–267; C. vii. 4. 6, 7.

It was the opinion of Gaius, that if the master of the slave refused to sell the slave, the fideicommissum perished, because liberty was a thing not admitting of computation in money. (Gal. ii. 265.) Justinian, in accordance with a rescript of the Emperor Alexander (C. vii. 4. 6), decides that it is only delayed.

If a testator enfranchised directly a slave that could not be
so enfranchised, the gift of liberty would be as valid as a fideicommissum.

Orcinus, from Orcus; because he is the freedman of a dead person.


3. The terms generally used in making fideicommissa are the following: I request, I ask, I desire, I commit, I entrust to thy good faith; and each of them is of as much force separately as all of them placed together.

GAL. ii. 249.

Antoninus Pius decided by rescript that commendem would not suffice (D. xxxii. 11. 2); but, in the time of Justinian, the expressions by which a fideicommissum was created were quite immaterial, provided that the wishes of the testator could be ascertained.

TIT. XXV. DE CODICILLIS.

Ante Augusti tempora constat ius codicillorum non fuisset, sed primus Lucius Lentulus, ex cuius persona etiam fideicommissa ceperant, codicillos introduxit. Nam cum decederet in Africa, scriptis codicillos testamento confirmatos, quibus ab Augusto petiti per fideicommissum, ut faceret aliquid: et cum divus Augustus voluntatem ejus implesset, cujus deinceps reliqui auctoritatem secuti, fideicommissa prestabant et filia Lentuli legata, que jure non debebat, solvit, dicistur Augustus convocasse prudentes, inter quos Trebatium quoque, cujus tunc auctorieta maxima erat, et quiesisse, an possit hoc recipi nec absenans a juris ratione codicillorum usus esset: et Trebatium suasse Augustus, quod diceret, utilisimum et necessarium hoc civibus esse propter magnas et longas peregrinationes, que apud veteres fuissent, ubi, si quis testamentum facere non posset, tamen codicillos posset. Post quo tempora cum et Labo codicillos fecisset, jam nemini dubium erat, quin codicili jure optimo admitterentur.

Codicils were certainly not recognised by law before the reign of Augustus; for Lucius Lentulus, to whom also the origin of fideicommissa may be traced, was the first who introduced codicils. When dying in Africa, he wrote codicils, which were confirmed by his testament; and in these he requested Augustus by a fideicommissum to do something for him. The emperor complied with the request, and, following his example, the other persons joined with him carried out the fideicommissa entrusted to them, and the daughter of Lentulus paid legacies which in strictness of law were not due from her. It is said that Augustus, having called together upon this occasion persons learned in the law, and among others Trebatius, whose opinion was of the greatest authority, asked whether codicils could be admitted, and whether they were not repugnant to the principles of law. Trebatius advised the emperor to admit them, as they were most convenient and necessary to citizens, on account of the great and long journeys which the ancients were frequently obliged to take, during which a man who could not make a testament might be able to make codicils. And subsequently, Labo himself having made codicils, no one afterwards doubted their perfect validity.
Codicilli were small tablets on which memorandums or letters were written. A testator might naturally address a short letter giving short directions to his heir. When fideicommissa came to be enforced, these letters or directions were enforced as creating fideicommissa. As under the Roman law a testator could make no alteration in his testament without making an entirely new testament, the use of codicils was obviously great. Codicils might be made without there being any testament at all. They were then directions addressed to the heredes ab intestato. But if there was a testament, they were always considered as attached to it: if the testamentary dispositions failed, they failed also, and all their provisions were taken with reference to the time when the testament was made. (D. xxix. 7. 2. 2 and 3. 2.)

A testator, by inserting an express clause to that effect, termed by commentators clausula codicillaris, might provide that his testament, if invalid as a testament, should take effect in the way of codicils. (C. vi. 36. 8. 1).

As to Labeo and Trebatius, see Introd. sec. 20.

It is to be noticed that codicilli does not mean, like the English word 'codicil,' a supplement to a will, but 'directions by tablets,' and that directions so made should be held obligatory constituted an innovation as great in the form of testamentary disposition as the recognition of fideicommissa constituted in the latitude of testamentary power.

1. Non tantum autem testamento facto potest quis codicillos facere, sed et intestatus quis decedens fidei committere codicillis potest. Sed cum ante testamentum factum codicilli facti erant, Papianianus ait, non aliter viret habere, quam si speciali postea voluntate confirmatur. Sed divi Severus et Antoninus rescipserunt, ex his codicillis, qui testamentum precedent, possit fideicommissum peti, si apparet, eum, qui postea testamentum fecerat, a voluntate, quam codicilli expresserat, non recessisse.

1. Not only a person who has already made his testament, may make codicils, but even a person dying intestate may create fideicommissa by codicils. But when codicils are made before a testament, they cannot take effect, according to Papianus, unless confirmed by a special disposition in the testament. But the Emperors Severus and Antoninus have decided by rescript, that a thing, left in trust by codicils, made before a testament, may be demanded by the fideicommissarius, if it appears that the testator has not abandoned the intention which he expressed in the codicils.

Gal. ii. 270.

There was a distinction between codicils confirmed by testament, and those not so confirmed; for if codicils were confirmed by testament, their provisions could operate to give legacies or appoint a tutor, and not only to create fideicommissa. A testator could, by anticipation, confirm in his testament any codicils he might thereafter make. (D. xxix. 7. 8. pr.)

2. Codicillis autem hereditas neque dari neque adimi potest, ne confundatur jus testamentorum et 2. An inheritance can neither be given nor taken away by codicils, as the different effect of testaments and
codicillorum, et ideo nec exhere-
datitio scribi. Directo autem hered-
ditas codicillis neque dari neque
adimi potest; nam per fideicom-
missum hereditas codicillis jure re-
linquitur. Nec condicionem heredi
instituto codicillis adicere neque
substituere directo potest.

codicils would be thereby confounded,
and of course, therefore, no heir can
be disinherited by codicils. But it is
only directly that an inheritance can
neither be given nor taken away by
codicils, for it may be legally disposed
of in codicils by means of a fideicom-
missum. Nor, again, can a condition
be imposed on an heir instituted by
testament, nor can a direct substitution
be made, by codicils.

GAI. ii. 278; D. xxix. 7. 6. pr.

3. Codicillos autem etiam plures
quis facere potest et nullam sollem-
nitatem ordinationis desiderant.

8. A person may make several codi-
cils, and no formality is requisite in
making them.

D. xxix. 7. 6. 1.

Codicils were not originally subjected to any rules determining
the mode in which they were made. But by a constitution of
Theodosius, added to by Justinian, they were to be made in pre-
sence of five witnesses, and, if made in writing, which was not
necessary, the witnesses were to subscribe them. If codicils were
not so made, then the fideicommissarius could, after having sworn
to his own good faith, call on the heir to deny them on oath. (C.
vi. 36. 8. 3.)
LIBER TERTIUS.

Trt. I. DE HEREDITATIBUS, QUÆ AB INTESTATO DEFERUNTUR.

Intestatus decedit, qui aut omnino testamentum non fecit aut non jure fecit aut id, quod fecerat, ruptum irritumve factum est aut nemo ex eo heres extitit. A person dies intestate, who either has made no testament at all, or has made one not legally valid; or if the testament he has made is revoked, or made ineffectual; or if no one becomes heir under it.

D. xxxviii. 16. 1. pr.

If a person died without a testament, the law regulated the succession to the inheritance. So also it did, if he left a testament that was fatally defective in form (non jure factum), or if his testament was revoked, or, in the language of Roman law, broken (ruptum), or if it was set aside as inofficious, or made ineffectual by a change of status in the testator (irritum), or if no heir would accept the inheritance under it.

If there was no testament to determine the succession, the law of the Twelve Tables gave the inheritance first to the sui heredes, who were also necessarii heredes, that is, could not refuse to accept the inheritance; then to the agnati; and then, if the deceased was a member of a gens, to the gentiles. In default of agnati, the pretor called to the inheritance the cognati, or blood-relations. (See Introd. sec. 45.) Perhaps the succession of gentiles lasted to a time later than the introduction of this praetorian succession of the cognati; but at any rate, it did not outlast the Republic, and therefore, speaking of the times when we are most familiar with Roman law, we may say that the succession was given first to the sui heredes, then to the agnati, then to the cognati. But some complication was introduced into the rules of succession, by certain classes of persons being, by different changes in the law, raised from the rank of agnati to that of sui heredes, and from the rank of cognati to that of agnati. These changes are not, however, very difficult to follow, if we divide them according as they were effected (1) by the pretor, (2) by senatusconsulta, and imperial enactments pre-
vious to Justinian, (3) by Justinian himself. The first Title treats
of the succession of *sui heredes*, and of those ranked among the
*sui heredes*; the second and two following Titles treat of the suc-
cession of *agnati*, and of those ranked among *agnati*. At the end
of this Title will be found a short summary of the changes in the
law relative to the succession of *sui heredes*; at the end of the
fourth Title one will be found of the changes relative to the suc-
cession of *agnati*.

Justinian altered the whole mode of succession to intestates by
the 118th and 127th Novels. This change, being effected several
years after the publication of the Institutes, should not be allowed
to interfere with the consideration of the law of succession existing
when the Institutes were published. But as it is too remarkable
and too well known a part of Justinian's legislation to remain
wholly unnoticed, a short account of it will be given at the end of
the ninth Title, which closes the part of the Institutes treating of
successions *ab intestato*.

Before we enter on the details of intestate succession, it may be
useful to consider generally the position of the heir under an in-
estacy, according as there was (1) no will at all, nor any expression
of last wishes; (2) no will, but *codicilli* creating a *fideicommissum*;
(3) a will under which the appointed heir or heirs would not enter.

1. If there was no will, the *sui heredes*, being *necessarii*, had,
under the old law, to accept the inheritance with all its burdens.
The prætor, however, allowed them the *beneficium abstinendi* (see
Bk. ii. Tit. 19. 2 note), but any act by which they mixed themselves
up with the inheritance terminated their power of abstaining. If
there were no *sui heredes*, or those who were *sui heredes* refused,
them all others, whether ranked by the prætor with *sui heredes*, or
in a lower grade of succession, were in the position of *extranei
heredes*, and had the inheritance offered to them according to their
priorities, and had to make their decision within a given time
(*cretio*: see Bk. ii. Tit. 19. 5) to accept or not, any act by which
they behaved as heirs (*pro herede gerere*) being regarded as a sign
of acceptance.

2. If there was no will, but a *fideicommissum* was cast upon the
heir under the intestacy by *codicilli*, the heir had the choice of
abstaining if a *suus heres*, or of accepting if an *extraneus heres*;
and if he accepted he had, after satisfying creditors, to carry out
the *fideicommissum*, retaining a fourth for himself, or if he was
compelled to enter he was protected against all loss. (See Bk. ii.
Tit. 23. 7.)

3. If there was a will, but neither the testamentary heirs nor,
ailing them, any heir in the line of intestate succession would enter
under the will, and the *fiscus* would not accept (see Tit. 9. 3 note),
the inheritance might be assigned to any one who was willing to
give security for the satisfaction of the claims of creditors, in order
that gifts of freedom to slaves might be sustained, and that the
reputation of the deceased might not suffer. (See Tit. 11.)
The heir under the intestacy might accept when he was insolvent, with a view of profiting by the estate of the deceased to the detriment of creditors, and then the creditors might ask that the property of the deceased should be kept distinct from the property of the heir (beneficium separationis, see Bk. ii. Tit. 19. 1 note).

The heir under an intestate succession, as also the heir under a will, enforced his civil rights to the inheritance by a petilio hereditatis which was heard before the centumviri (see Introd. sec. 92; Bk. ii. Tit. 18. pr. note; Bk. iv. Tit. 6. 28), and his prætorian rights by applying to the prætor for an interdict, which was ordinarily that termed quorum bonorum (see Introd. sec. 107; Tit. 9. 1 note).

1. Intestatorum autem hereditates ex lege duodecim tabularum primum ad suos heredes pertinent.

1. The inheritances of intestates, by the law of the Twelve Tables, belong in the first place to the sui heredes.

GAL. iii. 1.

2. Sui autem heredes existimantur, us et supra diximus, qui in potestate morientis fuerunt: veluti filius filia, nepos neptisve ex filio, pronepos pronepthise ex nepote filio nato progenitus progenitave. Nec interest utrum naturales sunt liberi an adoptivi. Quibus connumerari necesse est etiam eos, qui ex legitimis quidem matrimonii non sunt progeniti, curis tamen civitatum dati secundum divallium constitutionem, quae super his posita sunt, tenorem suorum jura nanciscuntur: nec non eos, quos nostræ amplexe sunt constitutiones, per quas jussumus, si quis mulierem in suo consisterno copulaverit non ab initio affecione matrali, sam tamen, cum qua poterat habere conjugium, et ex ea liberis sustulerit, postea vero affectione procedente etiam nuptialia instrumenta cum es fecerit filiosque vel filias habuerit: non solum eos liberos, qui post dotem editi sunt, justos et in potestate esse patribus, sed etiam anteriores, qui et his, qui postea nati sunt, occasionem legitem nominis praestiterunt: quod optimere censimus, etiamsi non progeniti fuerint post dotale instrumentum confectum liberi vel etiam nati ab hac luce subtracti fuerint. Ista demum tamen nepos neptisve et pronepos pro-nepthise suorum heredum numero sunt, si procedens persona desiderit in potestate parentis esse, sine morte

2. And, as we have observed before, those are sui heredes who, at the death of the deceased, were under his power; as a son or a daughter, a grandson or a granddaughter by a son, a great-grandson or great-grand-daughter by a grandson born of a son; nor does it make any difference whether these children are natural or adopted. We must also reckon among them those who, though not born in lawful wedlock, nevertheless, according to the tenor of the imperial constitutions, acquire the rights of sui heredes by being presented to the curia of their cities; as also those to whom our own constitutions refer, which enact that, if any person has lived with a woman not originally intending to marry her, but whom he is not prohibited to marry, and shall have children by her, and shall afterwards, feeling towards her the affection of a husband, enter into an act of marriage with her, and have by her sons or daughters, not only those born after the settlement of the dowry, shall be legitimate, and in the power of their father, but also those born before, who gave occasion to the legitimacy of the children born after. And this rule shall obtain, although no children are born subsequent to the making of the dotal act, or those born are all dead. But a grandson or granddaughter, a great-grandson or great-granddaughter, is not reckoned among the sui heredes, unless the person pre-
id acciderit sive alia ratione, veluti emancipatione: nam si per id tempus, quo quis moreretur, filius in potestate ejus sit, nepos ex eo suus heres esse non potest. Iduque et in ceteris deinceps liberorum personis dictum intellegimus. Postumni quoque, qui, si vivo parente nati essent, in potestate futuri forent, sui heredes sunt.

The *sui heredes* were the children, whether natural, adoptive, or made legitimate (see Bk. i. Tit. 10. 13), in the power of the deceased at the time of his death. We must not confuse persons made *sui heredes* by the later legislation, as these legitimate children were, with those permitted to rank with *sui heredes*.

3. *Sui heredes* may become heirs, without their knowledge, and even though insane; for in every case in which inheritances may be acquired without our knowledge, they may also be acquired by the insane. At the death of the father, ownership in an inheritance is at once continued; accordingly, the authority of a tutor is not necessary, since an inheritance may be acquired by *sui heredes* even without their knowledge; neither does an insane person acquire by assent of his curator, but by operation of law.

D. xxxviii. 16. 14.

Directly the succession *ab intestato* commenced, which it did when the deceased died if there was no testament, and as soon as it was ascertained that the testament was ineffectual if a testament had been made, the *suus heres* became at once heir without any act of his own. We may, however, apply here what we have already said of the power to abstain altogether from the inheritance given him by the prætor. (See Bk. ii. Tit. 19. 2.)

4. But sometimes a child becomes a *suus heres*, although he was not under power at the death of his parent; as when a person returns from captivity after the death of his father. He is then made a *suus heres* by the *jus postlimini.*

5. On the contrary, it may happen that a child who, at the death of his parent, was under his power, is not his *suus heres*: as when a parent, after his decease, is adjudged to have been guilty of treason, and his memory is
fuerit: suum enim heredem habere non potest, cum fiscus ei succedit. Sed potest dici, ipso jure esse suum heredem, sed desinere. thus made infamous. He can then have no suus heres, as it is the fiscus that succeeds to his estate. In this case it may be said that there has in law been a suus heres, but that he has ceased to be so.

D. xxxviii. 16. 1. 8.

As a general rule, if the accused died before conviction, the prosecution was at an end. His succession went to his heirs by testament or in law. But to this there was one exception. If a person charged with perduellio (treason against the state or emperor) died before conviction, the prosecution was continued, and if he was found guilty, his memory was said to be condemned (memoria damnata fuit), and, his sentence having a retrospective effect, his property was confiscated exactly as if he had been condemned in his lifetime. (D. xlviii. 4. 11.)

6. Cum filius filiave et ex altero filio nepos neptisve extant, pariter ad hereditatem vocantur nec qui gradu proximior est, ulteriorem exclusit: sequum enim esse videtur, nepotes neptesque in patris sui locum succeedere. Pari ratione et si nepos neptisque sit ex filio et ex nepote pronepos proneptisve, simul vocantur. Et quia placuit, nepotes neptesque, item proneptes proneptisque in parentis sui locum succedere, conveniens esse visum est, non in capita, sed in stirpes hereditatem dividit, ut filius partem dimidiam hereditatis habeat et ex altero filio duo pluresve nepotes alteram dimidiam. Item si ex duobus filiis nepotes extant et ex altero unus forte aut duo, ex altero tres aut quattuor, ad unum aut duos dimidia pars pertinent, ad tres vel ad quattuor altera dimidia.

6. A son, or a daughter, and a grandson or granddaughter by another son, are called equally to the inheritance; nor does the nearer in degree exclude the more remote; for it seems just that grandsons and granddaughters should succeed in the place of their father. For the same reason, a grandson or granddaughter by a son, and a great-grandson or great-granddaughter by a grandson, are called together. And since grandsons and granddaughters, great-grandsons and great-granddaughters, succeed in place of their parent, it appeared to follow that inheritances should not be divided in capita, but in stirpes; so that a son should possess one half, and the grandchildren, whether two or more, of another son, the other half of an inheritance. So, where there are grandchildren by two sons, one or two perhaps by the one, and three or four by the other, the inheritance will belong, half to the grandchild or the two grandchildren by the one son, and half to the three or four grandchildren by the other son.

GAL. iii. 7, 8.

The expressions 'in stirpes' and 'in capita' may be rendered, 'by the stock' and 'by the head.' An inheritance is divided 'by the head' when each head or person of those who take has an equal share in it; it is divided 'by the stock' when one share is distributed among all who are descended from one stock, i.e. are descended from the person who would, if he had been living, have taken the whole share.
7. Cum autem queritur, an quis suus heres existere potest: eo tempore quaerendum est, quo certum est, aliquem sine testamento deceisses: quod accidit et destituto testamento. Hae rationes si filius ex heredatus fuerit et extraneus heres institutus est, filio mortuo postea certum fuerit, heredem institutum ex testamento non fieri heredem, aut quia nolutit esse heres aut quia non potuit: nepos avo suus heres existet, quia quo tempore certum est, intestatum deceisses patrem-familias, solus inventur nepos. [Et hoc certum est.]

7. When it is asked, whether such a person is a suus heres, we must look to the time at which it is certain that the deceased died without a testament, including therein the case of no heir claiming under the testament. Thus, if a son is disinherited and a stranger is instituted heir, and after the death of the son it becomes certain that the instituted heir will not be heir, because he is either unwilling or unable to be so, in this case the grandson of the deceased becomes the suus heres of his grandfather; for, at the time when it was certain that the deceased died intestate, there exists only the grandchild. Of this there can be no doubt.

D. xxxviii. 16. 1. 8.

8. Et licet post mortem avi natus sit, tamen avo vivo conceptus, mortuo patre ejus posteaque desierto avi testamento, suus heres efficitur. Plane si et conceptus et natus fuerit post mortem avi, mortuo patre suo desertique postea avi testamento, suis heres avo non existit, quia nullo jure cognationis patrem sui patria tetigit. Sic nec ille est inter liberos avo, quem filius emancipatus adoptaverat. Hi autem cum non sunt quantum ad hereditatem liberi, neque honorum possessionem petere possunt quasi proximi cognati. Hae de suis heredibus.

8. And although a child is born after the death of his grandfather, yet, if he was conceived in the lifetime of his grandfather, he will, if his father is dead, and his grandfather's testament is abandoned by the heir, become the suus heres of his grandfather. Obviously a child both conceived and born after the death of his grandfather, cannot become the suus heres, although his father should die and the testament of his grandfather be abandoned; because he has never been connected with his grandfather by any tie of relationship. Neither is a person adopted by an emancipated son to be reckoned among the children of the father of his adoptive father. And not only are these adoptive children of an emancipated son incapable of taking the inheritance as children of the deceased grandfather, but they cannot demand possession of the goods as the nearest cognati. Thus much concerning sui heredes.

D. xxxviii. 16. 6, 7.

9. Emancipati autem liberi jure civili nihil juris habent: neque enim sui heredes sunt, quia in potestate esse desierunt parentis, neque alio ullo jure per legem duodecim tabularum vocantur. Sed pretor naturali sequitae motus dat sia honorum possessionem unde liberi, perinde ac si in potestate parentis mortis tempore fuissent, sive soli sive cum suis heredibus concurrent. Itaque duobus libris extantibus,

9. Emancipated children by the civil law have no right to the inheritance of their ascendant; being no longer under his power, they are not his sui heredes, nor are they called to inherit by any other right under the law of the Twelve Tables. But the pretor, obeying natural equity, grants them the possession of goods called unde libri, as if they had been under the power of their ascendant at the time of his death, and this, whether
emancipato et qui mortis tempore
in potestate fuerit, sanc quidem is,
qui in potestate fuerit, solus jure
civili heres est; id est solus suus
heres est: sed cum emancipatus
beneficio pretoris in partem admit-
titur, evenit, ut suus heres pro parte
heres fiat.

they stand alone, or whether there are
also others, who are sui heredes. Thus,
when there are two children, one
emancipated, and the other under
power at his father's death, the latter,
by the civil law, is alone the heir, and
alone the suus heres; but, as the
emancipated son, by the indulgence
of the pretor, is admitted to his share,
the suus heres becomes heir only of a
part.

Gal. iii. 19, 25, 26; D. xxxviii. 6. 1. 9.

Not only emancipated children, but, if they themselves were
dead, their children conceived after the emancipation, had the
possessio honorum given them by the pretor (D. xxxvii. 4. 5);
and a grandchild conceived before the emancipation, and who re-
mained in the power of the grandfather, was allowed to succeed to
the inheritance of the emancipated son (D. xxxvii. 4. 6. pr.). The
pretor could not give these persons the title of 'heir,' as that
belonged only to those who received it from the jus civile;
but he gave them possessio bonorum unde liberi (see Tit. 9. 3
note). If the emancipated son had children who remained in the power of the emancipator, he shared the inheritance with them,
instead of excluding them. (D. xxxvii. 8. 1. pr. and l.) Emanci-
cipated children were, however, obliged to bring into, and add to,
the inheritance all the property they themselves possessed at the
time of the father's death, except peculium castrensem and quasi-
castrensem (collatio bonorum); because, if they had remained in
the family, all that they had acquired would have been acquired
for the paterfamilias, and thus have formed part of the inherit-
ance; and a married daughter succeeding as heres suus had to
bring into the inheritance her dos (collatio dotis). (C. vi. 20. 4.)
When a person, after a capitis deminutio, was restitutus in
integrum, he also had the possessio bonorum given him, and
received what he would have had if his disability had not
prevented him from succeeding as suus heres. (D. xxxvii. 4. 1. 9.)

10. At hi, qui emancipati a pa-
rente in adoptionem se dederunt, non
admittuntur ad bona naturalis patris
quasi liberi, si modo, cum is more-
retur, in adoptiva familia sint. Nam
vivo eo emancipati ab adoptivo patre
perinde admittitur ad bona natu-
ralis patris, ac si emancipati ab ipso
esse nec umquam in adoptiva
familia fuissent: et convenienter,
quod ad adoptivum patrem pertinet,
extraneorum loco esse incipient.
Post mortem vero naturalis patris
emancipati ab adoptivo et quantum
ad hunc sequente extraneorum loco
sunt et, quantum ad naturalis
parentis bona pertinet, nihil magis

10. But those, who after emanci-
pation have given themselves in adop-
tion, are not admitted as children to
the possession of the effects of their
natural father, that is, if, at the time
of his death, they are still in their
adoptive family. But if, in the life-
time of their natural father, they have
been emancipated by their adoptive
father, they are then admitted to the
possession of the goods of their natural
father exactly as if they had been
emancipated by him, and had never
entered into the adoptive family. Ac-
cordingly, with regard to their adop-
tive father, they become from that
moment strangers to him. But if
they are emancipated by their adoptive father after the death of their natural father, they are equally considered as strangers to their adoptive father; and yet do not gain the position of children with regard to the inheritance of their natural father. This has been so laid down, because it was unreasonable that it should be in the power of an adoptor to determine to whom the inheritance of a natural father should belong, whether to his children, or to the cognati.

Until the time of Justinian, an adopted son, during his continuance in his adoptive family, had no right of succession to his natural father, but was a suus heres of his adoptive father. If he left the adoptive family before the death of his natural father, he was called by the preceptor to the succession of his natural father as a suus heres, but had, of course, no claim on the adoptive father. If he left the adoptive family after the death of his natural father, he had no claim to the succession of either natural or adoptive father, except as a cognatus of his natural father. Justinian, as we have seen in the First Book (Tit. 11. 2), altered this, and the adopted son, unless adopted by an ascendant, never lost his right to the succession of his natural father, although he gained a right to the succession ab intestato of his adoptive father. (See paragr. 14.) Justinian, it will be observed, does not in the text speak of the case of children given in adoption by their natural father, the changes he had made having altered their position. He speaks of children emancipated, and then giving themselves by arrogation to an adoptive father, and their position was not changed by his system. What is said in the text may, however, be applied to children given in adoption before the legislation of Justinian. What the text describes as unreasonable is that, after the natural father is dead, the adoptive father should have power to alter the succession of the natural father.

11. Minus ergo juris habent adoptivi filii quam naturales. Namque naturales emancipati beneficio pretoris gradum liberorum retinent, licet jure civili perdunt: adoptivi vero emancipati et jure civili perdunt gradum liberorum et a preitore non adjuvuntur. Et recte: natura enim jure civili ratio permere non potest nec, quia desinunt sui heredes esse, desinere possunt filii filiave aut nepotes nepotis esse: adoptivi vero emancipati extraneorum loco incipiunt esse, quia jus nomenclque filii filiave, quod per adoptionem consecuti sunt, alia

11. The rights of adopted children are therefore less than those of natural children, who, even after emancipation, retain the rank of children by the indulgence of the prector, although they lose it by the civil law. But adopted children, when emancipated, lose the rank of children by the civil law, and are not aided by the prector. And the distinction is very proper, for the civil law cannot destroy natural rights; and children cannot cease to be sons or daughters, grandsons or granddaughters, by ceasing to be sui heredes. But adopted children, when emancipated, become instantly stran-
civili ratione, id est emancipatione, perdunt.

GAI. ii. 186, 187.

12. Eadem hec observantur et in ea bonorum possessione, quam contra tabulas testamenti parentis liberis preteritis, id est neque heredibus institutis neque, ut oportet, exhereditatis, praeor pollicetur. Nam eos quidem, qui in potestate parentis mortis tempore fuerunt, et emancipatos vocat praeor ad eam bonorum possessionem: eos vero, qui in adoptiva familia fuerunt per hoc tempus, quo naturalis pares moreretur, repellit. Item adoptivos liberos emancipatos ab adoptivo patre sicut ab intestato, ita longe minus contra tabulas testamenti ad bona ejus admittit, quia desinent in liberorum numero esse.

12. The same rules are observed in the possession of goods which the prætor gives contra tabulas to children who have been passed over, that is, who have neither been instituted heirs, nor properly disinherited. For the prætor calls to this possession of goods those children under the power of their ascendant at the time of his death, and those also who are emancipated; but he excludes those who were in an adoptive family at the decease of their natural ascendant. So, too, adopted children emancipated by their adoptive father, as they are not admitted to succeed their adoptive father ab intestato, much less are they admitted to possess the goods of their adoptive father contrary to his testament, for they cease to be included in the number of his children.

D. xxxviii. 6. 1. 6; D. xxxvii. 4. 6. 4.

When a testament was made, but a person who was a suus heres, or who was raised to the rank of a suus heres, was not expressly disinherited in the testament, the prætor gave him the possessio bonorum contra tabulas, i.e. contrary to the testament. Such a person is not raised to the rank of a suus heres so much as maintained in his position of suus heres.

13. Admonendi tamen sumus, eos, qui in adoptiva familia sunt quive post mortem naturalis parentis ab adoptivo patre emancipati fuerint, intestato parente naturali mortuo, licet ea parte edicti, qua liberis ad bonorum possessionem vocantur, non admittantur, alia tamen parte vocari, id est qua cognati defuncti vocantur. EX qua parte ita admittantur, si neque sui heredes liberi neque emancipati obstant neque adgnatos quidem ulla interveniant: ante enim prætor liberos vocat tam suos heredes quam emancipatos, deinde legitimos heredes, deinde proximos cognatos.

13. It is, however, to be observed that children still remaining in an adoptive family, or who have been emancipated by their adoptive father, after the decease of their natural father, who dies intestate, although not admitted by the part of the edict calling children to the possession of goods, are admitted by another part, by which the cognati of the deceased are called. They are, however, only thus admitted in default of sui heredes, emancipated children, and agnati. For the prætor first calls the children, both the sui heredes and those emancipated, then the legitimi heredes, and then the nearest cognati.

GAI. iii. 81; D. xxxviii. 8. 1. 4.

14. Sed ea omnia antiquitati quidem placuerunt: aliquam autem

14. Such were the rules that formerly obtained; but they have re-
emendationem a nostra constitutione accepitur, quam super his personis posсимus, que a patribus suis naturalibus in adoptionem alis dantur. Invenimus enim nonnullas casus, in quibus filii et naturalium parentum successionem propter adoptionem amitebant et, adoptione facile per emancipationem soluta, ad neutrius patris successi-

...
Children adopted by a stranger were not, under Justinian's legislation, properly speaking, placed in the rank of sui heredes, but remained sui heredes, for the adoption had no effect on their position in their natural family. The effect of adoption was destroyed, not specially provided against.

15. Item vetustas, ex masculis progenitos plus diligens, solos nepotes vel nepotes, qui ex virili sexu descendunt, ad suorum vocabat successionem et iuri adgnatorum eos anteponebat: nepotes autem, qui ex filiabus nati sunt, et pronepotes ex nepitibus cognatorum loco numerans, post adgnatorum lineam eos vocabat tam in avise vel proavie sive paternae sive maternae successionem. Divi autem principes non passi sunt talem contra naturam injuriam sine competenti emendatione relinquere: sed cum nepotos et pronepotos nomen commune est utrisque, qui tam ex masculis quam ex feminis descendunt, ideo eundem gradum et ordinem successio sis eis donaverunt: sed ut aliquid amplius sit eis, qui non solum nature, sed etiam veteris juris suffragio munimentur, portionem nepotum et nepitum vel deinceps, de quibus supra diximus, paulo minuendum esse existimaverunt, ut minus tertiam partem acicerent, quam mater eorum vel avia fuerat acceptura, vel pater eorum vel avus paternus sive maternus, quando femina mortua sit, cujus de hereditate agitur, bisque, licet soli sint, ademtibus adgnatos minime vocabant. Et quemadmodum lex duodecim tabularum filio mortuo nepotes vel nepotes vel pronepotes et pronepotes in locum patris sui ad successionem avi vocat: ita et principalis dispositio in locum matris suae vel avise eos cum jam désignata partis tertiae deminutione vocat.

15. The ancient law, favouring descendants from males, called only grandchildren so descended to the succession as sui heredes, in preference to the agnati, while grandchildren born of daughters, and great-grandchildren born of granddaughters, were reckoned among cognati, and succeeded only after the agnati to their maternal grandfather and great-grandfather, or to their grandmother or great-grandmother, maternal or paternal. But the emperors would not suffer such a violence against nature to continue without an adequate alteration; and insomuch as the name of grandchild and great-grandchild is common to descendants both by females and by males, they gave all the same right and order of succession. But, that persons whose privileges rest not only on nature, but also on the ancient law, might enjoy some peculiar advantage, they thought it right that the portions of grandchildren, great-grandchildren, and other lineal descendants of a female, should be somewhat diminished, so that they should not receive so much by a third part as their mother or grandmother would have received, or, when the succession is to the inheritance of a woman, as their father or grandfather, paternal or maternal, would have received; and, although there were no other descendants, if they entered on the inheritance, the emperors did not call the agnati to the succession. And as, upon the decease of a son, the law of the Twelve Tables calls the grandchildren and great-grandchildren, male and female, to represent their father in the succession to their grandfather, so the imperial legislation calls them to take in succession the place of their mother or grandmother, subject only to the above-mentioned deduction of a third part.

C. vi. 55. 9.

This section contains the substance of a constitution of the Emperors Theodosius, Valentinian, and Arcadius. (Cod. Theod. v. 5.) Justinian here says, that when there were descendants by a
female who entered on the inheritance, the *agnati* were not called to the succession. We gather, however, from the Code itself, that the *agnati* had, under this constitution, a fourth part of the inheritance, as a sort of *Falcidia.* (See next paragr.)

16. Sed nos, cum adhuc dubitatio manebat inter adgnatos et memora-
tos nepotes, partem quartam defun-
cetie substantiae adgnatii si vindi-
cantibus ex cujusdam constitutionis auctoritate, memoraram quidem con-
stitutionem a nostro codice segrega-
vimus neque inseri eam ex Theo-
dosiano codice in eo concessimus.

Nostra autem constitutiones promul-
gata toti juri ejus derogatum est et
sanximus, talibus nepotibus ex filia
vel pronepotibus ex nepote et dein-
ceps superstitibus, adgnatos nullam par-
tem mortui successionis sibi vindici-
care, ne hi, qui ex transversa linea
veniunt, potiores his habeantur, qui
recto jure descendunt: quam con-
stitutionem nostram optimere secun-
dum su vigorem et tempora et nunc
sancimus. Ita tamen quemadmodum
inter filios et nepotes ex filio anti-
quitas statuit non in capita sed in
stirpes dividi hereditatem, similiter
nos inter filios et nepotes ex filia
distributionem fieri jubemus, vel
inter omnes nepotes et nepotes et alias
deinceps personas, ut utraque pro-
genies matris suae vel patris, aviae
vel avi portionem sine ulla diminu-
tione consequantur, et, si forte unus
vel duo ex una parte, ex altera tres
aut quattuor extendat, unus aut duo
dimidiam, alteri tres aut quattuor
alteram dimidiam hereditatis ha-
beant.

16. But, as there still remained
matter of dispute between the *agnati*
and the above-mentioned grandchil-
dren, the *agnati* claiming the fourth
part of the estate of the deceased by
virtue of a constitution, we have re-
jected this constitution, and have not
permitted it to be inserted into our
code from that of Theodosius. And
in the constitution we have ourselves
promulgated, we have completely de-
parted from the provisions of this
former constitution, and have enacted
that *agnati* shall take no part in the
succession of the deceased, when there
are grandchildren born of a daughter,
or great-grandchildren born of a grand-
daughter, or any other descendants
from a female in the direct line; so that
those in a collateral line may not be
preferred to direct descendants. This
constitution is to prevail from the date
of its promulgation in its full force,
as we here again enact. And as the
old law ordered, that between the
sons of the deceased and his grandsons
by a son, every inheritance should be
divided in *stirpes*, and not in *capita*,
so we also ordain, that a similar distri-
bution shall be made between sons and
grandsons by a daughter, and between
grandsons and granddaughters, great-
grandsons and great-granddaughters,
and all other descendants in a direct
line; so that the children of either
branch may receive the share of their
mother or father, their grandmother
or grandfather, without any diminu-
tion; and, if of the one branch there
should be one or two children, and of
the other branch three or four, then
the one or two shall have one half,
and the three or four the other half, of
the inheritance.

C. vi. 55. 12.

Those who, not being *sui heredes*, were admitted to rank as
such, were not *necessarii*. They could accept the inheritance or
not, which they only acquired when they entered on it, *his adeun-
tibus*. (Paragr. 15.)

The principal changes in the succession of the *sui heredes* were
these:—

1. Those at the time of his death in the power of the *de cujus*
(i.e. the person of whose inheritance we are speaking), and becoming \textit{sui juris} by his death, succeeded as \textit{sui heredes} under the law of the Twelve Tables.

2. The praetor, by giving them the \textit{possessio bonorum}, placed in the rank of \textit{sui heredes} the following classes of persons: (1) emancipated children; (2), if the emancipated father was dead, grandchildren conceived after his emancipation, or (3), if the \textit{de cujus} was the emancipated son, his unemancipated children conceived before the emancipation; (4) \textit{sui heredes} deprived of the power of inheriting by a \textit{capitis deminutio}, but afterwards \textit{restituti in integrum}; and (5) adopted children emancipated by the adoptive father during the life of the \textit{de cujus}, their natural father.

3. A constitution of Theodosius permitted the children and descendants of deceased daughters to succeed to the portion their mother would have received as \textit{suis heres}, giving up one-third of it to other \textit{sui heredes}, if there were any, and, if not, one-fourth to the \textit{agnati}.

4. Under Justinian, adoption by a stranger ceased to have any effect upon the position of the person adopted in his natural family; and the persons referred to in the constitution of Theodosius just mentioned succeeded to the whole share of the deceased daughter without any deduction.

\textbf{TIT. II. DE LEGITIMA ADGNATORUM SUCCESSIONE.}

\textit{Si nemo suis heres vel eorum, quos inter suos heredes praetor vel constitutiones vocant, extat et qui successionem quoqo modo amplexatur: tunc ex lege duodecim tabularum ad agnatum proximum hereditas pertinet.}

\textit{When there is no suis heres, nor any of those persons called by the praetor or the constitutions to inherit with suis heredes, to take the succession in any way, the inheritance, according to the law of the Twelve Tables, belongs to the nearest agnatus.}

\textit{Gal. iii. 9.}

All persons were \textit{agnati} who, descended from a common ancestor, would, if that ancestor had been living, and they themselves not emancipated, have been in his power. The \textit{sui heredes} were thus \textit{agnati}; but as they had the title of \textit{sui heredes} peculiar to themselves, only those \textit{agnati} received the name of \textit{agnati} who were connected with the \textit{de cujus} by a collateral line.

1. Sunt autem agnati, ut primo quoque libro tradidimus, cognati per virilis sexus personas cognatione junci, quasi a patre cognati. Itaque eodem patre nati fratres agnati sibi sunt, qui et consanguinei vocantur, nec requiritur, an eadem eandem matrem habuerint. Item patruus fratris filio et invicem est illi agnatus est. Eodem numero sunt fratres

1. \textit{Agnati}, as we have explained in the First Book, are those \textit{cognati} who are related through males, that is, are \textit{cognati} by the father; and therefore brothers, who are the sons of the same father, are \textit{agnati} to each other (they are also called \textit{consanguines}), and it is not asked whether they have the same mother. An uncle is also \textit{agnatus} to his brother's son, and
patruelles, id est qui ex duobus fratribus procreati sunt, qui etiam consobrini vocantur. Qua ratione etiam ad plures gradus adgnationis pervenire poterimus. Hi quoque, qui post mortem patris nascentur, nanciscuntur consanguinitatia jura. Non tamen omnibus simul adgnatis dat lex hereditatem, sed his, qui tunc proximo gradu sunt, cum certum esse ceperit, aliquem intestatum decessisse.

2. Per adoptionem quoque adgnationis jus consistit, veluti inter filios naturales et eos, quos pater eorum adoptavit (nee dubium est, quin proprie consangunaei appellentur); item si quis ex ceteris adgnatis tuis, veluti frater aut patruus aut denique is, qui longiore gradu est, aliquem adoptaverit, adgnatio inter vos esse non dubitatur.

3. Ceterum inter masculos quidem adgnationis jure hereditas etiam longissimo gradu utro citroque capitur. Quod ad feminas vero ita placebat, ut ipsae consangunaei jure tantum capiant hereditatem, si sorores sint, ulterius non capiant: masculi vero ad eorum hereditates, etiam si longissimo gradu sint, admittantur. Qna de causa fratri tui aut patrui tui filiis vel amitis tue hereditas ad te pertinebat, tua vero ad illas non pertinebat. Quod ideo ita constitutum est, quia commodis videbatur, etsi jura constituit, ut plerumque hereditates ad masculos confuerunt. Sed quia sane iniquum erat, in universum eam quasi extraneas repelli, pretor eam ad honorem possessionem admittebat ea parte, qua proximitatis nomine honorem possessionem pollicebat: ex qua parte ita sic licet admittuntur, si neque adgnatus ullus nec proximior cognatus interveniat. Et nec quidem lex duodecim tabularum nullo modo introduxit, sed simplicitatem legibus amicam amplexa, sylim modo omnes adgnatos sive masculos sive feminas cujuscunque gradus ad similitudinem suorum invicem ad successionem vocabat: media autem jurisprudentia, que conversely, the brother's son to his paternal uncle. So also fratres patruelles, that is, the children of brothers (also called consobrini), are likewise agnati. We may thus reckon many degrees of agnation. Children, too, who are born after the decease of their father, obtain the rights of consanguinity. The law does not, however, give the inheritance to all the agnati, but to those only who are in the nearest degree at the time that it becomes certain that the deceased has died intestate.

Gal. i. 156; iii. 10, 11.

2. The right of agnation arises also through adoption; thus the natural and the adopted sons of the same father are agnati. And such persons are without doubt properly included in the term consangunaei. Also, if one of your agnati, as, for example, a brother, a paternal uncle, or any other agnatus, however remote, adopts anyone, then there is undoubtedly agnation between you.

3. Agnation gives males, however distant in degree, reciprocal rights to the succession to inheritances. But it was thought right that females should only inherit by title of consanguinity if they were sisters, and not if in a more remote degree; while their male agnati, in however remote a degree, were admitted to succeed to them. Thus the inheritance of your brother's daughter, or of the daughter of your paternal uncle or aunt, would belong to you: but not your inheritance to them. This distinction was made, because it seemed expedient that the law should be so ordered, that inheritances should for the most part fall into the possession of males. But as it was contrary to equity that females should be thus almost wholly excluded as strangers, the pretor admits them to the possession of goods under the section of his edict giving possession of goods on account of proximity; but they are only admitted under this section if there is no agnatus, nor any nearer cognatus coming before them. The law of the Twelve Tables did not introduce any of these distinctions; but, with the simplicity proper to all legislation, called the agnati of either sex, or any degree, to a reciprocal succession, in the same
erat lege quidem duodecim tabularum junior, imperialis autem dispositione anterior, subtillitate quadam excogitata, praetam differentiain inducendo et penitus eae a successione adgnatorum repellebat, omnia alia successionem incognita, donec pretores, paulatim asperitatem juris civilis corrigitentis sive, quod deest, adimplentes, humano proposito alium ordinem suis edictis addide-runt et, cognitionis linea proximitatis nomine introducta, per honorum possessionem eas adjuvabant et pollicebantur bis honorum possessionem, quae unde cognati appellatur. Nos vero legem duodecim tabularum sequentes et ejus vestigia in hac parte conservantes, laudamus quidem pretores suas humanitatis, non tamen eos in plenum cause mederi invenimus: quare etenim, uno eodemque gradu naturali concurrente et adgnationis titulis tam in masculis quam in feminis aqua lance constitutis, masculis quidem dabant ad successionem venire omnium adgnatorum, ex adgnationis autem mulieribus nullis penitus nisi soli soror et adgnatorum successionem patebat aditus? Ideo in plenum omnia reducuentes et ad jus duodecim tabularum eandem dispositionem exequantes, nostra constituione sanximus, omnes legitimam personas, id est per virilem sexum descendentes, sive masculini sive feminini generis sunt, simili modo ad jura successionis legitimae ab intestato vocari secundum gradus sui prerogativam nec ideo excludendas, quia consanguinitatis jura sicuti germanae non habent. manner as sujkeredes. It was an intermediate jurisprudence, posterior to the law of the Twelve Tables, but prior to the imperial constitutions, that in a spirit of subtle ingenuity introduced this distinction, and entirely excluded females from the succession of agnati, no other method of succession being then known, until the pretors, correcting by degrees the asper- ity of the civil law, or supplying what was deficient, were led by their feeling of equity to add in their edicts a new order of succession. The line of cognati was admitted according to the degrees of proximity, and relief was thus afforded to females by the prator giving them the possession of goods called unde cognati. But we, turning to the law of the Twelve Tables, and following in its steps in our legislation on this point, praise the kind feeling of the pretors, but cannot think they have provided a complete remedy for the evil. Why, indeed, when males and females are placed in the same degree of natural relationship, and have equally the title of agnation, should males be permitted to succeed to all their agnati, while females, with the single exception of sisters, are entirely excluded? We therefore, bringing back everything to what it was, and conforming our scheme to that of the Twelve Tables, have declared by our constitution, that all legitima persona, that is descendants from males, whether themselves male or female, shall be equally called to the rights of legal succession ab intestato, according to the proximity of their degree, and shall not be excluded on the ground that they have not the right of consanguinity which sisters have.

The media jurisprudentia here spoken of consisted of the opinions of the jurisprudentes, who extended the principle of the lex Voconia, which limited the succession of females under a testament, to their succession ab intestato. Feminae ad hereditates legitimas ultra consanguineas successiones non admittuntur. Iaque jure civili Voconiana ratione videtur effectum. (Paul. Sent. 4. 8. 22.) Thus a distinction was made among the agnati themselves and the consanguinei, that is, agnati in the second degree; or, in other words, brothers and sisters, natural or adoptive, of the de cujus, were made into a class apart and distinguished from the agnati properly so called. Consan-
4. We have also thought fit to add to our constitution, that one whole degree, but only one, shall be transferred from the line of cognati to the legal succession. Not only the son and daughter of a brother, as we have just explained, shall be called to the succession of their paternal uncle, but together with them the son or daughter of a sister, though she is only by the same father or only by the same mother (but no one in a more distant degree than a son and daughter of such a sister), shall also be admitted to the succession of their maternal uncle. Thus, when a person dies who is a paternal uncle to the children of his brother, and maternal uncle to the children of his sister, then the children of either branch succeed exactly as if they were all descendants from males, and had a right by law to the succession. But this is only if the deceased leaves no brother or sister, for if he leaves any, and they accept the inheritance, the more remote degrees are entirely excluded from the inheritance, as it is to be divided in capite and not in stirpes.

C. vi. 58. 14. 6, 7.

The children of a sister, although only consanguinea, that is, having the same father, or uterina, having the same mother, were thus admitted to the succession as cognati. We might gather from this that uterine brothers and sisters themselves were admitted, although it is not expressed in the text. The code contains a constitution of Justinian (C. vi. 56. 7) expressly admitting them. The changes in the law with respect to the admission of brothers and sisters and their children as cognati were as follows:—In A.D. 498 Anastasius gave the rights of agnation to emancipated brothers and sisters, except that they only received one half of what they would have had if they had remained in the family. (See Tit. 5. 1.) The children of emancipated brothers and sisters still remained cognati only. Justinian gave the rights of agnation, in A.D. 528, to uterine brothers and sisters (C. vi. 56. 7); and in A.D. 531, to the children of uterine sisters (C. vi. 58. 14. 6); and though the children of uterine brothers are not mentioned in the constitution, they must undoubtedly have been placed in the same position. Finally, in a constitution dated October, A.D. 534 (C. vi. 58. 15), and therefore subsequent to the promulgation of the Institutes, Justinian admitted as cognati emancipated brothers and sisters.
without any deduction of a fourth, uterine brothers and sisters, and
nephews and nieces being the children either of emancipated or
uterine brothers and sisters. After that constitution there were
not, therefore, any but *agnati* in the second degree, nor any in the
third degree except the uncles and aunts of the *de cujus*.

4.) There was no division *per stirpes*, which was originally only
a consequence of the *patria potestas*, in the succession of *agnati*.
If one of those in any degree of relationship was dead, his repre-
sentatives did not take his share. He was entirely passed over,
and the others in that degree of relationship were alone called to
the succession.

*Agnati* were spoken of as *legitimi heredes* (cf. *legitimi tutores*,
Bk. i. Tit. 15. pr.), because the inheritance was given to them by
the law of the Twelve Tables, whereas the *cognati* only received it
from the prector.

5. *Si plures sint gradus adgnatorum, aperte lex duodecim tabula-
rum proximum vocat*: *itaque si verbi gratia sit frater defuncti et
alterius fratri filius aut patruus, frater potior habetur.* Et quamvis
singulari numero sae lex proximum vocet, tamen dubium non est, quin
et, si plures sint ejusdem gradus, omnes administrantur: *nam et pro-
prinus ex pluribus gradibus in-
telligitur et tamen dubium non est,
quid licet unus sit gradus adgnatorum, pertineat ad eos hereditas.*

5. When there are many degrees of *agnati*, the law of the Twelve Tables
expressly calls the nearest; if, for ex-
ample, there is a brother of the de-
ceased, and a son of another brother,
or a paternal uncle, the brother is pre-
ferred. And, although the law of the
Twelve Tables calls the nearest *agnatus*
(in the singular number), yet without
doubt, if there are several in the same
degree, they ought all to be admitted.
And, although properly by the nearest
degree must be understood the nearest
of several, yet, if all the *agnati* are in
the same degree, the inheritance un-
doubtedly belongs to them all.

GAI. iii. 15.

6. *Proximus autem, si quidem
nullo testamento facto quisque de-
cesserit, per hoc tempus requiritur,
quo mortuus est is, cujus de here-
ditate queritur.* Quodsi facto te-
stamento quiaquam decesserit, per
hoc tempus requiritur, quo certum
esse coeperit, nullum ex testamento
heredem extaturum: *tum enim pro-
pries quique intelligitur intestatus
decessisse.* Quod quidem aliquando
longo tempore declaratur: *in quo
spatio temporis sepe accidit, ut pro-
xiomire mortuo proximus esse inic-
piat, qui moriente testatore non erat
proximus.*

6. When a man dies without a test-
ament, the nearest *agnatus* is the *ag-
natus* who is nearest at the time of the
death of the deceased. But, if he dies
after having made a testament, then he
is the nearest who is so when it be-
comes certain that there will be no tes-
tamentary heir; for it is only then,
that a man who has made a testament
can be said to have died intestate, and
this sometimes is uncertain for a long
time. Meanwhile, the nearest *agnatus*
may die, and some one become the
nearest who was not so at the death of
the testator.

GAI. iii. 18.

7. *Placebat autem, in eo genere
perciipiendarum hereditatum succes-
sionem non esse, id est quamvis
proximus, qui secundum ea, que

7. But it was settled that in this
order of succession there should be no
devolution, that is to say, that if the
nearest *agnatus*, called in the manner
we have mentioned to the inheritance, either refused it, or died before he entered on it, those following him in agnatic succession were not thereby admitted to succeed him. Here, too, the pretors, though not introducing a complete reform, did not leave the agnati wholly without relief, but ordered that they should be called to the inheritance as cognati, since they were debarred from the rights of agnation. But we, desirous that our law should be as complete as possible, by our constitution, which we were prompted by regard for equity to publish concerning the right of patronage, have decided that a devolution in the succession shall not be denied to agnati. It was indeed absurd to refuse them a right which the pretor gave to cognati, especially as the burden of tutelage devolved on the remoter degree of agnati, if there was a failure of the nearer, and thus the principle of devolution was admitted to impose burdens, and was not admitted to confer advantages.

GAL. ii. 12, 22, 25, 28.

*In heritate legitima successione loci non est.* (PAUL. Sent. 4. 8. 23.) The suus heres or sui heredes in the nearest degree became heirs by force of law. But as to those who were only allowed to rank among the sui heredes without being, strictly speaking, sui heredes, if those in the nearest degree refused to accept the inheritance, or died before entering on it, the succession did not devolve upon any other sui heredes, but went at once to the agnati. (D. xxxviii. 16. 1. 8.) If, in this case or any other, the nearest agnatus refused or died before entering on the inheritance, the succession passed to the cognati without first devolving on any of the more remote agnati. Justinian alters this; and under his system there was a devolution of the succession to the agnati, and therefore probably to those ranked among the sui heredes.

8. Ad legitimam successionem nihil minus vocatur etiam pares, qui contracta fiducia filium vel filiam, nepotem vel neptem ac deinceps emancipat. Quod ex nostra constitutione omnimodo inducitur, ut emancipationes liberorum semper videantur contracta fiducia fieri, cum apud antiquos non alter hoc optinebat, nisi specialiter contracta fiducia pares manumisisset.

8. An ascendant also is called to the legal succession who has emancipated a son, a daughter, a grandson, a granddaughter, or other descendant under a fiduciary agreement. And by our constitution, every emancipation of children is now considered to have been made under such an agreement, while among the ancients the ascendant was never called to the succession unless he had expressly made this agreement at the time of the emancipation.

D. xxxviii. 16. 10; C. viii. 48. 6.
Under the old law the ascendant had nothing to do with the succession _ab intestato_ of his descendant; for if the descendant was in the power of the ascendant, the latter took all the property of which the former could dispose, but did not, as belonging to him by right of his _patria potestas_. If the descendant was emancipated, he was no longer in the family of the ascendant. The emancipated son, in short, had no _agnati_; and in default of _sui heredes_ the inheritance went to his patron, that is, to the person who had emancipated him. This was the fictitious purchaser (see Introd. sec. 42), unless the ascendant who emancipated him made an agreement (_contracta fiducia_) with the purchaser by which the purchaser made himself a trustee of the right of patronage for the ascendant. If this was done, the ascendant succeeded in default of _sui heredes_.

By the later imperial constitutions three changes were made in the position of the ascendant. First, by a constitution of Theodosius and Valentinian (C. vi. 61. 3), and subsequently of Leo and Anthemiuris (C. vi. 61. 4), and lastly of Justinian (C. vi. 59. 11), in the case of goods coming to a son from his mother, the order of succession was thus fixed: 1st, his children and other descendants were admitted; 2ndly, his brothers and sisters, whether of the whole or the half blood; 3rdly, his ascendants, the father being preferred to his grandfather, and so on.

Secondly, Justinian, as we have seen in the 12th Title of the Second Book (pr.), arranged the order of succession to the _peculium_ of a son, placing first the children, then the brothers and sisters, and lastly the father. But in this case the father was not preferred to the grandfather; for the ascendant did not really take in this instance _ab intestato_, but _jure communi_; i.e. the claims of the _patria potestas_ had been deferred to let in the children and brothers; but if there were no children or brothers, the ascendant, who is at the time the _paterfamilias_, took the _peculium_.

Lastly, the succession of emancipated sons was altered by the constitution of Justinian, which made a fiduciary contract implied in every emancipation. The ancestor thus retained all his rights of succession as patron to the emancipated son, and would properly have succeeded immediately after the _sui heredes_; but Justinian admitted the brothers and sisters before him, and the ascendant who emancipated the son had thus the third place in the order of succession. (C. vi. 56. 2.)

_Trt. III. DE SENATUSCONSULTO TERTULLIANO._

_Lex duodecim tabularum_ _ita stricto jure utobatur et præponebat masculorum progeniem et eos, qui per feminini sexus necessitudinem sibi junguntur, adeo expellebat, ut ne quidem inter matrem et filium filiamve ultrro citroque hereditatis Such was the rigour of the law of the Twelve Tables, so decided the preference given by it to the issue of males, and the exclusion of those related by the female line, that the right of reciprocal succession was not permitted between a mother and her
capiendae jus daret, nisi quod pretores ex proximitate cognatorum eas personas ad successionem bonorum possessione unde cognati accommodata vocabant.

children. The pretors, however, admitted such persons, but only in their rank as cognati, to the possession of goods called unde cognati.

Gal. iii. 24, 25.

Until the senatusconsultum Tertullianum was made a mother and her children had no right of succession to each other, except that which the pretor gave them as cognati. The children were not in the power of the mother, and were, therefore, not her sui heredes; they were not in her family, and were, therefore, not her agnati. If, indeed, the mother at her marriage passed in manum viri, she became, in the eye of the law, the daughter of her husband, and as she was thus of the same family with her children, she and they were agnati to each other. But even in the later days of the Republic, a marriage cum conventione in manum had probably become comparatively unusual.

1. Sed haec juris angustiae postea emendata sunt. Et primus quidem divus Claudius matri ad salutarem liberorum amissorum legitimam eorum detulit hereditatem.

2. Postea autem senatusconsulto Tertulliano, quod divi Hadriani temporibus factum est, plenissime de triasti successione matri, non etiam avise deferenda cautum est: ut mater ingenuus trium liberorum jus habens, libertina quattuor ad bona filorum filiarumque admittatur intestatorum mortuorum, licet in potestate parentis est, ut scilicet, cum alieno juri subjecta est, jussu ejus adeat, cujus juri subjecta est.

1. But this strictness of the law was afterwards mitigated. The Emperor Claudius was the first who gave the legal inheritance of deceased children to a mother, to console her grief for their loss.

2. Afterwards, the senatusconsultum Tertullianum, in the reign of the Emperor Hadrian, established the general rule that mothers, but not grandmothers, should have the melancholy privilege of succeeding to their children; so that a mother, born of free parents, having three children, or a freedwoman having four, should be admitted, although in the power of an ascendant, to the goods of her intestate children. Except that a mother in the power of another can only enter upon the inheritance of her children at the command of him to whom she is subject.

D. xxxviii. 17. 2. pr.

This senatusconsultum was passed 158 A.D., in the time of Antoninus Pius, who is here called by his name of adoption. It was only an extension of the lex Papia Poppaea, which had conferred on free persons having three children, and freed persons having four, many exceptional advantages. Husbands and wives, for example, could, under these circumstances, leave to each other a larger share of their property than was otherwise permitted. (ULP. Reg. 15, 16.) This jus trium liberorum, as it was termed, was frequently conferred by special favour of the emperors on persons who had not the requisite number of children; and from a constitution of Honorius and Theodosius (C. viii. 59. 1) it appears that the privilege in the later Empire became universal.
The mother was allowed to rank among the *agnati* by the *senatusconsultum Tertullianum*, but she had a relative rather than a definitive position, as being in a certain degree of agnation. What her exact position was at different periods of the law will be stated at the end of the Fourth Title.

4. Sed nos constitutione, quam in codice nostro nomine decorato posimus, matri subveniendum esse existimavimus, respicientes ad naturam et pauperiam et periculum et sepe mortem ex hunc casum matribus illatam. Ideoque impium esse credidimus, casum fortuitum in ejus admissi detrimentum: si enim ingenua ter vel libertinis quater non pepererit, immerito defraudabatur successionem suorum librorum; quid enim peccavit, si non plures, sed panos pepererit? et dedimus jus legitimum plenum matribus sive ingennis sive libertinis, etsi non ter enixe fuerint vel quater, sed eum tantum vel eam, qui queve morte intercepti sunt, ut et sic vocentur in librorum suorum legitimam successionem.
5. Sed cum antea constitutiones jura legitima per scutantes partim matrem adjuvabant, partim eam praegravabant et non in solidum eam vocabant, sed in quibusdam casibus tertiam partem et ab tetrahentes certis legitimis dabant personis, in alis antem contrarium faciebant: nobis visum est, recta et simplici via matrem omnibus legitimis personis anteponi et sine ullo diminutione filiorum suorum successionem accipere, excepta fratris et sororis personas, sive consanguinei sint sive sola cognationis jura habentes, ut quemadmodum eam tota alio ordini legitimo praeposimus, ita omnes fratres et sorores, sive legitimi sint sive non, ad capiendae hereditates simul vocemus, ita tamen ut, si quidem sole sorores cognatae vel adgnatae et mater defuncti vel defunctae superint, dimidiam quem mater, alteram vero dimidiam partem omnes sorores habent, si vero mater superstitie et fratre vel fratribus solis vel etiam cum sororibus sive legitima sive sola cognationis jura habentibus, intestatus quis vel intestata moriatur, in capita distributur ejus hereditas.

5. The constitutions of former emperors, relative to the right of succession, were partly favourable to mothers, and partly unfavourable. They did not always give the mothers the entire inheritance of their children, but in some cases deprived them of a third, which was given to certain agnati, and in other cases, doing just the contrary, gave a third. But it seems right to us that mothers should receive the succession of their children without any diminution, and that they should be decidedly and exclusively preferred before all legal heirs, except the brothers and sisters of the deceased, whether by the same father or having only the rights of cognition. And as we have preferred the mother to all other legal heirs, we call all brothers and sisters, legal or not, to the inheritance together with the mother, the following rule being observed. If there are living only sisters agnatae or cognatae, and the mother of the deceased, the mother shall have one half of the goods, and the sisters the other half. But if there are living the mother, and also a brother or brothers only, or brothers and also sisters, whether having agnatic rights, or only having the rights of cognati, then the inheritance of the intestate son or daughter shall be divided in capita.

C. vi. 56. 7.

In the code of Theodosius (v. I. 1), we find two constitutions, one of Constantine, the other of Valentinian and Valens, which made the first change in the jus liberorum introduced by the lex Papia Poppaea. By these constitutions it was enacted that if there were persons in a certain degree of agnation with the deceased, namely, a paternal uncle, or a paternal uncle’s son or grandson, or an emancipated brother, then the mother, instead of excluding them, as, if she had the jus liberorum, she would have done, divided the inheritance with them, taking two-thirds if she has the jus trium liberorum, and one-third if she had not. This enactment was, therefore, a gain to those who had not the jus liberorum, and a loss to those who had. Justinian did away altogether with the jus liberorum and the distinctions founded upon it.

6. Sed quemadmodum nos matribus prosperimus, ita eas oportet sue suboli consulere: scituris eis, quod, si tutores liberis non peterint vel in locum remoti vel excusati intra annum petere neglexerint, ab eorum

6. And as we have thus taken care of the interests of the mothers, they ought in return to consult the welfare of their children. Let them know, then, that if they do not demand a tutor for their children, or neglect to
impuberum morientium successione merito repellentur. ask within a year for the appointment of a new tutor in the place of one who has been removed or excused, they will be deservedly excluded from the succession of their children who may die before the age of puberty.

D. xxxviii. 17. 2. 48.

7. Licet autem vulgo quiesitus sit filius filiave, potest ad bona ejus mater ex Tertulliano senatusconsulto admitti. 7. Although a son or a daughter is born of an uncertain father, yet the mother may be admitted to succeed to their goods by the senatusconsultum Tertullianum.

D. xxxviii. 17. 2. 1.

The natural tie is all that is regarded in this case; this is equally strong between the mother and child, whoever may be the father.

Trt. IV. DE SENATUSCONSULTO ORPHITIANO.

Per contrarium autem ut liberi ad bona matrum intestatarum admissantur, senatusconsultum Orphitianum effectum est, quod latum est Orphito et Rufo consulibus, divi Marci temporibus. Et data est tam filio quam filiae legitima hereditas, etiam aliensi juri subjecta sunt: et preferuntur et consanguinei et adgnatis defuncte matris. Reciprocally children are admitted to the goods of their intestate mothers by the senatusconsultum Orphitianum, made in the consulship of Orphitus and Rufus, in the reign of the Emperor Marcus. By this senatusconsultum the legal inheritance is given both to the sons and daughters, although in the power of another, and they are preferred to the consanguinei and to the agnati of their deceased mother.

D. xxxviii. 17. 9; C. vi. 57. 1.

The senatusconsultum Orphitianum was made A.D. 178, in the time of Marcus Aurelius and Commodus. Previously, children could not succeed to their mother, except as cognati. But by this senatusconsultum they were preferred to the consanguinei, that is, the brothers and sisters, natural or adoptive, as well as to all other agnati.

1. Sed cum ex hoc senatusconsulto nepotes ad avise successionem legitimo jure non vocabantur, postea hoc constitutionibus principalibus emendatum est, ut ad similitudinem filiorum filiarumque et nepotes et neptes vocentur. 1. But since grandsons and granddaughters were not called by this senatusconsultum to the legal succession of their grandmother, the omission was afterwards supplied by the imperial constitutions, so that grandsons and granddaughters are now called to inherit, just as sons and daughters are.

C. vi. 55. 9.

The constitution enacting this given in the Code is one of Valentinian, Theodosius, and Arcadius.

2. Sciendo autem est, huissimodi successiones, quae a Tertulliano 2. It must be observed that these successions, derived from the senatus-
et Orphitiano deferuntur, capitis
demissione non peremità propter
illum regulam, qua novae hereditates
legitime capitis demissione non
perunt, sed illas sole, quae ex lege
duodecim tabularum deferuntur.

consulata Tertullianum et Orphiti-
anum, are not lost by a capitis demini-
tio. The rule is, that legal inheritances
given by the later law are not destroyed
by capitis deminutio, which affects
those only that are given by the law of
the Twelve Tables.

D. xxxviii. 17. 1. 8.

It is only the minima capitis deminutio which is here spoken
of. Any one who sustained the maxima or media deminutio, as
he ceased to be a citizen, ceased to have any rights of succession.

3. Novissime sciendum est, etiam
illos libros, qui vulgo quasiti sunt,
ad matris hereditatem ex hoc sena-
tusconsulto admitti.

3. Lastly, it must be observed,
that even children born of an un-
certain father are admitted by the
senatusconsultum Orphitianum to the
inheritance of their mother.

D. xxxviii. 17. 1. 2.

Justinian afterwards altered this, so as to exclude such children
from taking anything, whether by will, or on intestacy, or by gift
inter vivos from their mother, if she was of high rank (illustris), or
if she had other children born in lawful marriage. (C. vi. 57. 5.)

4. Si ex pluribus legitimis heredi-
bus quidam omiserint hereditatem
vel morte vel alia causa impediti
fuerint, quemun adesant: reliquis,
qui adierint, ad crescit illorum portio
et, licet ante descesserint, qui adierint,
ad heredes tamem eorum pertinet.

4. When there are many legal
heirs, and some renounce the
inheritance, or are prevented by death,
or any other cause, from accepting
it, then the portions of such persons
accrue to those who accept the
inheritance; and if any of those who
accept happen to die beforehand, the
portions accruing to them will go to
their heirs.

D. xxxviii. 16. 9.

This paragraph has nothing to do with the senatusconsultum
Orphitianum. It refers to the right of accrual enjoyed by all
heredes legiti.

If any of those called to share an inheritance did
not take his share, it was divided among all those who entered on
the inheritance; and, if any of those who had entered died before
receiving the share that accrued to him, this accruing share passed
to his heirs, his interest in it having become fixed, and made
transmissible to his heirs by his entering on the inheritance.

The following were the principal changes in the law of the
succession of the agnati. By the law of the Twelve Tables, agnati,
i.e. collaterals in the same civil family, succeeded in default of sui
heredes. Subsequently, different classes of persons were allowed
to rank as agnati who were not so. 1. Emancipated brothers and
sisters were allowed to rank as agnati by Anastasius, and their
children were allowed to do so by Justinian. 2. Under Justinian,
a peculiar order of succession was fixed on for persons emancipated;
first came their children; secondly, their brothers and sisters;
thirdly, the ascendant emancipator. 3. Justinian placed uterine brothers and sisters and their children on the same footing as consanguinei and their children. 4. The mother was allowed to succeed to her children by the senatusconsultum Tertullianum, and children to their mother by the senatusconsultum Orphitium. As the position of the mother is a subject of some complexity, it is treated separately below. 5. Grandchildren succeeded to their grandmother by a constitution of Valentinian, Theodosius, and Arcadius (par. 1).

There were also two other points, besides the admission of these persons excluded by the strict definition of agnati, in which the law underwent alterations. First the Twelve Tables made no distinction of sex in the agnati; the prudentes limited the succession of females to the second degree. Justinian restored the law of the Twelve Tables on this point, and permitted no distinction of sex. (Tit. 2. 3.) Secondly, under the law of the Twelve Tables, there was no devolution among the agnati; if the nearest refused, the more remote could not come in their place; Justinian permitted such a devolution to take place. (Tit. 2. 7.)

To have a place in the succession under the senatusconsultum Tertullianum, the mother must have the jus liberorum, the privileges accorded to free persons having three or freed persons having four children, and she had not a definite place, but one varying according as there were or were not other persons to preclude or share her claim. The chief provisions of the law on this head may be stated as follows.

We will first consider the position of the mother, having the jus liberorum, when the father is dead. 1. If her son died leaving children, his children, if in his family, would succeed as sui heredes. But these children might be in an adoptive family, and so have no claim, previously to Justinian's legislation, to the inheritance of their natural father. If there were agnati of the deceased, then the conflict was between the mother and these agnati, and the mother excluded the adopted children. If there were no agnati, then the conflict was between the mother and the adopted children as cognati, and the children excluded the mother. (D. xxxviii. 17. 2. 9.) If her daughter died leaving children, they excluded her under the imperial legislation. (Tit. 3. 3. and C. vi. 57. 1.) 2. If her son or daughter died childless and without brothers or sisters living, the mother took. If there was a brother of the deceased, he excluded the mother and shared with the sisters, if any. If there were no brothers, but there were sisters, the mother shared with them. (Tit. 3. 3.) Until we get to the legislation of Justinian, it is only of brothers and sisters by the same father. consanguinei, -ae, that we are speaking. 3. Under the later emperors, previously to Justinian, the position of the mother with regard to a paternal uncle, or a paternal uncle's son or grandson, or an emancipated brother of the deceased, was as follows: If the mother had not the jus liberorum, she was no longer
excluded by such *agnati*, but took one-third of the inheritance. If she had the *jus liberorum*, she no longer excluded them altogether, but only took two-thirds. (Tit. 3. 5.)

Secondly, we will take the case of the father as well as the mother having the *jus liberorum* being alive. The father took, if in the same family with the deceased child. But (1) the father might have been emancipated or given in adoption, and the deceased child not. Here, if there were *agnati* of the deceased, the father was excluded, and also the mother if there was a brother of the deceased among the *agnati*; if there was no brother, she shared with sisters, and excluded remoter *agnati*. If there were no *agnati*, or if the sisters disclaimed, then the conflict was between the father as one of the *cognati* and the mother, and then the father excluded the mother. (D. xxxviii. 17. 2. 17, 18.) (2) The deceased might have been emancipated, and then the father excluded the mother. There might, however, be living the father’s father. He, if the father was alive, being preferred to the father, was also preferred to the mother. (D. xxxviii. 17. 5. 2.) The conflict was here not between the mother and the grandfather directly, but between the mother and the grandfather claiming through the father. But if the father was dead, then the conflict was directly between the mother and the grandfather (*inter eos solos agitur*, Tit. 3. 3), and the mother was preferred.

Justinian made the following changes affecting the position of the mother. 1. He entirely did away with the *jus liberorum*, and put all mothers on an equality. (Tit. 3. 5.) 2. He put emancipated and uterine brothers and sisters and their children on a level with consanguinei, -e, and they therefore had to be taken into account when the mother’s position had to be determined with regard to the brothers and sisters of the deceased.

Some other minor points as to the succession of mothers and children are worth noticing. (1) The rule as to there being no devolution among *agnati* did not apply to the mother. If the *agnati* who preceded her refused, she took; if she refused, the *agnati* whom she preceded took. (D. xxxviii. 17. 2. 9, 14, 20.) (2) The *minima capitis deminutio* did not interfere with successions under the *senatusconsultum Tertullianum* or *Orphitium* (Tit. 4. 2); and (3) children born of an uncertain father inherited from their mother under the *senatusconsultum Orphitium* (Tit. 4. 3), and their mother from them under the *senatusconsultum Tertullianum*. (Tit. 3. 7.) (4) Mothers were excluded from succeeding to their children dying under the age of puberty, if they had not provided them with tutors. (Tit. 3. 6.)

**Trt. V. DE SUCCESSIONE COGNATORUM.**

Post suos heredes esque, quos
inter suos heredes pretor et constitutiones vocant, et post legitos

After the *sui heredes* and those whom the pretor and the constitutions call to inherit among the *sui*
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(quo numero sunt adgnati et hi, quos in locum adgnatorum tam supra dicta senatusconsulta quam nostra erexit constitutio) proximos cognatos pretor vocat. heredes, and after the legal heirs, that is, the agnati and those whom the above-mentioned senatusconsulta and our constitution have placed among the agnati, the pretor calls the nearest cognati.

D. xxxviii. 15. 1; D. xxxviii. 7. 2. 4.

The law of the Twelve Tables recognised only the succession of (1) sui heredes; (2) agnati; (3) gentiles. If there were no gentiles, the inheritance lapsed to the state. In plebian families, or rather in such plebian families as were not parts of a plebian gens, if there were no agnati, the inheritance would lapse at once.

The subject of gentilitias is too obscure, and repays investigation too little, to permit us to enter into it here. Probably the original notion of gentiles was that of members of some pure uncorrupted patrician stock, though not necessarily of the same descent, but bearing the same name, and having the same sacra. (See Introd. sec. 2.) Probably, also, freedmen and clients of gentiles were, in some degree, considered as themselves gentiles; probably if their property was not claimed by their patron, it went to the members of his gens, but they had not any claim on the property of any other gentiles. We know also that there were plebian gentes, formed probably by the marriage of a patrician with a plebian before the plebs received the connubium. Members of plebian gentes would, we may suppose, have the rights of gentilitias towards other members of the same plebian gens, and it would seem that they had them towards the members of the patrician gens, from which they were an offset (Cic. de Orat. i. 39). Of the mode in which the gentiles took the inheritance, we know nothing, nor at how late a period of history the gentes were still really in existence. Gaius (iii. 17) treats the subject as one of mere antiquarian interest. Probably at the time of the pretor's legislation there were few families that could boast a descent so pure and accurately known as to satisfy the requisites of gentilitias. At any rate, the pretors felt themselves at liberty to favour, in every way, the tie of blood, and they accordingly called the cognati to the succession. (See further, Ortolan, iii. 30 et seq.; Hunter, 657.)

1. Qua parte naturalis cognatio spectatur. Nam adgnati capite deminuti quiique ex his progeniti sunt, ex lege duodecim tabularum inter legitimos non habentur, sed a pretore tertio ordine vocantur, exceptis solis tantummodo fratre et sorore emancipatis, non etiam liberis eorum, quos lex Anastasia cum fratribus integri juris constitutis vocat quidem ad legitimam fratria hereditatem sive sororis, non aquis tamen partibus, sed cum aliquo deminu-
their brother or sister (not, indeed, giving them an equal share, but making a deduction set forth in the constitution), and prefers them to all agnati of an inferior degree, even though these agnati have undergone no capitiss de-minutio, and, of course, prefers them to all cognati.

Gal. iii. 21, 27; C. v. 30. 4.

We have already spoken of this lex Anastasiana in the note to Tit. 2. 4, and noticed the constitution of 554, by which Justinian admitted as agnati the children of emancipated brothers and sisters, and did away with the deduction mentioned in the text, namely, that of one-fourth.

2. Collateral relations united only by the female line are also called by the pretor in the third order of succession, by title of their proximity.

Gal. iii. 30.

3. Liber quaque, qui in adoptiva familia sunt, ad naturalium parentum hereditatem hoc eodem gradu vocantur.

3. Children, who are in an adoptive family, are likewise called in the third order of succession to the inheritance of their natural parents.

Gal. iii. 81.

Justinian's change in the law of adoption left the adoptive child, unless adopted by an ascendant, in his natural family, and, therefore, he could come in as a suus heres, or agnatus, and not merely as a cognatus. But the text would still be applicable to persons adopted by an ascendant and to persons sui juris, who arrogated themselves.

4. Vulgo quesitos nullum habere adgnum, manifestum est, cum ad Nations a patre, cognatio sit a matre, hi autem nullum patrem habere intellectuntur. Eadem ratione nec inter se quidem posunt videri consanguinei esse, quia consanguinitatis jus species est adnationis: tantum igitur cognati sunt sibi, sicut et matris cognatus. Itaque omnius isis ea parte competit bonorum possessio, qua proximitatis nomine cognati vocantur.

4. It is manifest that children born of an uncertain father have no agnati, insomuch as agnation proceeds from the father, cognition from the mother, and such children are looked upon as having no father. And, for the same reason, consanguinity cannot be said to subsist between these children, because consanguinity is a species of agnation. They can, therefore, only be related to each other as cognati by being so related by their mother; and it is for this reason that all such children are admitted to the possession of goods by that part of the edict which calls the cognati by title of their proximity.

D. xxxviiii. 8. 2. 4.

5. Hoc loco et illud necessario admodum sumus, adnationis quidem jure admissi aliquem ad hereditatem

5. Here we may observe, that by right of agnation any one may be admitted to inherit, although in the tenth
et si decimo gradu sit, sive de lege duodecim tabularum queramus, sive de edicto, quo pretor legitimis hereditibus daturum se bonorum possessionem pollicetur. Proximitatis vero nomine his solis pretor promittit bonorum possessionem, qui usque ad sextum gradum cognationis sunt, et ex septimo a sobrino sobrinaque nato nativae.

D. xxxviii. 16. 2. 1; D. xxxviii. 8. 1. 8; D. xxxviii. 8. 9. pr.

The agnati were not limited by the tenth degree. (See Tit. 6. 12.) This degree is only given as an instance of how far the succession might go. But the sixth degree was the limit, with the exception given in the text, of the succession of cognati.

**Tr. VI. DE GRADIBUS COGNATIONIS.**

Hoc loco necessarium est expone. quae propter gradus cognationis numerentur. Qua in re inprimis admonendi sumus, cognationem aliam supra numerari, aliam infra, aliam ex transverso, que etiam ex latere dicitur. Superior cognatio est parentum, inferior liberorum, ex transverso fratrum sororumve eorumque, qui ex his progenendarunt, et convenienter patrui, amite, avunculi, materterae. Est superior quidem et inferior cognatio a primo gradu incepit: at ea, que ex transverso numeratur, a secundo.

It is now necessary to explain how the degrees of cognation are computed; and first we must observe, that one cognation is reckoned by ascending, a second by descending, and a third by going transversely, or, as it is also called, collateral. The cognation reckoned by ascending is that of ascendants; that reckoned by descending is that of descendants; that reckoned transversely is that of brothers and sisters, and their issue, and consequently that of uncles and aunts, whether paternal or maternal. In the ascending and descending cognation the nearest cognatus is in the first degree; in the transverse, the nearest is in the second.

D. xxxviii. 10. 1. pr. and 1.

1. Primo gradu est supra pater, mater, infra filius, filia.
2. Secundo supra avus, avia, infra nepos, neptis, ex transverso frater, soror.
3. Tertio supra proavus, proavia, infra pronepos, proneptis, ex transverso fratre sororisque filius, filia et convenienter patruus, amita, avunculus, materterae. Patruus est patris

1. In the first degree are, ascending, a father or a mother; descending, a son or a daughter.
2. In the second degree are, ascending, a grandfather or a grandmother; descending, a grandson or granddaughter; in the collateral line, a brother or a sister.
3. In the third degree are, ascending, a great-grandfather or a great-grandmother; descending, a great-grandson or great-granddaughter; in the collateral line, the son or
frater, qui Graece μᾶρις vocatur; avunculus est matris frater, qui apud Graecos proprio μᾶρις appellatur: et promiscue θείος dicitur. Amita est patris soror, matertera vero matris soror: utraque θεία vel apud quosdam θείας appellatur.

4. Quarto gradu supra abavus, abavias, infra abneos, abneptis, ex transverso fratris sororisque nepos, nepetis et conveniunt patruus magnus, amita magna (id est avi frater et soror), item avunculus magnus, matertera magna (id est avic frater et soror), consobrinus, consobrina (id est qui queve ex fratibus aut sororibus progerrantur). Sed qui dam recte consobrinos eos propri propat dici, qui ex duobus sororibus progerrantur, quasi consororinos: eos vero qui ex duobus fratibus progerrantur, proprie fratres patruæ vocari (si autem ex duobus fratibus filiæ nascantur, sorores patruæ appellatur): at eos, qui ex fratre et sorore progerrantur, amitinos proprie dici (amitae tuae filii consobrimum te appellant, tu illos amitinos).

5. Quinto supra atavus, atavias, infra adneos, adneptis, ex transverso fratris sororisque proneos, proneptis et conveniunt pater truus, proamita (id est proavi frater et soror), proavunculus, promater tera (id est proavici frater et soror), item fratris patruæ, sororis patruæ, consobrini et consobrine, amitini, amitiones filius, filia, proprius sobro, sobrina (hi sunt patru magni, amitae magni, avunculi magni, materteræ magnæ filiius, filia).

daughter of a brother or sister; and so accordingly is an uncle or an aunt, whether paternal or maternal. Patruus is a father's brother, called in Greek μᾶρις; avunculus is a mother's brother, in Greek μᾶρις; θείος is applied indifferently to either; amita is a father's sister, matertera a mother's sister, and each is called in Greek θεία, indifferently, and sometimes θείαs.

4. In the fourth degree are, ascending, a great-great-grandfather, or a great-great-grandmother; descending, a great-great-grandson, or a great-great-granddaughter; in the collateral line, the grandson or the granddaughter of a brother or a sister; as also a great-uncle or great-aunt, paternal, that is, the brother or sister of a grandfather; or maternal, that is, the brother or sister of a grandmother; and first cousins (consobrini,-a), that is, the children of brothers or sisters; but to speak strictly, according to some, it is the children of sisters that are properly called consobrini, as if consororini; the children of brothers are properly fratres patruæ, if males; sorores patruæ, if females; the children of a brother and of a sister are properly amitini; the children of your amita (aunt by the father’s side) call you consobrini, and you call them amitini.

5. In the fifth degree are, ascending, a great-grandfather’s grandfather, or a great-grandfather’s grandmother; descending, a great-grandson or a great-granddaughter of a grandson or granddaughter; in the collateral line, a great-grandson or great-grand daughter of a brother or sister, as also a great-grandfather’s brother or sister, or a great-grandmother’s brother or sister; also, the son or daughter of a first cousin, that is, of a frater or soror patruæ, of a consobrini or consobrina, or of an amitini or amitina; also cousins who precede by a degree second cousins, that is, the son or daughter of a great-uncle or great-aunt, paternal or maternal.
Propior sobrino is, to use the exact equivalent, a first cousin once removed. He is one degree nearer (propius) than a sobrinus or second cousin.

6. Sexto gradu sunt supra tritavus, tritavia, infra trinepos, trineptis, ex transverso fratis sororisque abnepos, abneptis et convenienter abpatruus, abamita (id est abavi frater et soror), abavunculus, abmatertera (id est abavies frater et soror), item sobrini sobrinseque (id est qui queue ex fratrius vel sororibus patruelibus vel consobrinis vel amitinis progenerantur).

6. In the sixth degree are, ascending, a great-grandfather's great-grandfather, or a great-grandfather's great-grandmother; descending, the great-grandson or great-granddaughter of a great-grandson or a great-granddaughter; in the collateral line, a great-great-grandson or a great-great-granddaughter of a brother or sister; as also, a great-great-grandfather's brother or sister, and a great-great-grandmother's brother or sister; also, second cousins, that is, the sons and daughters of first cousins in general, whether the first cousins are sprung from two brothers or two sisters, or a brother and a sister.

D. xxxviii. 10. 8.

The list of the persons belonging to the sixth degree here given is not complete, as will be seen by looking at the accompanying table. To make the list complete we should have to insert, as Huschke inserts in the text after abavias frater et soror, the following words:—‘Item propatruis, proamites, proavunculis, promaterteres filius, filia, item fratis patruelis, sororis patruelis, consobrini, consobrine, amitini, amitines, nepos, nepies.’


7. It is sufficient to have shown thus far how degrees of cognition are reckoned; and from the examples given the more remote degrees may be computed; for each generation always adds one degree; so that it is much easier to express in what degree any person is related to another than to denote such person by his proper term of cognition.

D. xxxviii. 10. 10. 9.

8. Adgnationis quoque gradus eodem modo numerantur.

8. The degrees of agnation are reckoned in the same manner.

9. Sed cum magis veritas etesam fide quam per aures animis hominum infigitur, ideo necessarium duximus post narrationem graduum etiam eos presenti libro inscribi, quatenus possint et auribus et inspicerne adulescentes perfectissimam gradu num doctrinam adipsici.

This table is given in the opposite page.
10. Illud certum est, ad serviles cognitiones illam partem edicti, qua proximitatis nomine bonorum possesso promittitum, non pertinere: nam nec ulla antiqua legis talis cognatio computabatur. Sed nostra constitutione, quam pro jure patronatus fecimus (quod jus usque ad nostra tempora satis obscurum atque nube plenum et undique confusum fuerat), et hoc, humanitate suggerente, concessimus, ut si quis in servili consortio constitutus liberum vel liberos habuerit sive ex libera sive servilis condicionis muliere, vel contra serva mulier ex libero vel servo habuerit liberos quia vacuumque sexus, et ad libertatem his perveniensibus et hi, qui ex servili ventre nati sunt, libertatem meruereunt, vel dum mulieres libere erant, ipsi in servitute eae habuerunt et postea ad libertatem pervenerunt, ut hi omnes ad successionem vel patris vel matris veniant, patronatus jure in hae parte sopito: hos enim liberos non solum in suorum parentum successionem, sed etiam alteram in alterius mutnum successionem vocavimus, ex illa lege specialiter eos vocantes, sive soli invenianter, qui in servitute nati et postea manumissi sunt, sive una cum aliis, qui post libertatem parentum concepti sunt, sive ex eadem matre vel eodem patre sive ex aliis nuptis, ad similitudinem eorum, qui ex justis nuptis procreati sunt.

10. It is certain that the part of the edict in which the possession of goods is promised by title of proximity, does not apply to servile cognition, which was not recognised by any ancient law. But, by our constitution concerning the right of patronage, a right hitherto so obscure, so cloudy and confused, we have enacted, from a feeling of humanity, that if a male slave lives with, and has children by, a woman either free or a slave, or conversely, if a female slave has a child or children of either sex by a freeman or a slave, then if those of the parents who are not free are enfranchised, and the children, whose mother was a slave, are also made free; or if the mothers were originally free, but the fathers had lived with them after they had been reduced to a servile condition and afterwards both parents had been made free:—then in these cases, the children shall all succeed to their father or mother, the right of patronage as to this portion of it lying dormant. For we have called these children to succeed not only to their parents, but also mutually to each other, and that whether they have all been born in servitude and afterwards enfranchised, or whether they succeed with others who were conceived after the enfranchisement of their parents; and also whether they have all the same father and mother, or have a different father or mother, exactly as would be the case with the issue of parents legally married.

D. xxxviii. 8. 1. 2; C. vi. 4. 4.

The text here is very obscure. It is, perhaps, obvious that the children are to succeed to both their parents, and to inherit from each other without interference from the rights of patronage in the following cases:—(1) When the father and mother are slaves and they and the children have been enfranchised. (2) When the father is a slave and the mother a freewoman, and the father has been enfranchised. (3) When the father is a freeman, the mother a slave, and the mother and children have been enfranchised. But the text goes on to contemplate a further case in the words vel dum mulieres libere erant ipse in servitute eae habuerunt. The ordinary reading is eae, and then ipsi may probably be taken of their masters: but this is exactly the first of the above-mentioned cases over again, and has been stated in the words si quis in servili consortio constitutus liberum vel liberos habuerit ex libera muliere. Huschke reads eae, and suggests that the passage may refer to women who, under the senatusconsultum Claudianum
(Tit. 12. 1), had been made the slaves of the masters of the fathers, and thus the fourth case would be that of children who were the issue of a slave by a mother originally free, but reduced to the position of a slave, and whose parents had been subsequently manumitted. This suggestion has the advantage of making out a fourth case, and is perhaps therefore to be adopted; but some violence has to be put on the Latin to carry it out, and it must be remembered that the senatusconsultum Claudianum was abrogated by Justinian.

11. Repetitis itaque omnibus, quae jam tradidimus, appareat, non semper eos, qui parum gradum cognationis optinent, pariter vocari, eoque amplius nec eum quidem, qui proximior sit cognatus, semper potior esse. Cum enim prima causa sit suorum heredum quaeque inter suos heredes jam enumeravimus, appareat, praeceptum vel absque potiori definiti potior esse quam fratrem ant patrem matremque defuncti, cum aliquin pater quidem et mater, ut supra quoque tradidimus, primum gradum cognationis opteant, frater vero secundum, pronepos autem tertio gradu sit cognatus et absque quarto: nec interest, in potestate mortis fuerit an non fuerit, quod vel emancipatus vel ex emancipato aut ex feminino sexu propagatus est.

11. To recapitulate what we have said on this subject, it appears that those who are in the same degree of cognition are not always called equally to the succession; and further, that even the nearer in degree of cognition is not always preferred. For, as the first place is given to sui heredes, and to those who are numbered with them, it is evident that the great-grandson or great-great-grandson is preferred to the brother or even the father or mother of the deceased, although a father and mother (as we have before observed) are in the first degree of cognition, a brother in the second, a great-grandson in the third, and a great-great-grandson in the fourth; neither does it make any difference whether the descendants were under the power of the deceased at the time of his death, or out of his power, either by being themselves emancipated, or by being the children of those who were so, nor whether they were descended by the female line.

D. xxxviii. 10. 1. 2.

12. Amotis quoque sui heredibus quoque inter suos heredes vocari diximus, adgnatus, qui integrum jus adgnationis habet, etiamsi longissimo gradu sit, plerumque potior habetur quam proximior cognatus: nam patru nepos vel pronepos avunculo vel materterae preferetur. Tamen igitur dicimus aut potiori haberii eum, qui proximiorum gradum cognitionis optinet, aut pariter vocari eos, qui cognati sunt, quotiens neque suorum heredum jure quique inter suos heredes sunt, neque ad gnationis jure aliquis preferri debeat secundum ea, quem tradidimus, exceptis fratre et sorore emancipatis, qui ad successionem fratrum vel sororum vocantur, qui et si capite diminuti sunt, tamen preferentur ceteris ulterioris gradus adgnatis.

12. But, when there are no sui heredes, nor any of those who are called with them, then an agnatus who has retained his full rights, although he be in the most distant degree, is generally preferred to a cognatus in a nearer degree; thus the grandson or great-grandson of a paternal uncle is preferred to a maternal uncle or aunt. Thus, when we say that the nearest in degree of cognition is called to the succession, or, if there be many in the same degree, that they are all called equally, it is subject to there being no sui heredes, nor any of those who are called with them, nor any one who ought to be preferred by right of agnatio, according to the principles we have laid down. And we must notice the exception made in the case of an emancipated brother and
sister who are called to the succession of their brothers and sisters; for, although they have suffered a capitis diminuto, they are nevertheless preferred to all agnati of a more remote degree.

Gal. iii. 27, 29; C. v. 30. 4.

Tit. VII. DE SUCCESSIONE LIBERTORUM.

Nunc de libertorum bonis videamus. Olim itaque licebat liberto patronum suum impune testamento praterire: nam ita demum lex duodecim tabularum ad hereditatem liberti vocabat patronum, si testatus mortuus esset libertus, nullo suo herede relicto. Itaque intestato quoque mortuo liberto, si ex suum heredem reliquisset, nihil in bonis ejus patrono juris erat. Et si quidem ex naturalibus liberis aliquem suum heredem reliquisset, nulla videbatur quarela: si vero adoptivus filius esset, aperte iniquum erat, nihil juris patrono superesse.

We will now speak of succession to freedmen. A freedman might formerly, with impunity, omit in his testament any mention of his patron, for the law of the Twelve Tables called the patron to the inheritance only when the freedman died intestate without leaving any suus heredes. Therefore, though he had died intestate, yet if he had left a suus heres, the patron had no claim upon his estate. And, certainly, when the suus heres was a natural child of the deceased, the patron had no cause of complaint; but when the suus heres was only an adopted son, it was manifestly unjust that the patron should have no claim.

Gal. iii. 39, 40.

The law of the Twelve Tables regulated the succession to enfranchised slaves as follows: an enfranchised slave had no agnati, for he belonged to no civil family; but he might marry and found a family of his own, and then his children would be his suiheredes, or he might gain suis heredes by adoption. If he died intestate, his suis heredes succeeded to him; and in default of suis heredes, the patron, or, if the patron was dead, the children of the patron, took the place of agnati, and received the inheritance in capite, as agnati did. The enfranchised slave had, however, full power to make a testament, and might pass over both his own suis heredes and his patron. A female slave, however, if emancipated, could not exclude the patron from her inheritance; for she could have no suis heredes, being a woman; and as she was always, on account of her sex, considered under the tutela of her patron, she was incapable of making a testament, unless with the consent of her patron. (ULP. Leg. 29. 2; Gal. iii. 43.)

1. Qua de causa postea pretoris edicto haec juris iniquitas emendata est. Sive enim faciebat testamentum libertus, jubebat ita testari, ut patrono partem dimidiam bonorum suorum reliqueret: et si aut nihil aut minus partis dimidiae reliquerat, dabatur patrono contra tabulas testamenti partus dimidiae.

1. This unfairness in the law was therefore afterwards amended by the edict of the pretor. Every freedman who made a testament was commanded to make such a disposition of his property as to leave one half to his patron; and, if the testator left him nothing, or less than a half, then the possession of half was given to the patron contra
bonorum possessio. Si vero interstatus moriebat, suo herede relictio filio adoptivo, dabatur eaque patrono contra hunc suum heredem partis dimidiae bonorum possessio. Prod esse aulem liberto solebant ad exclusendum patronum naturales liberi, non solum quos in potestate mortis tempore habebat, sed etiam emancipati et in adoptionem dati, si modo ex aliqua parte heredes scripti erant aut preteriti contra tabulas bonorum possessionem ex edicto petierant: nam exhereditati nullo modo repellebant patronum.}


tabulas. And if a freedman died intestate, leaving an adopted son as his suus heres, still the possession of a half was given to the patron. But the patron was excluded by the natural children of a freedman, not only by those in his power at the time of his death, but by those children also who had been emancipated or given in adoption, provided that they were instituted heirs for some part, or, in case they were omitted, had demanded the possession contra tabulas, under the pretorian edict. For in no way did disinherit children exclude the patron.

GAI. iii. 41.

The pretor considered it hard that a testament, or sui heredes gained by adoption or by the marriage of a wife in manu, should exclude the patron. This was to exclude him by purely voluntary acts of the freedman. If the freedman had children really born to him, that constituted a good reason why the patron should be excluded, and in this case the pretor did not interfere. It is to be observed that the pretor left the law as it was if it was a patrona, or a female child of the patronus, who was excluded; but by the lex Papia Poppea women with a certain number of children were placed on a level with men in this respect (GAI. iii. 49; ULP. Reg. 29. 6).

2. Postea lege Papia aduicta sunt jura patronorum, qui locupletiores libertos habeabant. Cautum est enim, ut ex bonis ejus, qui ses tertiorum centum milium patrimonii reliquerit et pauciores quam tres liberos habebat, sive est testamento facto, sive intestato mortuus erat, viridis pars patrono debeatur. Itaque cum unum filium filiamve heredem reliquerit libertus, perinde pars dimidia patrono debetur, ac si is sine ullo filio filiave deceisset: cum duos duaeve heredes reliquerat, tertia pars debebatur patrono: si tres reliquerat, repellebatur patronus.

2. But afterwards the rights of patrons, who had wealthy freedmen, were enlarged by the lex Papia, which provided that the patron should have one equal share in the distribution of the effects of his freedman, whether dying testate or intestate, if the freedman had left a patrimony of a hundred thousand sesterces, and fewer than three children. Thus, if a freedman possessed of such a fortune left only one son or daughter as heir, a half was due to the patron, exactly as if the deceased had died testate, without having any son or daughter. But, when there were two heirs, male or female, a third part only was due to the patron; and, when there were three, the patron was wholly excluded.

GAI. iii. 42.

By the same law, freedwomen having four children were so far freed from the jus patronatus that the patron received only an equal share. (ULP. Reg. xxix. 3; GAI. iii. 44.)

8. Sed nostra constitutio, quam pro omnium notione Graeca lingua, in a compendious form, and in the
compendioso tractatu habito, compositionis, ita hujusmodi causas definitivum, ut si quidem libertus vel liberta minores centenariis sint, id est minus centum aureis habeant substantiam (sic enim legis Papiae summam interpretati sumus, ut pro mile sestertii unus aureus computetur), nullum locum habest patronus in eorum successionem, si tamen testamentum fecerint. Sin autem intestati decesserint, nullo liberorum relicto, tunc patronatus jus, quod erat ex lege duodecim tabularum, integrum reservavit. Cum vero maiores centenariis sint, si heredes vel bonorum possessores liberi habeant sive unum sive plures cujusque sexus vel gradus, ad eos successionem parentem tamen deduximus, omnibus patronis una cum sua progenie seminat. Sin autem sine liberis decesserint, si quidem intestati, ad omnem hereditatem patronos patronaque vocavi mus; sic vero testamentum quidem fecerint, patronos autem vel patronas praterierint, cum nullus liberorum habent vel habentes eos exhere daverint, vel mater sive avus mater nus eos praterierit, ita ut non possint argui inofficiosa eorum testamento: tunc ex nostra constitutione per bonorum possessionem contra tabulas non dimidiam, ut ante, sed tertiam partem bonorum liberti consequentur, vel quod deest eis, ex constitutione nostra repleatur, si quando minus tertia parte bonorum suorum libertus vel liberta eis reliquerit, ita sine onere, ut nec liberis libertae liberraeve ex ea parte legata vel fideicomissae prestantur, sed ad coheredes hoc onus redun daret; multis aliis casibus a nobis in praefata constitutione congregatis, quos necessarios esse ad hujusmodi juris dispositionem persperimus: ut tam patrini patronque quam liberi eorum nec non qui ex transverso latere veniunt usque ad quintum gradum ad successionem libertorum vocentur, sicut ex ea constitutione intellegendum est: ut si ejusdem patroni vel patronae vel duorum duarum plurimum sint liberi, qui proximior est, ad liberto seu liberta vocetur successionem et in capita, non in stirpes dividatur successio, eodem modo et in his, qui ex transverso latere veniunt, servando. Pene enim consonantia jurainge-Greek language, for the information of all men, established the following rules. If a freedman or freedwoman are less than centenarius, i.e. when their fortune does not reach a hundred aureos (the amount at which we estimated the sum mentioned in the lex Papia, counting one aureus for a thousand sestertii), the patron shall not be entitled to any share in the succession, provided the deceased has made a testament. But where a freed man or woman dies intestate, and without children, the right of patronage is maintained undiminished, and is as it formerly was, according to the law of the Twelve Tables. But if a freed person leaves more than a hundred aureos, and has one descendant or several, whatever be their sex or degree, as his heirs or the possessors of his goods, such descendant or descendants shall succeed their ascendant to the exclusion of the patron and his issue; but if he dies without children and intestate, we have called the patron or patroness to his whole inheritance. If, however, he has made a testament, omitting his patron or patroness, and has left no children, or has disinherited them, or if a mother or maternal grandfather has omitted them, so however that such testaments cannot be attacked as inofficious, then, according to our constitution, the patron or patroness shall succeed by a possession contra tabulas, not to a half as formerly, but to the third part of the estate of the deceased freedman, or shall have any deficiency made up in case the freed man or woman has left the patron or patroness a less share than a third of his or her estate. But this third part shall not be subject to any charge, so much so that it shall not furnish anything towards any legacies or fideicommissae, even though given for the benefit of the children of the deceased; but the whole burden shall fall exclusively on the co-heirs of the patron. In the same constitution we have collected many other decisions which we thought necessary to settle the law on the subject. Thus, patrons and patronesses, their children and collateral relations, so far as the fifth degree, are called to the succession of their freedmen and freedwomen, as may be seen in the constitution itself. And if there be several children, whether of one, two, or more patrons or patronesses, the
nuitatis et libertinitatis in successionibus fecimus.

nearest in degree is called to the succession of the freedman or freedwoman; and the estate is divided in capita and not in stirpes. It is the same with collaterals; for we have made the laws of succession as regards persons free-born and as regards enfranchised slaves almost the same.

C. vi. 4. 4.

Doing away with all distinction of sex, and making the claim of the patrona the same as that of the patronus, and the position of the liberta the same as that of the libertus, Justinian thus regulates the succession ab intestato: first come the children of the freedman, whether in his power or not, or even if born before he was enfranchised; then, if he has no children, come the patron and his descendants; in default of these, the collaterals of the patron to the fifth degree. If the freedman has children, he can make any testament he pleases; if he has not, he can only make what testament he pleases provided his fortune is less than one hundred aurei; if it is more, he must leave the patron one unencumbered third, or the law will give this third contra tabulas.

4. Sed hece de his libertinis hodie dicenda sunt, qui in civitatem Romanae pervenerunt, cum nec sunt alii liberti, simul et dediticiis et Latinis sublatiis, cum Latinorun legitime successiones nullas penitus erant, qui licet ut liberi vitam suam peragebant, attamen ipso ultimo spiritu simul animam atque libertatem amitiebant, et quasi servorum ita bona eorum jure quodammodo peculii ex lege Junia manumissiores detinebant. Postea vero senatus-consulto Largiano cautum fuerat, ut liberi manumissores, non nominati exheredati facti, extraneis hereditibus eorum in bonis Latinorum praponenterur. Quibus supervenit etiam divi Trajani edictum, quaod eundem hominem, si invito velignante patrono ad civitatem venire ex beneficio principis festinavit, faciebat vivum quidem civem Romanum, Latinum antem morientem. Sed nostra constitutione propter hujusmodi conditionum vices et alias difficulitates cum ipsis Latinis etiam legem Juniam et senatusconsultum Largianum et edictum divi Trajani in perpetuum deleri consentimus, ut omnes liberti civitate Romana fruatur, et mirabilis modo quibusdam adjectiionibus ipsas vias, quae in Latinitatem ducebant, ad civitatem

4. What we have said relates in these days to freedmen who are citizens of Rome; for there are now no others, there being no more dediticii or Latini. And the Latini never enjoyed any legal right of succession; for although they lived as free, yet, with their last breath, they lost at once their life and liberty: and their goods, like those of slaves, were claimed by their manumittor, as a kind of peculium, by virtue of the lex Junia Norbana. It was afterwards provided by the senatusconsultum Largianum, that the children of a manumittor, not disinherited by name, should, in the succession to the goods of a Latin, be preferred to any strangers whom a manumittor might institute his heirs. The edict of the Emperor Trajan followed, by which, if a slave, either against the will or without the knowledge of his patron, had managed to obtain Roman citizenship by favour of the emperor, he was regarded as a Roman citizen during his life, but at his death was looked on as a Latin. But we, being dissatisfied with the difficulties attending these changes of condition, have thought proper, by our constitution, for ever to abolish the Latin, and with them the lex Junia, the senatusconsultum Largianum, and the edict of Trajan; so that all freedmen whatever become citizens of Rome.
Romanam capiendam transposui-
mus.

And we have happily contrived, by
some additional dispositions, that the
very modes used to confer the freedom
of Latins have now become modes of
confering Roman citizenship.

GAI. iii. 56–58, 63–65, 71–78; C. vii. 6.

Dediticii and Latini Juniani. See Bk. i. Tit. 5. 3 and note.

Senatusconsulto Largiano. This senatusconsultum was passed
in the time of Claudius (A.D. 42), and in the consulate of Lupus
and Largus. (GAI. iii. 63–67.) As we might infer from the text,
the rights of the children of the patron to the succession of a
Latinus Junianus remained if they were disinherited in any other
way than by name.

By the edict of Trajan the rights of the patron were, in the case
mentioned in the text, restored at the death of a Latinus exactly
as if the Latinus had never become a citizen by imperial rescript.
(GAI. iii. 72.)

TIT. VIII. DE ADSIGNATIONE LIBERTORUM.

In summa, quod ad bona liberto-
rum, admonendi sumus, senatum
censisse, ut quamvis ad omnes pa-
tronis liberis, qui ejusdem gradus
sint, equaliter bona libertorum per-
tineant, tamen licet parenti uni
ex liberis adsignare libertum, ut
post mortem ejus solus est patronus
habeatur, qui adsignatus est, et ce-
teri liberi, qui ipsi quoque ad eadem
bona, nulla adsignatione interveni-
ente, pariter admitterentur, nihil
juris in his bonis habeant. Sed ita
demum pristinum jus recipiunt, si
is, cui adsignatus est, decesserit,
nullis liberis relietis.

Finally, with regard to the goods
of freedmen, we must remember that
the senate has enacted, that although
the goods of freedmen belong equally
to all the children of the patron who
are in the same degree, yet an ascen-
dant may assign a freedman to any one
of his children, so that, after the death
of the ascendant, the child, to whom
the freedman was assigned, is alone
considered as his patron, and the other
children, who would have been equally
admitted had there been no assign-
ment, are wholly excluded. But if
the child to whom the assignment has
been made dies without issue they
regain their former right.

D. xxxviii. 4. 1. pr.

The senate enacted this by the consultum mentioned in
paragr. 3.

1. Nee tantum libertum, sed
etiam libertam, et non tantum filio
nepotive, sed etiam filiae nepotae ad-
signare permittitur.

1. Not only a freedman, but a
freedwoman may be assigned, and not
only to a son or grandson, but to a
daughter or granddaughter.

D. xxxviii. 4. 1. pr., and 4. 8. 1, 2.

But it was necessary that the child or grandchild should be
in the power of the patron.

2. Datur autem hece adsignandi
facultas ei, qui duos pluresve liberos
in potestate habebit, ut eis, quos in

2. The power of assigning freed
persons is given to him who has two
or more children in his power, and it
potestate habet, adsignare ei libertum libertamve liceat. Unde querebatur, si eum, cui adsignaverit, postea emancipaverit, num evanescat adsignatio? Sed placuit, evanescere, quod et Juliano et aliis plerisque visum est.

is to children in his power that a father may assign a freedman or freedwoman. Hence the question arose, supposing a father assigned a freedman to his son, and afterwards emancipated that son, whether the assignment would be destroyed. It has been determined that it is destroyed; such was the opinion of Julian and of most others.

D. xxxviii. 4. 1. pr.

The senatusconsultum did not allow the patron to give the freedman new heirs, but only to give a preference to particular heirs. If the children passed out of the power of the patron, they would cease to be heirs of the freedman.

3. Nec interest, testamento quis adsignet an sine testamento: sed etiam quibuscumque verbis hoc patronis permissit facere ex ipso senatusconsulto, quod Claudianis temporibus factum est Suillo Rufo et Ostorio Scapula consulis.

3. It makes no difference, whether the assignment of a freedman be made by testament, or without a testament. And patrons may make it in any terms whatever, by virtue of a senatusconsultum passed in the time of Claudius, in the consulship of Suillus Rufus and Ostorius Scapula.

D. xxxviii. 4. 1. pr. and 3.

The date of this senatusconsultum is given as A.D. 45.

Just as any expression of the wishes of a patron sufficed to make an assignment, so any expression of a contrary wish sufficed to revoke it. (D. xxxviii. 4. 1. 4.) The mere disinheriting of a child did not revoke a previous assignment. (D. xxxviii. 4. 1. 6.)

Trt. IX. DE BONORUM POSSESSIONIBUS.

Jus bonorum possessionis introductum est a prenare eademandandi veteris juris gratia. Nec solum in intestatorum hereditatibus vetustus jus eo modo prenare emendavit, sicut supra dictum est, sed in eorum quoque, qui, testamento facto, decesse-rint. Nam si alienus postumus heres fuerit institutus, quamvis heridatem jure civili adire non poterat, cum instituto no valebat, honorario tamen jure bonorum possessor efficiebatur, videlicet cum a pretore adjuvabatur: sed hic e nostra constitutione Hodie recte heres institutur, quasi et jure civili non incognitus.

The system of bonorum possessiones was introduced by the pretors as an amendment of the ancient law, this amendment being made with regard to the inheritances not only of intestates, as we have said above, but of those also who die after making a testament. For if a posthumous stranger was instituted heir, although he could not enter upon the inheritance by the civil law, inasmuch as his institution would not be valid, yet by the pratorian law he might be made the possessor of the goods, because he received the assistance of the pretor. But such a person may now, by our constitution, be legally instituted heir as being not unrecognized even by the civil law.

Gal ii. 242; D. i. 1. 71; D. xxxviii. 6. 1. pr.

The jus civile knew of no other mode of succession than that of
those who were strictly heredes. The praetor introduced a new
mode, that by giving possession of the goods. This was, in its ori-
gen, merely the placing of the person best entitled in at least tempo-
rary possession of the hereditas in case this possession was disputed;
and then the praetor, being thus called on to admit to the possession,
in process of time regulated this admission by the feeling of natural
justice which it was part of his province to entertain, and admitted,
in many cases, those whose blood gave a claim, in preference to
those whom the course of the civil law marked out. He did not,
indeed, admit any one whom the law expressly rejected; for the
praetor could not openly violate the law; but when the law was
silent, the praetor took advantage of this silence to admit persons
whom the law passed over. (D. xxxvii. 1. 12. 1.) He never gave
the dominium Quiritarium in any of the goods of the inheritance,
but only the dominium bonitarium (see Introd. sec. 62), i.e. he
made all that constituted the inheritance a part of the goods (‘in
bonis’) of the person to whom he gave the possession, and then
usucapion gave this person the legal ownership.

The constitution referred to in the text is not in the Code we
now have.

1. Aliquando tamen neque emen-
dandi neque impugnandi veteris
juris, sed magis confirmandi gratia
pollicetur bonorum possessionem.
Nam illius quoque, qui recte facto
testamento heredes instituti sunt,
dat secundum tabulas bonorum pos-
sessionem: item ab intestato suos
heredes et agnatos ad bonorum pos-
sessionem vocat: sed et remota quo-
que bonorum possessione, ad eos
hereditas pertinet jure civilis.

1. But the praetor sometimes be-
stows the possession of goods with a
wish not to amend or impugn the old
law, but to confirm it; for he also
gives possession secundum tabulas to
those who are appointed heirs by regu-
lar testament. He also calls sui heredes
and agnati to the possession of the
goods of intestates, and yet the inheri-
tance would be theirs by the civil law,
even if the praetor did not give the
possession of the goods.

GAI. iii. 84; D. xxxvii. 1. 6. 1.

The person to whom the praetor gave the bonorum possessio
could make use of the interdict (see Introd. sec. 107) beginning
with the words ‘Quorum bonorum;’ and as this was the readiest
way of procuring the praetor’s aid in being placed in possession, the
heir might be glad to adopt it, though the possessio bonorum did
not give him, as it did others, a title to succeed, which he would
not otherwise have had.

In cases provided for by the edict the praetor gave possession
in the exercise of his executive authority (possessio edictalis). If
there were special circumstances in the case, the praetor would, after
hearing opponents, give a special possession (possessio decretalis)
which was not always protected by the interdict Quorum bonorum,
but might be protected only by an interdict forbidding forcible
eviction. (D. xxxvii. 9. 1. 14; xxxvii. 1. 3. 8; xliii. 4.)

2. Quos antem praetor solus vocat
ad hereditatem, heredes quidem ipsa
jure non sunt (nam praetor heredom

2. But those whom the praetor alone
calls to an inheritance, do not in law
become heirs, inasmuch as the praetor
facere non potest: per legem enim tantum vel similum juris constitu-
tionem heredes sunt, veluti per senatusconsultum et constitutiones
principales: sed cum eis praetor dat
bonorum possessionem, loco here-
dum constitutur et vocantur bo-
norum possessores. Adhuc autem
et alios complures gradus praetor
feicit in bonorum possessionibus dan-
dis, dum id agebat, ne quis sine
successore moriatur: nam angustis-
simis finibus constitutum per legem
duodecim tabularum jus perciplen-
darum hereditatum praetor ex bono
et sequo dilatavit.

cannot make an heir, for heirs are
made only by a law, or by what has
the effect of a law, as a senatusconsul-
tum or an imperial constitution. But
when the praetor gives any persons the
possession of goods, they stand in the
place of heirs, and are called the pos-
sessors of the goods. The praetor has
also devised many other orders of per-
sons to whom the possession of goods
may be granted, from a wish to insure
that no man should die without a suc-
cessor. In short, the right of succeed-
ing to inheritances, which was confined
within very narrow limits by the law
of the Twelve Tables, has been ex-
tended by the praetor in conformity to
the principles of justice and equity.

3. Sunt autem bonorum posses-
siones ex testamento quidem ha.
Prima, quae praetornis liberis datu
vocaturque contra tabulas. Secunda,
quam omnibus jure scriptis heredi-
bis praetor polluctur idoeque voca-
tur secundum tabulas. Et cum de
testamentis prius locutus est, ad in-
testatos transitum fecit. Et primo
locco suis hereditibus et his, qui ex
edicto praetoris suis connumeratur,
dat bonorum possessionem, que voca-
tur unde liberi. Secundo legitimi
hereditibus: tertio decem per-
sonis, qua extrae vacun manumissori
preferebat (sunt autem decem per-
sone ha: pater, mater, avus, avia,
tam paterni quam materni, item
filius, filia, nepos, nepis, tam ex
filio quam ex filia, frater, soror, sive
consanguiue sive uterini): quarto
cognatis proximus: quintum quem
ex familia: sexto patrono et patronae
liberisque eorum et parentibus: se-
ptimo viro et uxori: octavo cognatis
manumissoribus.

3. The testamentary possessions of
goods are these. First, that which is
given to children passed over in the
testament; this is called contra tabu-
las. Secondly, that which the praetor
promises to all those legally instituted
heirs, and is therefore called possessio
secundum tabulas. After having spoken
of testaments, he passes on to ines-
tancies: and first he gives the possession
of goods, called unde liberi, to the sui
heredes, or to those who by the pra-
torian edict are numbered among the
su heredes: secondly, to the legal heirs
thirdly, to the ten persons who were
preferred to a patron, if a stranger;
and these ten persons were, a father;
a mother; a grandfather or grand-
mother, paternal or maternal; a son;
a daughter; a grandson or grand-
daughter, as well by a daughter as by
a son; a brother or sister, either by
the father or uterine. Then, fourthly,
he gives the possession of goods to the
nearest cognati; fifthly, 'tum quem ex
familia,' to the nearest member of the
family of the patron; sixthly, to the
patron or patroness, and to their chil-
dren and ascendants; seventhly, to a
husband and wife; eighthly, to the
cognati of the manumittor.

The various kinds of possessions of goods may be divided ac-
ording as they were testamentary (ex testamento) or ab intestato.
Under the first head come the two kinds called contra tabulas and
secundum tabulas.

1. The possessio contra tabulas was given, as it is said in
the text, to children passed over in the testament. It was also
given, as we have seen, to a patron passed over. (Tit. 7. 1.) It was not given against the testament of women, as they had no sui heredes. (D. xxxvii. 4. 4. 2.)

2. The possessio secundum tabulas was given not only when the testament was in due form and valid, but also when it would have had no effect according to the civil law. The prætor gave the possession though the testament was defective in form, as, for instance, if it contained no familiae mancipatio or nuncupation. (Ulp. Reg. 28. 6. See Bk. ii. Tit. 17. 6.) The prætor, again, only required that the testator should have been capable of making a testament at the time he made it and at his death, without regard to the intermediate time. (See Bk. ii. Tit. 10. 6 note; D. xxxvii. 11. 1. 8.) He permitted the institution of the posthumous child of a stranger (see Bk. ii. Tit. 20. 26), and would, in cases where a gift was conditional, place the heir or legatee in possession of the goods while the condition was pending, and remove him if the condition was not fulfilled. (D. xxxvii. 11. 5. 6.)

The possessio secundum tabulas was not given until after that contra tabulas, that is, not until it was ascertained that there were no children passed over, or that they had made no claim within the time fixed by law. (D. xxxvii. 11. 2. pr.)

If there was no testament, the prætor gave the possession under one of the following heads: Unde liberi—Unde legitimi—Unde decem personæ—Unde cognati—Tum quem ex familia—Unde liberi patroni patronæque et parentes eorum—Unde vir et uxor—Unde cognati manumissoris. (Ulp. Reg. xxviii. 7.)

These are given in the text in the order in which they occurred in the edit; and those beginning with unde are in that form, by a contraction for ea pars editi unde liberi vocantur, unde legitimi vocantur, &c.

Four only have reference to the succession of persons of free birth: Unde liberi, unde legitimi, unde cognati, unde vir et uxor. The other four are only applicable to freedmen.

1. The possessio unde liberi was given to the $sui$ heredes and those called with them, in case there was no testament, or one wholly inoperative. If there was a testament not allowed to operate, the possessio would be that contra tabulas.

2. That unde legitimi was given to all those who would be the heirs of the deceased by law, that is, to those summoned to the succession by the law of the Twelve Tables, and those placed in the same rank by subsequent legislation. This part of the edit ran thus:—Tum quem ei heredem esse oporiteret, si intestatus mortuus esset. (D. xxxviii. 7. 1.) It included the $sui$ heredes, if they did not apply for, or even if they had refused, the possessio unde liberi, the agnati, those placed by the constitutions in the rank of agnati, the mother under the senatusconsultum Tertullianum, the children under the senatusconsultum Orphitianum, and the patron and his children as the heredes legitimi of their libertus.
3. That *unde decem personae* was given to the ten persons mentioned in the text in preference to a stranger who might have emancipated a free person, after having acquired him *in mancipio* for the purpose of the fictitious sale necessary to emancipation. This emancipation made the emancipator the patron, and gave him rights of succession, which the praetor postponed by the edict.

4. The *possessio unde cognati* created a new class of persons interested in the succession by ties of blood which gave no claim except under the edict. The *sui heredes and legiti*ni, if they had omitted to come in under the previous parts of the edict, might come in as cognati.

5. The *possessio tum quem ex familia* was given to the nearest member of the family of the patron (ULP. Reg. 28. 7) in default of the *sui heredes* taking under the *unde liberi*, or of the patron or his children taking under the *unde legiti*ni. The words seem to be an abridgment of part of the edict, 'tum quem ex familia patroni proximum oportebit, vocabo.' For the first two words is read sometimes tanquam, and this reading, which derives some support from the paraphrase of Theophilus, is adopted by Huschke; but *tum quem* seems most in keeping with the usual phraseology of the edict. (D. xxxviii. 7. 1.)

6. The *possessio unde liberi patroni patronæque et parentes corum* was given to the descendants of the patron, whether they had been in the power of the patron or not, and to the descendants, whether the patron had been in their power or not—thus going a step beyond the last-mentioned possession, which was only given to a person in the family of the patron. This is as probable an account as any of the use of this and the last *possessio*; but so little is known respecting them, that we cannot be certain how they were applied.

7. The *possessio unde vir et uxor* gave husband and wife reciprocal rights of succession. The only mode in which one married person succeeded by the *jus civile* to the goods of another was when the wife passed into the power of her husband by *in manum conventio*, for she then succeeded as his daughter. (GAI. iii. 3.) The husband and wife succeeded in default of cognati.

8. The *possessio unde cognati manumissorioris* was given to all the blood relations of the patron. In the possession given exclusively with reference to the goods of freedmen, it was the same as with those given alike of the goods of free persons and of freedmen; any one who might have applied for an earlier possession might, if he failed to do so, apply for a later possession, in the terms of which he was included. Thus the *quem proximum* might apply as for the *possessio unde liberi patroni*, &c., and both he and one of the *liberi patroni* might have applied for that *unde cognati manumissorioris*.

If there was no one to whom possession of goods could be given, the right to the goods devolved to the people, and, in the times of the later emperors, to the *fiscus*. (*Si nemo sit, ad quem*
bonorum possessorum pertinere possit, aut sit quidem, sed jus suum omisisset, populo bona deferuntur ex lege Julia caducaria.) (ULP. Reg. 28. 7.)

4. Sed eas quidem pretoria induxit juridictio. Nobis tamen nihil incuriosum pretermissem est, sed nostris constitutionibus omnia corrigentes, contra tabulas quidem et secundum tabulas bonorum possessiones admisimus utpote necessarias constitutas, nec non ab intestato unde liberi et unde legiti bonorum possessiones. Quae autem in pretoris edicto quinto loco posita fuerat, id est unde decem personae, eam pio proposito et compendioso sermone supervacuum ostendimus: cum enim prefata bonorum possession decem personas presponebat extraneo manumissori, nostra constitutio, quam de emancipacione liberorum fecimus, omnibus parentibus eisdemque manumissoribus contracta fiducia manumissionem facere dedit, ut ipse manumissor eorum hoc in se habeat privilegium et supervacua fiat predata bonorum possession. Subita igitur prefata quinta bonorum possessione, in gradum ejus sextam antea bonorum possessionem reduximus et quintam fecimus, quam pretor proximus cognatus pollicetur.

See Tit. 2. 8.

5. Cumque antea septimo loco fnuerat bonorum possessor tum quem ex familia et octavo unde liberi patroni patronaque et parentes eorum, utramque per constitutionem nostram, quam de jure patronatus fecimus, penitus vacuavimus: cum enim ad similitudinem successionis ingeniorum libertinorum successiones possimus, quas usque ad quintum tantummodo gradum coartavimus, ut sit aliqua inter ingenuos et libertos differentia, sufficiunt eis tam contra tabulas bonorum possessione quam unde legiti et unde cognati, ex quibus possint sua iura vindicare, omni scrupulositate et inextricabili errore duarum iatarum bonorum possessionum resoluta.

The possession tum quem ex familia is here said to be in the seventh place, because it was in regarding intestacies, and the two possessiones regarding testamentary successions came before.

4. Such are the possessions of goods introduced by the pretor's authority. We ourselves, who have passed over nothing negligently, but have wished to amend everything, by our constitutions have admitted as indispensably necessary the possessions of goods contra tabulas and secundum tabulas, and also the possessions ab intestato, called unde liberi and unde legiti; but with a kind intention, and in a few words, we have shown that the possession called unde decem personae, which held the fifth place in the pretor's edit, is superfluous; for ten kinds of persons were therein preferred to a patron if a stranger; but by our constitution on the subject of the emancipation of children, parents themselves are the manumitters of their children, as if under a fiduciary contract, so that this privilege belongs necessarily to the manumission they go through, and the possession unde decem personae is now useless. We have suppressed it therefore, and putting the sixth in its place, we have now made that the fifth, by which the pretor gives the succession to the nearest cognati.

C. viii. 49. 6.

5. As to the possession tum quem ex familia, formerly in the seventh place, and the possession unde liberi patroni patronaque et parentes eorum, in the eighth, we have now annulled them both by our constitution concerning the right of patronage. For having made the successions of libertini like those of ingenui, except that we have limited the former to the fifth degree, so that there may still remain some difference between them, we think that the possessions contra tabulas unde legiti, and unde cognati may suffice for claimants to vindicate their rights; all the subtle and intricate niceties of those two kinds of possessions, tum quem ex familia and unde patroni, being done away with.
6. Aliam vero bonorum possessionem, que unde vir et uxor appellant et nono loco inter veteres bonorum possessiones posita fuerat, et in suo vigore servavimus et altiore loco, id est sexto, eam posuimus, decima vetere bonorum possessione, que erat unde cognati numismatis, propter causas enarratas merito sublat: ut sex tantummodo bonorum possessiones ordinarse permaneant suo vigore pollentes.

7. Septima eas secuta, quam optima ratione pretores introductorunt. Novissime enim promittitur edicto his etiam bonorum possessioni, quibus ut detur, lege vel senatusconsulto vel constitutione comprehensum est, quam neque bonorum possessionibus, que ab intestato veniunt, neque eis, que ex testamento sunt, pretor stabili jure convenienti, sed quasi ultimum et extraordinarium auxilium, prout res exigiert accommodavit scilicet his, qui ex legibus, senatusconsultis, constitutionibus principio ex novo jure vel ex testamento vel ab intestato veniunt.

6. The other possession of goods, called *unde vir et uxor*, which held the ninth place among the ancient possessions, we have preserved in full force, and have given it a higher place, namely, the sixth. The tenth of the ancient possessions, called *unde cognati numismatoris*, has been deservedly abolished for reasons already given; and there now, therefore, remain in force only six ordinary possessions of goods.

7. To these a seventh possession has been added, which the pretors have most properly introduced. For by the last disposition of the edict, possession of goods is promised to all those to whom it is given by any law, *senatusconsultum*, or constitution. The pretor has not positively numbered this possession of goods either with the possessions of the goods of intestates, or of persons who have made a testament; but has given it, according to the exigence of the case, as the last and extraordinary resource of those who are called to the successions of intestates, or under a testament whether by a law, a *senatusconsultum*, or, in later times, by an imperial constitution.

D. xxxviii. 14.

The difference between the *possessio quibus ut detur, lege vel senatusconsulto vel constitutione comprehensum est*, or, as it was sometimes called, the *possessio tum quibus ex legibus* (THEOPH. Paraphr.), and the *possessio unde legitimi*, was, that the first was given when the law, &c., expressly declared that the possession of goods was to be given; the latter when the law, &c., gave the *hereditas*, and the pretor gave the *possessio*. It was, for instance, by means of the possession *uti ex legibus*, that the patron took concurrently with the children of the *libertas*, by virtue of the *lex Papia Poppea*.

8. Cum igitur plures species successionem pretor introduxitse eosque per ordinem disposuissest et in unaqueque specie successiunis sepe plures extant dispari gradu personae: ne actiones creditorum differenter, sed haberent, quos convenirent, et ne facile in possessione bonorum defuncti mitterentur et eo modo sibi consulerent, ideo petendo bonorum possessioni certum tempus praefinivit. Liberis itaque et parentibus tam naturalibus quam adoptivis in petenda bonorum possessione anni spatium,

8. As the pretor thus introduced and arranged in order many kinds of successions, and as in each rank of succession persons in different degrees of relationship might often be found, therefore in order on the one hand that the actions of creditors might not be delayed, but there might be a proper person against whom to bring them, and on the other hand that the creditors might not possess themselves of the effects of the deceased too easily, and consult solely their own advantage, the pretor fixed a certain time within
ceteris centum dierum dedit. which the possession of the goods was to be demanded. To ascendants and children, whether natural or adoptive, he allowed one year, within which they must ask for possession. To all other persons he allowed a hundred days.

D. xxxviii. 9. 1. pr. and 12.

The *species successionum* correspond to the different *possessiones*.

9. Et si intra hoc tempus aliquis bonorum possessionem non petetit, ejusdem gradus personis ad crescit; vel si nemo ex eo sit, deinceps ceteris proinde bonorum possessionem ex successorio edicto pollicetur, ac si is, qui precedebat, ex eo numero non esset. Sed si quis ita delatam sibi bonorum possessionem repudia verit, non quoniam tempus bonorum possessioni præsens excesserit, expectatur, sed statim ceteri ex eodem edicto admitteruntur. In petenda autem bonorum possessione dies utiles singuli considerantur.

9. And if any person does not claim possession within the time limited, the possession accrues to those in the same degree with himself; and if there are none of that degree, the praetor, by the successory edict, gives the possession to the succeeding degrees, exactly as if he who preceded had not been in the degree in which he was. But if a man refuses the possession of goods when it is thus offered to him, there is no necessity to wait until the time limited is expired, but the others in succession are instantly admitted under the same edict. In reckoning the time allowed for applications for the possession of goods, only those days which are *utiles* are counted.

D. xxxvii. 1. 8. 9; D. xxxvii. 1. 4, 5; D. xxxviii. 9. 1. 6, 8, 10; D. xxxviii. 15. 2.

10. Sed bene antiores principes et huic cause providerunt, ne quis pro petendo bonorum possessiones curet, sed, quocumque modo sit ad mittentis eam indicium, intra statuta tamen tempora, ostenderit, plenum habeat earum beneficium.

10. Former emperors have wisely provided that no person need trouble himself as to the possession of goods in the way of making an express demand; for if he has in any manner signified within the appointed time his wish to accept the possession, he shall enjoy the full benefit of the possession he can claim.

C. vi. 9. 8, 9.

Only those *dies* were considered *utiles* which were subsequent to the person entitled to the possession being aware of, and capable of claiming, his right, and which were not days on which magistrates did not transact business (*dies nefasti*). Demand of possession was to be made before a magistrate, that is, before the praetor in the city, and the *praefectus* in the province; for the possession did not devolve by course of law, but had to be expressly asked for within a prescribed time. A particular formality in the terms of the demand was held necessary, the applicant having to say *da mihi hanc bonorum possessionem* (THEOPH. Paraphr.), until a constitution of the Emperor Constantius (C. vi. 9. 9) permitted the application to be made in any terms, and before any magis-
trate, and another constitution of the same emperor excused those whom ignorance of what was the proper cause, or whom absence prevented from making an application. (C. vi. 9. 8.) In the time of Justinian there was no application before a magistrate; any act that manifested the wish to have the possession was enough.

Sometimes the possession of goods was said to be given sine re, as opposed to cum re. (Gai. iii. 35–38; Ulp. Reg. 28. 13.) The possession might be claimed, in many cases, by persons who were entitled to enter on the inheritance as heirs under the civil law. If these persons entered on the inheritance without demanding possession of the goods, the right to this possession devolved, at the expiration of the time in which they might have claimed it, to the next class entitled to it. But if the person standing next in the order of pretorian succession demanded the possession in such a case, he received it, but only sine re, i.e. he was placed in the legal position of possessor of the goods, but did not really have any share in those goods which formed the inheritance of the heir under the civil law.

As we have now finished the subject of successions ab intestato, as treated of in the Institutes, and seen the system prevailing when the Institutes were published, this is the most natural place to notice briefly the complete change introduced by the 118th and 127th Novels, which were issued respectively in the years 543 and 547. By this sweeping change, the difference between the possessor honorum and the hereditas, and that between agnati and cognati (except in the case of arrogation), were entirely suppressed, and three orders of succession were created: the first, that of descendants; the second, that of ascendants; the third, that of collaterals. (1.) The descendants succeeded, whether emancipated or not, and whether adoptive or natural, to the exclusion of all other relations, and without distinction of sex or degree. When they were in the first degree, they shared the inheritance per capita; when in the second, they shared it per stirpes. (2.) If there were no descendants, the succession belonged to the ascendants, except that, when there were brothers or sisters of the whole blood, the ascendants shared the inheritance with them, each person who had a claim to succeed taking an equal share. When there were several ascendants, the nearest excluded the more remote; if two or more ascendants of the same degree were not in the same line, that is, were partly in the paternal, partly in the maternal line, then the ascendants of one line took one half, and the ascendants of the other took the other half, although there might be more of the same degree in one line than in the other. (3.) If there were no ascendants, then came, first, brothers and sisters of the whole blood, then brothers and sisters of the half-blood, no distinction being made between consanguinei, -æ, and uterini, -æ. The children of a deceased brother or sister were allowed to represent their deceased parent, and to receive the
share that parent would have received; but the grandchildren of
a brother or sister were not allowed to represent their grandfather
or grandmother. If there were no brothers and sisters, or children
of brothers and sisters, the nearest relation, in whatever degree,
succeeded; if there were several in the same degree, they shared
the inheritance per capita. Finally, it is specially provided that
these reforms are to apply only to those persons qui catholicae
fidei sunt.

TIT. X. DE ADQUISITIONE PER ADRAGATIONEM.

Est et alterius generis per universitatem successio, quae neque leges
duodecim tabularum neque praetoris edicto, sed eo jure, quod consensus
receptum est. introducta est. There is also another kind of universal succession, introduced neither
by the law of the Twelve Tables, nor by the edict of the praetor, but by the
law which rests on general consent.

GAL. iii. 82.

1. Ecce enim cum paterfamilias
see in adrogationem dat, omnes res
ejus corporales et incorporales quam
eque ei debite sunt, adrogatori ante
quidem pleno jure adquirebantur,
exceptis his, quae per capita deminutionem
pereunt, quales sunt operarum obligationes et jus adgnationis.
Usus etenim et usufructus licet his
ante communesrubantur, attamen
capitis deminutione minima eos tolli,
nostra prohibuit constitutio.

GAL. iii. 88; C. iii. 88. 16.

Gaius remarks that the property of the wife who passed in
manuum viri was acquired by her husband exactly as fully as that
of the paterfamilias was by the person who arrogated him. Every-
thing belonging to them passed to the husband or arrogator, except
only those things which were ipso facto destroyed by the change
of status; for example, services which, as the price of his fre-
dom, the freedman bound himself by oath to render to the patron,
operarum obligationes, were due to him personally, and were no
longer due if the patron passed into the power of another. The
ties of agnation were also lost by the change of status, as the
person arrogated passed out of his civil family.

2. Nunc autem nos eandem ad-
quisionem, quae per adrogationem
fiebat, coartavimus ad similitudinem
naturalium parentum: nihil etenim
aliquid nisi tantummodo usufructus
tam naturalibus patribus quam adop-
tivis per filiosfamilias adquiritur in
his rebus, quae extrinsecus filiiis ob-
veniunt, dominio eis integro servato:

2. At the present day acquisitions
by arrogation are restrained within the
same limits as acquisitions by natural
parents. Neither natural nor adoptive
parents now acquire anything but the
usufruct of those things which come
to their children from any extraneous
source, the children still retaining the
dominium. But, if an arrogated son
morsuo autem filio adrogato in adoptiva familia etiam dominium ejus ad adrogatorem transit, nisi superint aliis personis, quae ex nostrae constitutione patrem in his, quae adquiri non possunt, antecedunt.

dies in his adoptive family, then the property also will pass to the arrogator, provided there exist none of those persons who, by our constitution, are preferred to the father in the succession of those things which cannot be acquired by him.

The order of succession fixed by later emperors and Justinian to the goods of the filiusfamilias coming to him from his mother, or as legacies, gifts, &c., from sources other than the father (peculum adventitrium, which could not be acquired by the father, but only the usufruct of which passed to him), was—1. His children; 2. His brothers or sisters; 3. His ancestors, the father taking before the grandfather. (C. vi. 61. 3, 4, 6; C. vi. 59. 11.)

8. Sed ex diverso pro eo, quod is debuit, qui se in adoptionem dedit, ipse quidem jure adrogator non tenetur, sed nomine filii convenit se et, si nonserit cum defendere, permititur creditoribus per competentes nostros magistratus bona, quae ejus cum usufructu futura fuissent, si se alieno juri non subjiciisset, possidere et legitimo modo ea disponere.

8. On the other hand, an arrogator is not directly bound to satisfy the debts of his adopted son, but he may be sued in his son's name; and if he refuses to answer for his son, then the creditors may, by order of the proper magistrates, seize upon and sell in the manner prescribed by law those goods, of which the usufruct, as well as the property, would have been in the debtor, if he had not made himself subject to the power of another.

GAI. iii. 84.

The arrogator succeeded to all the rights of action for debt which the person arrogated had, but not to the debts. For the arrogator was in the position of a father, who was not bound by the obligations of a son. Under the jus civile, the debts themselves were extinguished by the change of status; but the pretor made the property of the arrogated son answerable for them, and, creating a sort of restitutio in integrum in favour of the creditor, gave an action against the arrogated as if the capitis minuto had not taken place; and then, if the arrogator did not guarantee the creditors, the pretor put the creditors in possession of the goods brought by the arrogated to the arrogator, with leave to sell them. (D. iv. 5. 2. 1; GAI. iii. 84.)

Trt. XI. DE EO, CUI LIBERTATIS CAUSA BONA ADDICUNTUR.

Accessit novus casus successionis ex constitutione divi Marci. Nam si hi, qui libertatem aceperunt a domino in testamento, ex quo non aditur hereditas, velint bona sibi addici libertatem conservandarum causa, andiuntur. Et ita rescripto divi

A new species of succession has been added by the constitution of the Emperor Marcus. For, if those slaves, to whom freedom has been given by the testament of their master, under which testament no one will accept the inheritance, wish that the property
If no heres ex testamento accepted the inheritance, it devolved to the heredes ab intestato, and if no heres ab intestato accepted it, it devolved to the fiscus; if the fiscus would not accept it, the creditors could have the goods of the deceased sold for their benefit. But if the deceased had by testament or codicil given freedom to any slaves, then, after the inheritance had been successively rejected by the heredes ex testamento, the heredes ab intestato, and the fiscus, application might be made to have the goods given up to the applicant instead of being sold by the creditors, the applicant undertaking to enfranchise the other slaves and to satisfy the creditors; and then the applicant became the honorum possessor, though not the owner of all the property of the deceased. If the inheritance was accepted by any heir, or if there were no slaves to whom the deceased had left their liberty, then this addictio could not take place.

Gaius makes no mention of this mode of acquisition per universitatem; a circumstance used to fix his date, as showing that he wrote before the time when Marcus Aurelius issued the rescript contained in the next paragraph.

1. Verba rescripti ita se habent: 'Si Virginius Valenti, qui testamento suo libertatem quibusdam adscriptam, nemine successore ab intestato existente, in ea causa bona esse concepunt, ut veniri debeant: is, cujus de ea re notio est, aditus, rationem desiderii tui habebit, ut libertatum tam earum, que directo, quam earum, quae per speciem fideicommissi relictae sunt, tuendarum gratia addicantur tibi, si idonee creditoribus caveris de solido, quod cuique debetur, solendo. Et hi quidem, quibus directa libertas data est, perinde liberis erunt, ac si hereditas adita esset: hi autem, quae heres rogatus est manumittere, a te libertatem consequatur: nisi si non alia condicio velis bona tibi addici, quam ut etiam qui directo libertatem acceperunt, tui liberti sint; nam huic etiam voluntati tue, si ii, de quorun statu agitur, consentiant, auctoritatem nostram accommodamns. Et ne hujus rescriptonis nostrae emolumentum alia ratione irritum fiat, si fiscus bona agnoscerne should be adjudged to them, in order that effect may be given to the disposition for their enfranchisement, their request is granted. Such is the effect of a rescript addressed by the Emperor Marcus to Popilius Rufus.'
voluerit, et hi, qui rebus nostris attendunt, scient, commodo pecuniario preferendam libertatis causam et ita bona cogenda, ut libertas his salva sit, qui eam adipsici potuerunt, si hereditas ex testamento adita esset.'

to receive their freedom agree to this, we are willing that your wishes in this respect shall be complied with. And, lest the benefit of this our rescript should be lost in another way, namely by the property being seized on behalf of the imperial treasury, be it known to the officers of our revenue, that the gift of liberty is to be attended to more than our pecuniary advantage; and seizure shall be made of the property in such a way as to preserve the freedom of those who would have been in a situation to obtain it, had the inheritance been entered on under the testament.'

D. xI. 5. 2, and 5. 4, 8, 11. 12, 17.

By a constitution of Gordian, it was declared that the rescript of Marcus Aurelius extended to cases in which a stranger, and not one of the slaves of the deceased, applied for the addiction. (C. vii. 2. 6.)

When the inheritance was not rejected, but accepted by the heredes ab intestato or by the fiscus, the fiscus, so far as regards the enfranchisement of the slaves, was placed by the latter part of this rescript in a different position from that which was occupied by the heredes ab intestato; whichever accepted it, the addictio could not take place, but the fiscus was ordered to fulfil the wishes of the deceased, while the heredes ab intestato were at liberty to disregard them.

2. Hoc rescripto subventum est et libertatis et defunctis, ne bona eorum a creditoribus posse deantur et venant. Certe si fuerint ex hac causa bona addicta, cessat honorum venditio; existit enim defuncti defensor, et quidem idoneus, qui de solido creditoribus caverat.

2. This rescript is meant to favour both the gift of liberty and also the deceased testator, whose effects it prevents being seized and sold by creditors: for, of course, when goods are thus adjudged, in order that liberty may be preserved, there cannot be a sale by creditors, for there is some one to answer for the deceased, and very efficiently, as he gives security to the creditors for the full satisfaction of their claims.

8. Inprimis hoc rescriptum toc-tiens locum habet, quotiens testamento libertatae date sunt. Quid ergo, si quis intestatus decedens codicillis libertates dererit neque adita sit ab intestato hereditatis? Favor constitutionis debet locum habere. Certe si testatus decedat et codicillis dederit libertatem, competere eam, nemini dubium est.

3. This rescript is applicable whenever freedom is conferred by testament. But what if a master dies intestate, having bequeathed freedom to his slaves by codicils, and the inheritance ab intestato is not entered upon? The benefit of the constitution shall extend to this case; of course, if the deceased dies testate, freedom given by codicils is effectual.

D. xI. 5. 2.

4. Tun constitutioni locum esse, verba ostendunt, cum nemo successor ab intestato existat. Ergo quam-

4. The words of the constitution show, that it applies only when there is no successor ab intestato. There-
diu incertum sit, utrum existat an non, cessabit constitutio: si certum esse coeperit, neminem extare, tunc erit constitutioni locus.

fore, as long as it remains doubtful whether there is or is not a successor, the constitution is not applicable; but when it is certain that no one will enter upon the succession, it then takes effect.

D. xl. 5. 4. pr.

5. Si est, qui in integrum restitutus postest, abstinuit se ab hereditate, an, quamvis postest in integrum restitutus potest admirsit constitutio? Ea debet additio bonorum fieri. Quid ergo, si post additionem libertatum conservandarum causa factam in integrum sit restitutas? Utique non erit dicendum revocari libertates, quae semel competierunt.

5. If a person who has a right to be placed again in exactly the position he once held, should abstain from taking the inheritance, is the constitution here applicable, although he may possibly be restored to his former position? Here, too, an adjudication of the goods may be made. What, then, if, after an adjudication has been made for the sake of preserving liberty, the heir is restored to his former position? The answer will be that gifts of liberty are not to be held to be revoked which have once been established.

D. xl. 5. 4. 1, 2.

The case contemplated is that of a minor under 25 years, who was heres ab intestato. If he had accepted the inheritance at once, he would have taken it without any of the burdens, such as gifts of liberty, with which it was charged by the testament, which had become of no effect. But if he refused to accept it, and the slaves were enfranchised by addiction being granted, then when the minor attained the age of 25, and was entitled to the restitutio in integrum, was the freedom gained by the slaves to be revoked? Justinian says undoubtedly not. The inheritance would be restored to the minor, but liberty once given could not be taken away again.

6. Hec constitutio libertatum tuendarum causa introducta est: ergo si libertates nulie sint datae, cessat constitutio. Quid ergo, si vivus dedit libertates vel mortis causa et, ne de hoc quaeratur, utrum in fraudem creditorum an non factum sit, idcirco velint addici sibi bona, an audiendi sunt? Et magis est, ut audiri debeant, etsi deficiant verba constitutionis.

6. This constitution was intended to make gifts of liberty effectual; and, therefore, when no such gifts are made, the constitution is not applicable. Suppose then a master has given freedom to his slaves by a donation either inter vivos or mortis causa, and, to prevent any question arising whether the creditors have been defrauded, the slaves intended to be enfranchised should petition that the goods of the deceased may be adjudged to them; is this to be allowed? And we think that we ought, on the whole, to say that it is, although the constitution is silent on the point.

See Bk. i. Tit. 6.

7. Sed cum multas divisiones ejuemodi constitutioni deesse perspeximus, lata est a nobis plenisima constitutio, in quam multae species collatæ sunt, quibus jus hujusmodi

7. Perceiving that the constitution was deficient in many respects, we have published a very complete constitution, containing many provisions, which complete the legislation on this
successionis plenissimum est effectum, quas ex ipsa lectione constitutionis potest quis cognoscere. kind of succession, and which may be easily learned by reading the constitution itself.

C. vii. 2. 15.

The chief changes made by this constitution were—1. That even if the goods had been sold by the creditors, the *addictio* might still be made within a year from the sale, which was rescinded on the applicant guaranteeing the creditors; 2. That the *addictio* might be made if the applicant offered a composition satisfactory to the creditors, instead of payment in full; 3. That some only of the slaves need be enfranchised if the property did not admit of all being enfranchised; and 4. That while, if several persons, having an equal right to apply, asked for an *addictio*, they became joint possessors of the goods; if they applied one after the other, the first applicant was preferred.

Tit. XII. DE SUCCESSIONIBUS SUBLATIS, QUÆ FIEBANT PER BONORUM VENDITIONEM ET EX SENATUSCONSULTO CLAUDIANO.

Erant ante predictam successionem olim et aliae per universitatem successiones. Qualis fuerat bonorum emptio, quæ de bonis debitoris vendendis per multas ambages fuerat introducta et tunc locum habebat, quando judicia ordinaria in usu fuerunt: sed cum extraordinariis judiciis posteritas usa est, ideo cum ipsis ordinariis judiciis etiam bonorum venditiones exspiraverunt et tantummodo creditoribus datur officio judicis bona possidere et, prout eis utile visum fuerit, ea disponere, quod ex iatribus digestorum libris perfectius apparebit.

There were formerly other kinds of universal succession prior to that of which we have just spoken; such was the *emptio bonorum* which with numberless formalities was established for the sale of the goods of debtors. It continued while the *judicia ordinaria* were in use; but afterwards, when the *judicia extraordinaria* were adopted, the sale of goods passed away with the *judicia ordinaria*. Creditors can now do no more than possess themselves of the goods of their debtors by order of a judge, and dispose of them as they think proper. The subject will be found treated of more at length in the larger work of the Digest.

GAL. iii. 77-81; D. xlii. 5; C. vii. 72. 9.

This *bonorum emptio per universitatem*, one of the praetorian modes of execution (see *Intro* sec. 108), was a transfer of the entire property of the debtor to the person who, in consideration of receiving it, would undertake to pay the largest proportion of the claims of the creditors. The creditors might apply for permission to have the goods sold in this way, not only when the debtor was dead, but (1) when he fraudulently hid himself, so that he could not be summoned before the magistrate; or (2) when he was absent, and no one appeared to defend his cause; or (3) if, after having been condemned, he did not satisfy the claims of the creditors within the time allowed by law; or (4) if he had made a *cessio bonorum*, i.e. had himself abandoned all his property to his creditors, as he
was allowed to do by the *lex Julia*. (Gal. iii. 78.) The *venditio honorum* was held to carry with it the infamy of the debtor. The creditors were first placed by the praetor in possession of the property, *rei servandae causa*, and the intended sale was announced by advertisement (*proscriptio*). This possession was continued during thirty days if the debtor was alive, and during fifteen if he was dead. The praetor then summoned a meeting of the creditors, at which they chose one of their own body to conduct the business for them, called the *magister*. Ten or five days thereafter, according as the debtor was alive or dead, the conditions of sale were fixed under the supervision of the praetor (*publicatio*). After a further delay of twenty or ten days, the goods were put up to public auction, and, the offer of the highest bidder having been accepted, the praetor made the *addictio*, by which the goods of the debtor, though not the Quiritanian ownership in them, were transferred to the *honorum emptor*, who stepped into the place of the debtor, and might sue and be sued exactly as the debtor might have sued or been sued. (Theoph. Par.; Gal. iii. 79, 80.)

*Judicia ordinaria, extraordinaria.* (See Introd. sec. 109.)

The process under the *judicia extraordinaria*, which is referred to in the text, was termed *distractio honorum*. The creditors—or some of them, time being allowed for others to come in (C. vii. 72. 10. pr.)—were placed in possession of the goods generally of the debtor, and then the goods were sold, not in block to one purchaser, but separately to separate purchasers, as occasion offered. (See D. xxvii. 10. 5.)

1. *Erat et ex senatusconsulto Claudiae miserabilis per universitatem adquisitio, cum libera mulier servili amore bacchata ipsam libertatem per senatusconsultum amittet et cum libertate substantiam: quod indiguum nostris temporibus esse existimantes, et a nostris civitate deleri et non inseri nostris digestis concessimus.*

1. There was also, by virtue of the *senatusconsultum Claudianum*, another most wretched method of acquisition *per universitatem*; when a freedwoman indulged her passion for a slave, and lost her freedom under this *senatusconsultum*, and with her freedom her estate. This was, in our opinion, unworthy of our age, and we have therefore abolished it in our empire, and forbidden it to be inserted in our Digest.

Gal. i. 84, 91, 160; C. viii. 24.

There could be no marriage between a slave and a free person. If, therefore, a woman born free lived with a slave in *contubernio*, this was thought so disgraceful to her, that if the master of the slave complained by three denunciations of her conduct, a magisterial decree subjected her to the punishment mentioned in the text, and she and her property passed to the owner of the slave. The strong expression, ‘*servili amore bacchata,*’ must not be taken as indicating anything more than cohabitation with a slave. If the woman was a freedwoman who thus lived with a slave, she became again the slave of her patron, if he had not known of, and assented to, her conduct, and the slave of the master of the slave
with whom she lived, if the patron had been aware of how she was living. (Paul. Sent. 2. 21; Gal. i. 84–86, 91, 160; see also Tacit. Annal. xii. 53.) The date of the senatusconsultum Claudianum is A.D. 52.

TIT. XIII. DE OBLIGATIONIBUS.

Nunc transeamus ad obligationes. Obligatio est juris vinculum, quo necessitate adstringitur aliquus solvende rei, secundum nostrae civitatis jura.

Let us now pass to obligations. An obligation is a tie of law, by which we are so constrained that of necessity we must render something according to the laws of our state.

D. xlv. 7. 3. pr.


D. xlv. 7. 52. pr. 5, 6.

1. The principal division of all obligations is into two kinds, for they are civil or prætorian. Civil obligations are those constituted by the laws, or, at least, recognised by the civil law. Prætorian obligations are those which the prætor has established by his own authority; they are also called honorary.


D. xlv. 7. 1. pr. and 1.

2. A further division separates them into four kinds, for they arise ex contractu or quasi ex contractu, ex maleficio or quasi ex maleficio. Let us first treat of those which arise from a contract: which again are divided into four kinds according as they are formed re, verbis, litteris, or consensu. Let us examine each kind separately.

GAL. iii. 88, 89; D. xlv. 7. 1. pr. and 1.

We now pass to obligations. Having finished the subject of rights over things, and of the modes in which they are acquired, we now pass to rights against particular persons, jura in personam, expressed very inaccurately in later Latin by the term jura ad rem. These rights are those which we have against some one or more particular persons, as opposed to the general rights, such as that of having the secure enjoyment of our property, which we have against all mankind. (See Introd. sec. 61.)

Obligations are placed in the Institutes between the subject of things and the subject of actions; and as in Bk. i. (Tit. 2. 12) it is said that the whole of private law relates to persons, things, and actions, it has been questioned whether obligations are meant to be included under things or actions. Theophilus understood them to be included under actions, as we see by his paraphrase on this Title, and on the sixth Title of the Fourth Book; but it is evident that Gaius, from whom Justinian borrows the arrangement, meant obligations to come under the discussion of res:

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otherwise, as Savigny remarks (System des heut. röm. Rechts, Bk. ii. ch. 1), we must consider the part specially relating to actions as a subsidiary part of the portion commencing with obligations, which is contradicted by the mode in which Gaius treats of the subject of actions. The subject of obligations does not properly fall under either res or actiones, and it was from feeling this that Gaius placed it between the two, although his division of law obliged him to rank it under one or the other. He could not, consistently with this division, place obligations in his system according to their nature, and he preferred to consider them with reference to their ultimate result (res) rather than with reference to the mode by which the law secured this result (actio). The incorrectness of such a mode of treating obligations, and the inaccuracy of the expression jus ad rem, are evident when we consider that the actio did not really give the res which was the subject of the obligation, but only a pecuniary equivalent.

The remainder of this Book and the first five Titles of the Fourth Book must be taken together as treating of obligations, the remainder of this book being mainly devoted to one head of obligations, those arising from contract. As a preliminary to the general study of the part of the Institutes treating of obligations, and specially to the study of contracts, it will be convenient here to take a preliminary survey of some points to which constant reference is made in the discussion of subsequent details.

These points are: 1. The meaning of the term obligation. 2. The sources of obligations. 3. The obligations which arise from contract, and their recognised heads. 4. Innominate contracts, pacts, natural obligations. 5. Culpa. 6. Interest. 7. The actions by which obligations, and especially contracts, were enforced.

1. The Meaning of the Term Obligatio.—Obligatio, as the text in the initial paragraph tells us, is a 'tie of law by which we are so constrained that of necessity we must render something according to the laws of our state,' i.e. the rules of either the strict civil law or the pratorian law. It was because it could be enforced by an action that the tie was binding on the person bound, debitor (debitor intelligatur in quo invitio exigi pecunia potest, D. I. 16. 108), in favour of the creditor, these words debitor and creditor being used in a general sense, in Roman law, for the person bound and the person profiting by the tie. That which the debtor is thus bound to render is in the text expressed by the general word solvere; and this general term includes three kinds of such rendering—dare, facere, praestare. Dare meant to give either the property in a thing, as in the contract of stipulatio, or only the possession of it, as in the case of the seller in the contract of sale; facere, to do something, as, for example, the mandatory or agent had to do what he had undertaken to do; and praestare, to make good, as the person guilty of negligence had praestare culpam, to make good his fault. These three terms, however, were not kept distinct, facere and praestare being constantly used in the sense
of *dare*. In every case, however, it was a sum of money that was the real thing that the debtor was forced to give, as the remedy for every breach of contract was put into the shape of a pecuniary equivalent, unless the debtor could and did execute his contract under compulsion.

*Obligatio* is thus properly the tie between creditor and debtor; but it is also used to express the right thus gained (D. xii. 2. 9. 3), the duty thus owed (D. i. 16. 21), and also one mode by which such a tie is created, being used as equivalent to *contractus*. (D. v. 1. 20.)

2. *The Sources of Obligations.*—The two main sources of obligations are contracts and delicts: the debtor is bound by having undertaken to be bound, or he has done an injury and has to make good his wrong. Contracts are the principal subject of the remainder of this Book, and delicts of the first Titles of the Fourth Book. But there were obligations which arose in a manner very similar to that from which contracts sprang, a state of facts having arisen by which the debtor was placed in very much the position in which he would have been had he contracted—*obligaciones quasi ex contractu*, treated of in the 27th Title of this Book; and there were obligations which arose from wrongs being done, which did not fall within the special list of delicts known to Roman law—*obligaciones quasi ex delicto*, treated of in Title 5 of the Fourth Book. The sources of obligations in the Institutes are thus four; while Gaius says (iii. 88), *omnis obligatio vel ex contractu nascitur, vel ex delicto*, and adds in a passage given in the Digest (xlv. 7. 1. pr.), *aut proprio quodam jure ex variis causarum figuris*, i.e. by obligations *quasi ex contractu* and *quasi ex delicto*.

3. *Contracts.*—A contract is a species of agreement, the accord of two wills, *convenio, pactum*; and in an agreement there is first of all the *pollicitatio*, the offer made by one party, and then the acceptance by the other. When this accord of wills is such that the law adds a third element, the *vinculum juris*, or obligation, we have a contract. (D. i. 12. 3. pr.) But in order that this third element should be added, it was, according to the strict theory of Roman law, necessary that the accord of wills should have been expressed in a particular manner. In the old times of Roman law, the *nemum*, the form of conveyance by the scales and the copper, was the chief and, perhaps, the only form of contract recognised, and the use of this form continued to be necessary to pass *res mancipi*. (See *Introd.* sec. 59.) Possibly stipulations also dated from the earliest time of Roman law (HUNTER, 364–8), but at any rate there were gradually recognised in Roman law the following forms by which contracts could be made: 1. *Verbis*, by the stipulation. 2. *Litteris*, by entry in a ledger. 3. Then, without any special form being gone through, contracts were recognised when made *re*, by the simple delivery of a thing in one of four ways, *mutuum, commodatum, depositum, pignus*. And, lastly, 4. In four cases contracts were recognised as arising immediately
out of the consent of the parties: sale, letting on hire, partnership, mandatum. There were thus ten recognised heads of contract. The Institutes, following Gaius, treat first of contracts re, although this is out of the historical order, then the formal contracts verbis and litteris, and lastly the formless contracts consensu. It may be observed that contracts re may in one way be classed with contracts verbis and litteris, and opposed to the consensual contracts; for in contracts re there is something, i.e. the delivery of the thing, as in contracts verbis and litteris there is something, i.e. the use of a form, beyond the mere consent.

By an obligation the debtor is bound to the creditor; but an obligation might either be such as to bind one party, the debtor, and not the other, the creditor (unilateral contracts), or it might be such that each party was in turn debtor and creditor (bilateral contracts). Contracts made verbis and litteris were unilateral. Among contracts made re, the contract of mutuum was unilateral. The contracts of commodatum, depositum, and pignus were so far bilateral that the person to whom the thing was delivered might recover extraordinary outlay incurred in preserving or maintaining the thing, or caused by the fault of the other person to the contract. It was much in the same sense that the consensual contract of mandatum was bilateral. The other three consensual contracts were always bilateral. An essential feature of the three contracts, commodatum, depositum, and mandatum, was that they were always gratuitous. Contracts again may be regarded as they are executed or executory—that is according as something must have been done in accomplishment of the contract at the time of making it, or as the liabilities of both parties might be altogether prospective. Contracts re belong to the former head; contracts verbis and consensu to the latter. Contracts litteris were, properly, executed, but were so used as to be executory.

4. Innominatae Contracts.—When an agreement did not take the shape of any of the ten forms of contract recognised in the civil law (it will be remembered that the heads re and consensu have each four subdivisions), it was, strictly speaking, not a contract at all, but if one party to it had executed it, the praetor would force the other party to execute it also. These contracts, as having no special name, have been termed contractus innominati, and as the contract sprang into existence by a thing having been done or given, by the fact, that is, of the contract being already executed by one party to it, these contractus innominati may be looked on as belonging more immediately to the head of contracts made re. Paulus (D. xix. 5. 5. pr.) thus sums up the heads of the cases in which such contracts might arise: 'Aut do tibi ut des, aut do ut facias, aut facio ut des, aut facio ut facias.' I give something to you in such a way that by the fact of my gift (re) you are bound to give something to me, or I give so that you are bound to do something for me, or I do something for you so that you are bound to give me something, or I do something for you so that you are
bound to do something for me. Contracts of this sort would be enforced by an *actio in factum prœscriptis verbis*, by one, that is, in which the formula would be arranged to meet the circumstances of this particular case (*in factum*), a short statement of these circumstances being placed in the *demonstratio* (*prœscriptis verbis*).

**Facts.**—An agreement, *pactum*, not coming under the ten heads of contract, nor binding as an innominate contract by having been executed on one side, was, as a general rule, a *nudum pactum*; that is, it could not be enforced by an action. But such an agreement might be used as the basis of an exception. (See Bk. iv. Tit. 13.) *Nuda pactio obligationem non parit, sed parit exceptionem.* (D. ii. 14. 7. 4.) There were, however, some pacts to which an action was attached, either by express enactment, *pacta legitima*, such as, after the time of Justinian, the agreement to give (Bk. ii. Tit. 7. 2), or by the pretors (*pacta praetoria*), such as the *pactum constitutæ pecuniae*, an agreement by which a person agreed to pay what he already owed. (Bk. iv. Tit. 6. 9.) *Pacta* might also be added (*adjecta*) as subsidiary to a main obligation.

**Natural Obligations.**—There were certain ties to which no action was attached, but which still were not without a recognised legal force, because of the moral claim to recognition they involved. They were called natural obligations. As for example, if an agreement was made between a *paterfamilias* and any one in his power, this was not an obligation that could be legally enforced, but the parties were bound by a tie which the jurists ascribed to the sphere of the *lex naturæ* or *jus gentium*. *Is natura debet quem jure gentium dare oportet, cujus fidel secuti sumus.* (D. i. 17. 84. 1.) The principal effects of natural obligations were, that if money was paid in pursuance of them it could not be sued for back (D. xii. 6. 19. pr.), and they could be made the subject of a set-off in an action brought to enforce a legal obligation: *etiam quod natura debetur venit in compensationem.* (D. xvi. 2. 6.) Pacts probably were considered to produce always a natural obligation; but a natural obligation might arise in cases where there was no pact, no agreement, for example, of persons able to contract, as, if a thing was due from a slave, the slave could not bind himself, but after he became free, the thing was due by a natural obligation (D. xlv. 7. 14), and a suretyship could be created to give effect to it. (Tit. 20. 1.)

5. *Culpa, dolus, diligentia.*—One of the varying features in obligations which it is of considerable importance to notice is the amount of responsibility thrown on one or both of the parties to it.

If one person who was bound to another by a contract, designedly subjected him to harm or loss (*damnnum*) with respect to anything included in the contract, the wrongdoer, in inflicting this wilful injury, was said to be guilty of *dolus*; if he was the means of an injury not designed being inflicted, then, unless the *damnnum* was
the result of unavoidable accident, he was said to be guilty of *culpa*. The technical term for being responsible for malicious injury or a fault was *dolum, culpam praestare.* Every contract bound all parties *dolum praestare,* and a special agreement that the parties should not be so bound was void. (D. ii. 14. 27. 3.) *Culpa* would naturally admit of degrees. The fault might be one which any man in his senses would have scrupled to commit, and it was then termed *lata culpa* (*lata culpa est nirma negligenta, id est, non intelligere quod omnes intelligunt; D. i. 16. 213. 2*); and *lata culpa* was treated as approaching nearly to *dolus,* as such extreme negligence must generally be due to design. Or it might consist in falling short of the highest standard of carefulness to avoid injury that could be found; such, for instance, as the carefulness employed in the management of affairs by a person who would deserve to be called *bonus paterfamilias,* and the *culpa* was then termed *levis* or *levissima.* Or, again, it might consist in falling short of the care which the person guilty of the *culpa* was accustomed to bestow on his own affairs. In this last case we no longer measure by an absolute standard, but a relative one; what is *culpa* in one man is not in another, and modern writers have therefore spoken of it as being *culpa levius in concreto,* i.e. as seen in and measured by the particular individual, opposed to the *culpa levius in abstracto,* i.e. estimated by the absolute standard of the diligence which a person of the utmost care would exhibit.

If we measure the degrees of responsibility which under various circumstances those bound by an obligation will incur, we may speak either of the fault for which they will be held responsible, or of the degree of negligence which this fault implies, or of the degree of diligence that is exacted from them. These are only different modes of talking of the same thing. If the circumstances are such that the person bound by the obligation undergoes a slight degree of responsibility, we may say that he will be responsible for a grave fault (*lata culpa*), not for a slight one (*culpa levius*), that the negligence for which he will be responsible must be gross, *crassa,* or that the diligence he has to show is of the second, not of the first, of the two orders to be mentioned immediately. It is in the language of diligence that the Roman jurists generally calculate the amount of responsibility. They make two orders of diligence, the higher, that of the *bonus paterfamilias,* *exacta diligentia,* and the lower, that shown by the person spoken of in the conduct of his own affairs, *quaesit in suis rebus diligentia,* and these two orders of diligence are brought into harmony with the three divisions of *culpa* (*lata, levius,* and *levius in concreto*) in this way. (1) A person responsible for *culpa levius in abstracto* has to show the diligence of a *bonus paterfamilias.* (2) A person who is only responsible for *lata culpa* is not to be held liable until it is shown that he has not used as much care as he does habitually about his own things. A person who is responsible for *culpa levius in concreto* has to show that he has used as much care as he does about
his own things, i.e. in this case the burden of proof is on him. In each case the standard is the care which the person sought to be made liable takes about his own things. All responsibility for \textit{culpa} is thus set under two heads of diligence, and in the same way there are two corresponding heads of negligence; and negligence has a distinguishing mark added to it in the term \textit{crassa}, as opposed to slight (\textit{minima}), when it is meant that the person spoken of has not used in the case in question the care he habitually employs in matters that affect him.

The higher degree of diligence, that of a \textit{bonus paterfamilias}, was required, or, in other words, the negligence from which liability would arise need not be \textit{crassa}, or, in other words, the \textit{culpa} causing liability might be \textit{levis} and \textit{levis in abstracto}, in the following set of cases: 1. Where the person responsible got the benefit of a contract, as, for example, when he borrowed a thing for his own use (\textit{commodatum}). 2. When both parties were interested in the obligation being carried out, but there was no joint interest in the thing, as, for example, mortgagor and mortgagee (Tit. 14. 4), vendor and vendee (D. xviii. 6. 3), letter and hirer (D. xix. 2. 25. 7). 3. In case of agents (\textit{negotiorum gestores}) (Tit. 27. 1).

Only the lower degree of diligence, that \textit{quanta in suis rebus}, was required, or, in other words, the negligence from which liability would arise must be \textit{crassa}, or, in other words, the \textit{culpa} causing liability might be \textit{lata} or \textit{levis in concreto}, in the following cases: 1. When the other person to the contract got the benefit from it, as in a contract of deposit, the depositary is only liable for \textit{crassa negligentia}, and it must be proved that he has not used the \textit{quanta in suis rebus diligentia}. (D. xvi. 3. 32.) 2. When both parties to the contract have a common interest in the thing as to which the question of diligence or negligence arises, as partners, the husband in the management of the dotal estate, where he is a sort of partner (D. xxiii. 3. 17. pr.), co-heirs and co-legatees (D. x. 2. 25. 16). 3. Involuntary parties to a \textit{quasi} contract, like tutors and curators (D. xxvii. 3. 1. pr.).

6. \textit{Interest, mora.}—When a person bound by a contract delayed to execute it, and this delay (\textit{mora}) was of such a kind that \textit{culpa} could be imputed to him, he was subjected to something more than the necessity of fulfilling the contract, and especially he was in most cases liable to pay interest (\textit{usurae}). (D. xxii. 1. 7.) But interest was not ordinarily payable on debts except by express agreement. By the Twelve Tables there was fixed a legal maximum of 12 per cent. per annum, or 1 per cent. per month, \textit{centesimae usurae}. It was afterwards reduced to 6 per cent., and by the \textit{lex Genucia} (B.C. 341) interest was declared illegal. During the Republic, however, it was again recognised, and the maximum once more rose to 12 per cent. Justinian fixed a maximum varying according to circumstances from 12 to 4 per cent. (C. iv. 32. 26.)

7. \textit{Actions.}—The subject of actions is treated of fully in the sixth and following Titles of the Fourth Book, and it is only neces-
sary here to notice generally that part of the subject which has to do with the enforcement of obligations, and especially of contracts. As an obligation was constituted a legal tie by having an action attached to it, it is necessary to know by what kind of action different obligations were enforced, and in almost every case the Institutes couple the mention of the kind of action attached with the mention of each kind of obligation. The main distinction to be now referred to is that between condicitions and bonae fidei actions, corresponding with the distinction noticed in Tit. 13. 1 between civil and praetorian obligations.

The older actions of law (see Intro. sec. 94) afforded a very cumbersome machinery for the enforcement of rights against particular persons; and the lex Silia (510 a.u.c.) introduced a new kind of action, termed condicio, for the enforcement of obligations binding a person to give the absolute ownership (dare) of a certain sum of money (pecunia certa); and the lex Calpurnia (520 a.u.c.) extended its application to a similar demand of any certain thing, as a definite quantity of oil or wheat. (Gai. iv. 19.) In process of time the condicio was made to embrace uncertain as well as certain things, and was applied to obligations binding a person facere, and hence Gaius says, appellantur in personam actiones, quibus dari fieri vo opertere intendimus, condiciones (iv. 5). The condicio certi, i.e. the condicio in its older and stricter form, came thus to be opposed to the condicio incerti. We may therefore say that contracts dare or facere were enforced by a condicio, and that this condicio was certi or incerti according as a definite or indefinite thing was demanded. Whenever the contract was to do a thing, it was always uncertain, because the law could not compel the person bound by the contract to do the thing, but only to give a pecuniary equivalent; and what sum of money was a reasonable compensation for the loss sustained by the thing not being done was left to be settled by the judge. The formula of the condicio certi ran si paret eum [decem aureos] dare opertere. (See paragr. 1. of next Title.) That of the condicio incerti ran quicquid paret eum dare facere opertere. The condicio incerti, besides its general name, received also a special name derived from the kind of contract it was brought to enforce, or from the subject matter of the contract itself. For instance the action brought to enforce a stipulation for an uncertain sum was termed an actio ex stipulatu. When the condicio was certi, it was generally spoken of simply as condicio. Sometimes, however, though more rarely, it too received a special name, as the condicio certi brought to enforce a mutuum sometimes termed the actio mutui.

There was another class of actions in which a wide discretion was given to the judge, who was to take all the circumstances of the case into his consideration, and pronounce the sentence which equity demanded, thus acting as an arbiter rather than as a judec. Such actions were termed bonae fidei actiones, and the obligations, to
enforce which they were given, were termed bonae fidei obligationes. The right to have this equitable consideration of the whole case was inherent in the nature of the obligation, i.e. the action brought to enforce any of the bonae fidei obligationes was always bonae fidei. All actions instituted by the praetorian law were of this description. There was thus an opposition made between condictiones which were stricti juris, derived from the civil law, and in which the judge was confined within the limits of the formula, and these bonae fidei actiones. Among the bonae fidei actiones we shall find several mentioned in the following Titles of this Book, as, for instance, the action *ex empto*, *ex vendito*, *ex locato*, *ex conducto*, *mandati*, *depositi*, *pro socio*, &c. (See Bk. iv. Tit. 6. 28.) The bonae fidei action given by the praetor to enforce innominate contracts was almost always one specially adapted to meet the facts of the particular case, and it received the name of the actio in factum præscriptis verbis. The formula was drawn up to meet the facts of the particular case (in factum), and this was done by placing in the demonstratio a short statement of these facts (præscriptis verbis). (See Intro. sec. 106.)

TIT. XIV. QUIBUS MODIS RE CONTRAHITUR OBLIGATIO.

Re contrahitur obligatio veluti mutui datione. Mutui autem obligatio in his rebus consistit, qua ponderare, numero mensuravere constant, veluti vino, oleo, frumento, pecunia numerata, sere, argento, auro, quas res aut numerando aut metiendo aut adpendendo in hoc damus, ut accipientium siant et quandoque nobis non eadem res, sed aliae ejusdem nature et qualitatis reddantur. Unde etiam mutuum appellatum sit, quia sua mea tibi datur, ut ex meo tuum fiat. Ex eo contractu nascitur actio, qua vocatur condictio.

An obligation is contracted re, as, for example, by giving a mutuum. This always consists of things which may be weighed, numbered, or measured, as wine, oil, corn, coin, brass, silver, or gold. In giving these things by number, measure, or weight, we so give them that they may become the property of those who receive them. And identical things lent are not returned, but only others of the same nature and quality; and hence the term mutuum, because what I give, from being mine, becomes yours. From this contract arises the action termed condictio.

GAI. iii. 90; D. xii. 1. pr. 1, 2.

Obligations were said to be contracted re when the actual receipt of a thing under certain conditions imposed the necessity of fulfilling those conditions. Four kinds of contracts came under this head, all of which are noticed in this Title, viz. those named mutuum, commodatum, depositum, and pignus. By the contract of mutuum the property in the thing delivered passed to the receiver; by that of pignus the recipient acquired possession; in contracts of commodatum and depositum the recipient was only in possessione. (See Bk. ii. Tit. 6. pr. note.)

The contract of mutuum was a contract of loan, where not the thing lent, but an equivalent, was to be returned. The obligation to return this equivalent arose on and by the delivery of the thing
lent. It is scarcely necessary to say that the derivation from *ex meo tuum* is quite erroneous. Things which were of such a nature that they could be replaced by equal quantities and qualities are termed, in barbarous Latin, *fungibles*, because *mutua vice funguntur* (D. xii. 1. 6), they replace and represent each other: thus a bushel of wheat is said to be a *res fungibilis*, a particular picture is not. The distinction is much better expressed by saying that the classes of things which can represent each other are considered *in genere*, those which cannot are considered *in specie*. (See Introd. sec. 55.) If the person who lends the bushel of wheat receives in return a bushel of equally good wheat, consisting of grains totally different from those he lent, it is the same to him as if the identical grains were restored; the wheat may be considered *in genere*; not so with the picture, which can only be considered *in specie*. But it is to be observed that it is the intention of the parties, not the nature of the thing, that makes the thing considered *in genere* rather than *in specie*. A person might lend a picture, and only require that a picture of some sort, whether the same picture or another, should be given in return to him, in which case the picture would be considered *in genere*; or a person might require the identical grains of wheat to be returned, and then the wheat would be considered *in specie*. A thing lent in a *mutuum* was always considered *in genere*, so that whenever it was the intention of the parties that the loan should be a *mutuum*, it was also their intention that the thing lent should be considered *in genere*.

It was by the contract of *mutuum* that money was generally lent, and so we are told in Bk. iv. Tit. 7. 7, that persons who lent money (*mutuas pecunias*) to *filifamiliares* were deprived by the *senatusconsultum Macedonianum* of all power to recover the debt.

The action for recovering the equivalent would be a *condictio certi*, as the equivalent was necessarily something fixed and determined on. In this case the *condictio* received the name of *condictio ex mutuo*, or sometimes *actio mutui*, but as it was always *certi*, it very seldom was termed anything but *condictio*, and perhaps the term *actio mutui* (C. vii. 35. 5) would not have been used in the time of strict legal language.

1. Is quaque, qui non debitum acceptit ab eo, qui per errorem solvit, re obligatur: daturque agenti contra eum propter repetitionem condicticia actio; nam proinde ei condici potest 'si paret eum dare oportere,' ac si mutuum accepisset. Unde pupillus, si ei sine tutoris auctoritate non debitum per errorem datum est, non tenetur indebiti condicione, non magis quam mutui datione. Sed hae species obligationis non videtur ex contractu consistere, cum is, qui solvendi animo dat, magis distrahere

1. A person, also, who receives a payment which is not due to him, and which is made by mistake, is bound *re*; and the plaintiff may have against him an *actio condicticia* to recover what he has paid. For the *condictio* 'Staret eum dare oportere,' may be brought against him, exactly as if he had received a *mutuum*. Thus a pupil, to whom a payment has been made by mistake without the authorisation of his tutor, is not subject to a *condictio indebiti*, any more than he would be by the gift of a *mutuum*. This species
voluit negotium quam contrahere. of obligation, however, does not seem to arise from a contract, since he, who
gives in order to acquire himself of something due from him, intends rather
to dissolve than to make a contract.

GAI. iii. 91.

In this case it is the law that imposes certain conditions, and
not the intention of the parties, and therefore the obligation arises
 quasi ex contractu, under which head it is, indeed, subsequently
placed. (Tit. 27. 6.) A pupil could not be bound without the
consent of his tutor. If, therefore, without the consent of his tutor,
a loan was made him, he was not bound to repay it, or if money
not due to him was paid him, he was not bound to refund it. (See
Bk. i. Tit. 21. pr.)

2. Item is, cui res aliquo utenda datur, id est commodatur, re obliga-
tur et tenetur commodati actione. Sed is ab eo, qui mutuum acceptit,
longe distat: namque non ita res datur, ut ejus fiat, et ob id de ea re
ipso restitutenda tenetur. Et is qui-
dem, qui mutuum acceptit, si quolibet
fortuito casu, quod acceptis, amiserit,
veluti incendio, ruina, naufragio aut
latronum hostiumve incurso, nihil imped-
minus obligatus permanet. At is, qui utendum acceptit, sane quidem
exactam diligentiam custodienda rei
prestare jubetur nec sufficit ei, tan-
tam diligentiam adhibuisse, quam,
suis rebus adhibere solitus est, si
modo alius diligenter potuerit eam
rem custodire: sed propter majorem
vim majoresve casus non tenetur, si
modo non hujus culpa is casus inter-
venit: alioquin si id, quod tibi
commodatum est, peregrare ferre te-
cum maleuris et vel incursu hostium
pradonumve vel naufragio amiseris,
dubium non est, quin de restitutenda
ea re tenearis. Commodata autem
res tunc proprie intellegitur, si nulla
merce deferat vel constituta res
tibi utenda data est. Alloquin mer-
cede interveniente locatus tibi usus
re videtur: gratuitum enim debet
esse commodatum.

2. A person, too, to whom a thing
is given as a commodatum, i.e. is given
that he may make use of it, is bound
re, and is subject to the actio commo-
dati. But there is a wide difference
between him and a person who has
received a mutuum; for the thing is
not given him so that it may become
his property, and he therefore is bound
to restore the identical thing he re-
ceived. And, again, he who has re-
ceived a mutuum, if by any accident,
as fire, the fall of a building, ship-
wrack, the attack of thieves or en-
emies, he loses what he received, still
remains bound. But he who has re-
ceived a thing lent for his use, is
indeed bound to employ the utmost
diligence in keeping and preserving
it; nor will it suffice that he should
take the same care of it, which he
was accustomed to take of his own
property, if it appears that a more
careful person might have preserved
it in safety; but he has not to answer
for loss occasioned by superior force,
or extraordinary accident, provided
the accident is not due to any fault of
his. If, however, you take with you
on a journey the thing lent you to
make use of, and you lose it by the
attack of enemies or robbers, or by
shipwreck, you are undoubtedly bound
to restore it. A thing is properly said
to be commodatum, when you are per-
mitted to enjoy the use of it without
any recompense being given or agreed
on; for, if there is any recompense,
the contract is that of locatio, as a
thing, to be a commodatum, must be
lent gratuitously.

D. xliv. 7. 1. 8, 4; D. xiii. 6. 18. pr.
As the advantage is, in almost every case, entirely on the side of the receiver of the commodatum, he was bound to take every care of it, or, as Gaius says, as great care as the most diligent paterfamilias takes of his own property. (D. xiii. 6. 18. pr.)

To use the technical phrase, it was 'essential' to the commodatum that it should be gratuitous. Things incident to a contract may be essential to it, i.e. necessarily belonging; natural, i.e. belonging in the absence of express agreement to the contrary; or accidental, i.e. belonging only by express agreement.

The commodatum gave rise to the actio commodati, which was either directa or contraria; by the actio commodati directa, the commodans made the receiver of the commodatum restore the thing lent, after the receiver had had it in his possession for the time agreed on (for he could not reclaim it before), or made him pay for any loss accruing through his fault. By the actio commodati contraria, the receiver of the commodatum obtained from the commodans compensation for any extraordinary expenses which the preservation of the thing had entailed, or for any losses occasioned by the fault of the commodans. The actio was, in the former case, termed directa, because it proceeded from what was a necessary part of the execution of the contract, viz. the thing lent being put in the possession of the receiver, while the actio contraria only arose from a thing which might happen or not, viz. there being some extraordinary expense, or some fault on the part of the commodans. (See D. xiii. 6. 17. 1.) All the actions arising out of contracts re, except the condicio ex mutuo, were bona fidei. (Bk. iv. Tit. 6. 28.)

8. A person, again, with whom a thing is deposited, is bound re, and is subject to the actio depositi, by which he is bound to give back the identical thing which he received. But he is only answerable if he is guilty of fraud, and not for a mere fault, such as carelessness or negligence; and he cannot, therefore, be called to account if the thing deposited, being carelessly kept, is stolen. For he who commits his property to the care of a negligent friend, should impute the loss to his own want of caution.

D. xlv. 7. 1. 5.

Here the benefit is entirely on the side of the person who commits the thing to the care of one who receives it gratuitously. The latter, therefore, unless he specially agrees to be answerable for the thing entrusted to him, or himself offers to take care of it (D. xiii. 6. 5. 2), is not liable for its loss or deterioration, if he is not guilty of dishonesty, or of such gross neglect as amounts to dishonesty. He has, however, no right to make use of the thing, and would be guilty of theft if he did (Bk. iv. Tit. 1. 6); and as it is
deposited for the benefit of the person depositing it, that person can reclaim it when he pleases, and need not, like the commodans, wait for the expiration of the time agreed on.

The depositum gave rise to the actio depositi, which was directa or contraria, upon the same principle as the actio commodati. The depositary was entitled to be recompensed for every expense incurred, and to compensation for every loss occasioned by the fault of the deponens, however light that fault might be. If the depositary had voluntarily offered to receive the deposit, he too would be answerable for loss occasioned by a culpa levis, i.e. a slight fault, as opposed to culpa lata, gross negligence. If a deposit was rendered necessary by circumstances of unforeseen and sudden misfortune, as a shipwreck or fire, and if the depositary who had received the thing denied he had received it, double the value of the thing could be recovered. (See Bk. iv. Tit. 6. 23.)

4. Creditor quoque, qui pignum acceptit, re obligatur, qui et ipse de ea ipsa re, quam acceptit, restitua non faciat actionem pignorativam. Sed quia pignum utiusque gratia datur, et debitoris, quo magis ei pecunia crederetur, et creditoris, quo magis ei in tuto sit creditum, plaeuit sufficiere, quod ad eam rem custodiendam, exactam diligentiam adhibere: quam si praetiterit et aliquo fortuito casu rem amiserit, securum esse nec impediri creditum petere.

4. A creditor also, who has received a pledge, is bound re, for he is obliged to restore the thing he has received, by the actio pignorativa. But, inasmuch as a pledge is given for the benefit of both parties, of the debtor that he may borrow more easily, and of the creditor that repayment may be better secured, it has been decided that it will suffice if the creditor employs his utmost diligence in keeping the thing pledged; but if, notwithstanding this care, he has lost it by some accident, the creditor is not accountable for it, and he is not prohibited from suing for his debt.

D. xlii. 7. 1. 6; D. xiii. 7. 18. 1.

The oldest form of the contract of pledge was that of mancipatio, or absolute sale of the thing subject to a contract of fiducia or agreement for redemption. There were so many things to which mancipatio was considered inapplicable, that the more simple contract of pignum quite superseded this mancipatio contracta fiducia. A further simplification of the contract of pledge was the hypotheca, in which the thing pledged remained with the pledger. The mancipatio, it may be observed, transferred both the property and possession of the thing pledged; the pignum gave the possession to the creditor, but left the property in the thing with the debtor; the hypotheca left both the property and the possession with the debtor. (See note at end of Bk. ii. Tit. 5.) The right of the creditor over the thing pledged or hypothecated was protected by the actio quasi-Serviana (see Bk. iv. Tit. 6. 7), by which the creditor recovered the thing pledged if lost out of his possession, and got possession of the thing hypothecated.

The text seems to draw a distinction between the position of the creditor and that of the recipient of a commodatum, in regard to the degree of responsibility for negligence. But practically they
were on the same footing. The creditor, like the receiver of a commodatum, could not make use of the thing placed in his possession; and although he could without agreement take them as against the principal of his claim (C. iv. 24. 1), it was only by an agreement, expressed or understood, that the creditor could take the fruits of the thing pledged by way of interest (D. xx. 1. 11. 1; D. xx. 2. 8).

Creditor and debtor are terms used more widely in Roman law than in our own. Every one who possessed a personal right against another was termed a creditor, and every one who owed the satisfaction of a claim, or was the subject of a personal right, was a debtor.

From the contract of pignus sprang the actio pigneratoria, which was directa when used by the debtor to constrain the creditor to give back the thing pledged if the debt had been paid, or to pay over the surplus if the thing pledged had been sold, and produced more than was due for the debt, or to obtain compensation from him for any injury to the thing pledged, arising through his fault. The actio pigneratoria was contraria when used by the creditor to make the debtor reimburse him for all expenses incurred in keeping the thing safe, or compensate him for all injuries sustained by the thing pledged through the fault of the debtor (D. xiii. 7. 31); or, again, to compensate him if the thing pledged proved to be in reality not the property of the debtor, and was claimed by the real owner. Until it was claimed, the fact that it belonged to another did not prevent a thing being made the subject of a contract of pignus, and the creditor was as much bound to restore it to the debtor, if the sum due was paid, as if it had really been the debtor’s property.

Trt. XV. DE VERBORUM OBLIGATIONE.

Verbis obligatio contrahitur ex interrogatione et responsione, cum quid dari fierive nobis stipulamur. Ex qua due profliscuntur actiones, tam condicio, si certa sit stipulatio, quam ex stipulatu, si incerta. Quae hoc nomine inde utitur, quia stipulum apud veteres firmum appellabatur, forte a stipite descendens.

An obligation verbis is contracted by means of a question and an answer, when we stipulate that anything shall be given to or done for us. It gives rise to two actions—the condicio, when the stipulation is certain, and the actio ex stipulatu, when it is uncertain. The term stipulation is derived from stipulum, a word employed by the ancients to mean ‘firm,’ and coming perhaps from stipes, the trunk of a tree.

D. xlv. 7. 1. 7; D. xii. 1. 24.

The stipulatio was, properly speaking, not a contract, but a means of making a contract, a solemn form giving legal validity to an agreement. This form consisted of a question and answer, and it was the question only which was, properly speaking, the stipu-
latio, it being only by an extension of the term that the word was applied to the whole mode of contracting, and that the answerer as well as the questioner was said, as in paragr. 1, to be one of the stipulantes. Like all the old forms of obligation, this formula only bound one party, viz., the maker of the promise. The promissor had himself to become the stipulator, and to receive in his turn a promise, if he wished to secure reciprocal rights. Obligations may be divided according as they are unilateral and bind one party only, or bilateral and bind both parties. A stipulation gave rise to a unilateral obligation.

Festus derives stipulatio from stips, coined money; and Isidorus from stipula, a straw. 'Vetere enim, quando sibi aliqur promittebant, stipulam tenentes frangebant, quam iterum jun-gentes, sponsiones suas agnoscebant.' (Orig. v. 24. Quoted by Ortolan.) Stipes and stipulum are a more probable source of the derivation of the word.

When the stipulation was for something certain, as for a fixed sum of money, or for wine of a specified kind, it was enforced by the condicio certi; when for something uncertain, as for wine of a good quality, for something to be done or left undone, by the condicio incerti. The term actio ex stipulatu is sometimes used to denote the condicio, whether certi or incerti, but it is more usually employed to denote the condicio incerti, as when the condicio was certi, that is, was employed in its proper form, it generally received no other name than condicio. The action arising on a stipulation of any kind was always stricti juris.

The stipulation was not the only contract made by going through a solemn form of words. By the dictio dotis the wife and her ascendants bound themselves to give the dos to the husband; and by a promise accompanied by an oath (jurata promissio liberti) the freedman bound himself to render his services to his patron. In neither of these cases, however, was a previous question a necessary part of the form.

ab utraque parte solum desiderat, licet quibuscumque verbis expressus est.

answer agrees with the question. So two Greeks may contract in Latin. Anciently indeed it was necessary to use the formal words just mentioned. But the constitution of the Emperor Leo was afterwards enacted, which, removing formalities of expression, requires only that the parties understand one another and mean the same thing, no matter what words they use.

Gal. iii. 92, 98; D. xliv. 1. 1. 6; C. viii. 87. 10.

Spondeo was the form exclusively proper when both parties were Roman citizens; adeo proprjcia civium Romanorum est, ut ne quidem in Græcum sermonem per interpretationem proprius transferri possit, quamvis dicatur a Græca voce figurata esse. (Gal. iii. 93.)

This constitution of Leo was published A.D. 472. (C. viii. 37. 10.)

2. Omnis stipulatio aut pure aut in diem aut sub condicione fit. Pure veluti 'quince aureos dare spondeos?' Idque confestim peti potest. In diem, cum adjeceto die, quo pecunia solvatur, stipulatio fit: veluti 'decem aureos primis kalendis Martii dare spondeos?' Id antem, quod in diem stipulamur, statim quidem debetur, sed peti priusquam dies veniat, non potest: ac ne eo quidem ipso die, in quem stipulatio facta est, peti potest, quia totus ille dies arbitrio solventis tribui debet. Neque enim certum est, eo die, in quem promissum est, datum non esse, priusquam est pretereat.

2. Every stipulation is made simply, or with the introduction of a particular time, or conditionally. Simply, as, 'Do you engage to give five aurei?' in this case the money may be instantly demanded. With the introduction of a particular time, as when a day is mentioned on which the money is to be paid, as, 'Do you engage to give me ten aurei on the first of the calends of March?' That which we stipulate to give at a particular time becomes immediately due, but cannot be demanded before the day arrives, nor can it even be demanded on that day, for the whole of the day is allowed to the debtor for payment, as it is never certain that the payment has not been made on the day appointed until that day is at an end.

D. xliv. 1. 46. pr.; D. i. 16. 218.

In the technical language of the jurists, Ubi pure quis stipulatus fuerit, et cessit et venit dies; ubi in diem, cessit dies, sed nondum venit. (See note on Bk. ii. Tit. 20. 20.) If the stipulation was made pure, the interest in the thing stipulated for passed at once to the stipulator (cessit dies), and he could at once demand to have it (venit dies), giving, of course, sufficient time for the debtor to fulfill his obligation. If the stipulation was made in diem, the interest in the thing stipulated for passed at once to the stipulator, but he could not demand it until the dies was past.

There is a distinction in the respective effects of a stipulation in diem and of a conditional stipulation that deserves notice. When a stipulation was made in diem, the promise was binding
at once, and the debt was already due, and therefore if any part of the debt was paid before the day named, it could not be recovered; whereas, when a stipulation was made with a condition, if anything was paid before the condition was accomplished, it could be recovered back, because, until the condition was fulfilled, the stipulator had no interest in the thing stipulated for (nondum cessit dies). (See paragr. 4.)

3. At si its stipuleris 'decem aureos annuos, quod vivam, dare spondes?' et pure factura obligatio intellegitur et perpetuatur, quia ad tempus deberi non potest. Sed heres petendo pacti exceptione submovebitur.

8. But, if you stipulate thus, 'Do you engage to give me ten aurei annually, as long as I live?' the obligation is understood to be made simply, and is perpetual; for a debt cannot be due for a time only; but the heir, if he demands payment, will be repelled by the exceptio pacti.

D. xlv. 1. 56. 4.

Lapse of time was not, in the Roman law, a mode by which a debt could be extinguished. Consequently, if it was owed, it was owed for ever: but this technicality was prevented from working any injustice by the plea referred to in the text, namely that there was an agreement to the contrary, or by that of fraud. Plane post tempus stipulator vel pacti conventi, vel doli mali exceptione submoveri poterit. (D. xlv. 7. 44. 1.) If, however, a similar gift had been given as a legacy, the right to receive would be extinguished ipso jure by the death of the legatee.

4. Sub condicione stipulatio fit, cum in aliquem casum differtur obligatio, ut, si aliquid factum fuerit aut non fuerit, stipulatio committatur, veluti 'si Titius consul factus fuerit, quinque aureos dare spondes?'. Si quis its stipuleret 'si in Capitolium non ascendero, dare spondes?'; perinde erit, ac si stipulatus esset, cum morietur dari sibi. Ex condicionali stipulazione tantum spes est debitum iri, samque ipsam spem transmittimus, si, priusquam condicio existat, mors nobis contigerit.

4. A stipulation is made conditionally, when the obligation is postponed to the happening of some uncertain event, so that it takes effect if such a thing happens or does not happen, as, for instance, 'Do you engage to give five aurei, if Titius is made consul?' Such a stipulation as 'Do you engage to give five aurei if I do not go up to the Capitol?' is in effect the same as if the stipulation had been, that five aurei should be given to the stipulator at the time of his death. From a conditional stipulation there arises only a hope that the thing will become due; and this hope we transmit to our heirs, if we die before the condition is accomplished.

D. xlv. 1. 115. 1; D. l. 16. 54.

The heir or legatee, it may be remembered (see Bk. ii. Tit. 14. 9), who died before the condition was accomplished, did not transmit any interest in the inheritance or legacy to his heirs, whereas the stipulator did, as we learn from the text, transmit to his heirs the hope that the thing stipulated for would be one day due to him (spes debitum iri). The reason of this difference is,
that the testamentary dispositions were considered to be made to
the heir or legatee personally.

If the promissor attempted to defeat the condition by prevent-
ing its being fulfilled, he was treated as if he had promised pure,
and the thing could be demanded from him at once.

It is here said that a promise to pay, if a person did not do a
thing, was a promise to pay when he died. There was, however,
this difference: the promissor was certain to die, and therefore the
stipulation, with the words cum moriar, was really made in diem;
whereas it was not certain whether the promissor would or would
not go up to the Capitol, and, therefore, the stipulation with the
words si in Capitolium non ascendero was made sub conditione.

5. Loca etiam inseri stipulati
solent, velut \textit{Carthagine dare spon-
des?} Que stipulatio licet pure fieri
videatur, tamen re ipsa habet tem-
pus injectum, quo promissor utatur
ad pecuniam Carthaginem dandum.
Et ideo si quis \\textit{ita Romæ stipuletur
\textit{Hodie Carthagine dare spondes?}}
innullis erit stipulatio, cum impos-
sibilis sit repromissio.

5. It is customary to insert a par-
ticular place in a stipulation, as, for
instance, ‘Do you engage to give me at
Carthage?’ and this stipulation, al-
though it appears to be made simply,
yet necessarily implies a delay sufficient
to enable the person who promises to
pay the money at Carthage. And
therefore, if any one at Rome stipulates
thus, ‘Do you engage to give to me
this day at Carthage?’ the stipulation
is useless, because the fulfilment of
the promise is impossible.

D. xlv. 1. 78. pr.; D. xiii. 4. 2. 6.

6. Condiciones, que ad præsteri-
tum vel ad presens tempus refe-
runtur, aut statim infirmant obliga-
tionem aut omnino non differunt:
veluti \textit{si Titius consul fuit, vel si
Mevius vivit, dare spondes?} Nam
si ea \textit{ita sunt}, nihil valet stipu-
latio: \textit{sin autem ita se habent, stat-
tim valet}. Que enim per rerum
naturam certa sunt, non morantur
obligationem, licet apud nos incerta
sint.

6. Conditions, which relate to time
present or past, either instantly make
the obligation void, or do not suspend
it in any way; as, for instance, \textit{If
Titius has been consul, or if Mevius is
alive, do you engage to give me?} For
if the thing mentioned is not really
the case, the stipulation is void; if it is
the case, the stipulation is immediately
valid: since things certain, if regarded
in themselves, although uncertain as far
as our knowledge is concerned, do not
delay the formation of the obligation.

D. xlv. 1. 100; D. xii. 1. 87–89.

7. Non solum res in stipulatum
deduci possunt, sed etiam facta: ut si
stipulemur fieri aliquid vel non fieri.
Et in hujusmodi stipulationibus
optimum erit pennam subjicere, ne
quantitas stipulationis in incerto sit
ac necesse sit actori probare, quid
ejus interesit. Itaque si quis, ut fiat
aliquid, stipuletur, ita adjici pena
debet: \textit{si ita factum non erit, tum
penes nomine decem aureos dare
spondes?} Sed si quædam fieri, quæ-
dam non fieri una eademque concep-
tione stipuletur, clausula erit hujus-

7. Not only things, but acts, may
be the subject of a stipulation: as when
we stipulate, that something shall, or
shall not, be done. And, in these
stipulations, it will be best to subjoin
a penalty, lest the amount included in
the stipulation should be uncertain,
and the plaintiff should therefore be
obliged to prove how great his interest
is. Therefore, if any one stipulates
that something shall be done, a penalty
ought to be added as thus: \textit{If the-
thing is not done, do you engage to
give ten aurei by way of penalty?}
modi adjicienda: 'si adversus ea factum erit, sive quid ita factum non erit, tune pœnæ nomine decem aureos dare spondeas?'

But, if by one single question a stipulation is made, that some things shall be done, and that other things shall not be done, there ought to be added some such clause as this: 'If anything is done contrary to what is agreed on, or anything agreed on is not done, then do you engage to give ten aurei by way of penalty?'

D. xlv. 1. 187. 7; D. xlvi. 5. 11.

Trt. XVI. DE DUOBUS REIS STIPULANDI ET PROMITTENDI.

Et stipulandi et promittendi duo pluresve rei fieri possunt. Stipulandi ita, si post omnium interrogationem promissor respondes 'spondeo.' Ut puta cum duobus separatim stipulantibus ita promissor respondes 'utrique vestrum dare spondeo.' nam si prius Titio spondeas, deinde alio interrogante spondeas, alia atque alia erit obligatio nec creduntur duo rei stipulandi esse. Duo pluresve rei promittendi ita fiant, (veluti si post Titii interrogationem) 'Mævi, quinque aureos dare spondeas? Sei, eoedem quinque aureos dare spondeas?' respondes singuli separatim 'spondeo.'

Two or more persons may be parties together in the stipulation or in the promise. In the stipulation, if, after all have asked the question, the promissor answers 'Spondeo,' 'I engage;' for instance, when, two stipulators having each separately asked the question, the promissor answers, 'I engage to give to each of you.' For if he first answers Titius, and then, on another person putting the same question, he again answers him, there will be two distinct obligations, and not two co-stipulators. Two or more become co-promissors, thus, as if after Titius has put the question: 'Mævius, do you engage to give five aurei?' 'Sei, do you engage to give five aurei?' they each separately answer, 'I do engage.'

D. xlv. 2. 4.

The word reus, strictly speaking, signifies the person who is liable, or subject, to a demand, but is used more generally to signify a party to an obligation, whether active or passive: so here we have rei stipulandi, as well as rei promittendi.

It was immaterial whether the interrogation was put and answered in the plural, spondetis ? spondemus; or in the singular, spondes ? spondeo. (D. xlv. 2. 4.)

It was not only in contracts made verbis that there could be joint creditors and joint debtors. In a commodatum or depositum, for instance, the parties might agree that several persons should be subject to a common obligation, and each be bound for the whole. (D. xlv. 2. 9.)

1. Ex hujusmodi obligationibus et stipulantibus solidum singulis debetur et promittentes singuli in solidum tenetur. In utrique tamen obligatione una res vertitur: et vel alter debitum accipiendo vel alter solvendo omnium perimit obliga-

1. By virtue of such obligations, the whole thing stipulated for is due to each stipulator, and from each promissor. But in each obligation, there is only one thing due, and if either of the joint parties receives the thing due, or gives the thing due, the obligation 

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If we look to the thing which was the subject of the contract, we may say, however many were the joint parties, there was but one obligation; while if we look to the persons by or to whom the promise was given, there were as many obligations as there were persons making or receiving the promise. If, therefore, the thing was given, that is, payment or performance made, the obligation was at an end, but the obligation binding on any one might be made to cease, as by the *deminutio capitis* of one of the co-promissors, without those binding on the others ceasing also. If, indeed, the aid of the law had been called in to enforce the obligation, the position of the parties was different. If one co-stipulator sued the promissor, all the other parties to the stipulation were thereby prevented from suing him; and if one co-promissor was sued, none of the others could be sued, the *litis contestatio* operating as an extinction of the debt; but under Justinian, when it appeared that there was a deficiency in what had been obtained from the promissor that had been sued, the others might be sued to make up this deficiency. (C. viii. 41. 28.) The co-promissor who had paid all could recover, as a partner, their shares from the others, if there was a partnership between them, and if not, he could recover by paying to the creditor the whole sum, but separating the payment, paying his share absolutely, and paying the rest as the price of having the creditor's actions transferred to him to use against the other co-promissors (*beneficium cedendarum actionum*); and probably, even if he had not actually made this separation, the prector would allow him to bring an action against the other co-promissors in which he was feigned to have done it. (D. xxvii. 3. 1. 13.)

2. Of two co-promissors, one may engage simply, the other with the introduction of a particular time, or conditionally; and neither the time nor the condition will prevent payment being exacted from the one who binds himself simply.

D. xlv. 2. 7.

Trt. XVII. DE STIPULATIONE SERVORUM.

Servus ex persona domini jus stipulandi habet. Sed hereditas in plerique persone defuncti vicem sustinet: ideoque quod servus hereditarius ante altam hereditatem stipulatur, adquirit hereditati ac per hoc etiam heredi postea facto adquiritur. A slave derives from the *persona* of his master the power of making a stipulation. But as the inheritance in most respects represents the *persona* of the deceased, if a stipulation is made by a slave belonging to the inheritance before the inheritance is entered on,
he acquires for the inheritance, and therefore for him who subsequently becomes heir.

D. xli. 1. 84, 61.

A slave had no *persona*, that is, no capacity of acquiring civil or political rights. But his master, who had such a capacity, could make his own *persona* speak and act through the slave, who was thus only a channel by which the wishes of the master were expressed. (See Bk. i. Tit. 3. pr. note.) But although a slave could thus engage others for the benefit of his master, by a stipulation, he could not bind his master, and could not, therefore, be the promisor in a stipulation; hence, the text only speaks of the stipulations, and not of the promises, of slaves.

*In plerisque personae defuncti vicem sustinet*; the inheritance represented the person of the deceased in most things, but there were some things which the slave could not acquire for the inheritance, which he could acquire for a living master: a usufruct, for instance, being always attached to a person, could not be stipulated for by a slave before the inheritance was entered on. (D. xli. 1. 61.)

1. Sive autem domino sive sibi sive conservo suo sive impersonaliter servus stipuletur, domino adquirit. Idem jus est et in libris, qui in potestate patris sunt, ex quibus causis adquirere possunt.

1. Whether a slave stipulates for his master, or for himself, or for his fellow-slave, or without naming any person for whom he stipulates, he always acquires for his master. It is the same with children in the power of their father, in all cases in which they acquire for him.

D. xlv. 8. 15; D. xlv. 1. 45. pr. and 4.

What is said here of the children in *potestate* must be taken with all the limitations made necessary by the power they had to acquire a *peculium* for themselves. (See Bk. ii. Tit. 9.)

2. Sed cum factum in stipulatione contingebitur, omnimodo persona stipulantis continentur, veluti si servus stipuletur, ut sibi ire agere licet: ipsae enim tantum prohiberi non debet, non etiam dominus ejus.

2. If it is a licence to do something that is stipulated for, the benefit of the stipulation is personal to the stipulator; for instance, if a slave stipulates that he shall have a right of passage for himself or beasts and vehicles, it is he himself, not his master, who is not to be hindered from passing.

D. xlv. 1. 180.

Even in this case the slave really acquires for the master. It is the master, and not the slave, who could enforce the stipulation by action. Of course this personal licence to cross land is something quite different from a servitude. For a servitude *eundi* or *agendi*, stipulated for by the slave, could only be attached to the *praedium* of the master. (D. xlv. 3. 17.)
3. Servus communis stipulando uniuque dominorum pro portione domini adquirit, nisi si unius eorum iusse aut nominatim cui eorum stipulatus est: tunc enim soli ei adquiritur. Quod servus communis stipulatur, si alteri ex dominis adquiri non potest, solidum alteri adquiritur, veluti si res, quam dari stipulatus est, unus domini sit.

GAI. iii. 167; D. xlv. 3. 7. 1.

TIT. XVIII. DE DIVISIONE STIPULATIONUM.

Stipulationum alis judiciales sunt, alie prætoriae, alie conventionales, alie communes tam prætoriæ quam judiciales.

Stipulations are either judicial, or prætorian, or conventional, or common, that is, both prætorian and judicial.

D. xlv. 1. 5. pr.

The division of stipulations here given is based on the difference of the circumstances in which they are entered into. Sometimes they are the result simply of the will of the parties, sometimes of the direction of a person in authority.

1. Judiciales sunt dumtaxat, que a mero judicis officio proficiscuntur: veluti de dolo cautio vel de persequendo servo, qui in fuga est, restituendove pretio.

1. Judicial stipulations are those which proceed exclusively from the office of the judge, such as the giving security against fraud, or the engagement to pursue a fugitive slave, or to pay his price.

D. xlv. 1. 5. pr.; D. xxx. 69. 5.

Before the magistrate the parties were in jure, before the judex they were in judicio. (See Introd. sec. 92.) The judex sometimes ordered that the parties before him should enter into stipulations.

Two instances are here given of stipulations directed by the judex. The first is the de dolo cautio. This was a stipulation directed for the benefit of a plaintiff, that the sentence given in his favour might be executed, without any attempt at fraud (dolus malus) on the part of the defendant. For instance, if the defendant was ordered to make over the property in a slave, the judex would direct that he should stipulate that he had done nothing to lessen the value of the slave. Otherwise the slave might be made over to the plaintiff, and the plaintiff's claim be thus nominally satisfied, while it might really be evaded by the defendant wilfully doing the slave some material harm. (D. vi. 1. 20 and 45.)

The other instance given is that of the stipulation de peres-
quendo servum qui in fuga est, restituendove pretio. A slave must be supposed to be demanded, and to run away before the decision is given. As the defendant, being the actual possessor, could alone reclaim the slave against third parties, the judex would com- pel him to engage by stipulation to follow and reclaim him, or to pay his price. If the slave escaped without any fault whatsoever of the defendant, the judge merely directed that the defendant should engage to give up the slave if he came into his power, and to permit the plaintiff to bring an action in the defendant's name for the recovery of the slave from any one who might detain him. (D. iv. 2. 14. 11.)


2. Prætorian stipulations are those which proceed exclusively from the office of the prætor; as the giving security against damnunm infectum, or for the payment of legacies. Under prætorian stipulations must be com- prehended edilition, for these, too, proceed from a magistrate pronouncing the law.

D. xliv. 1. 5. pr.

Damnunm infectum est damnunm nondum factum quod futurum veremur. (D. xxxix. 2. 2.) Supposing the damnum futurum which a man apprehended were an injury to his premises from the fall of the ill-repaired house of his neighbour, by the strict civil law, if he was to wait till the mischief was done, his neigh- bour might abandon his property in the fallen house, and the in- jured man could then obtain no reparation from him. To remedy this, the prætor would, if he saw fit, order the neighbour to give security (cautio damnii infecti) to indemnify the person applying, his heirs and successors in title, against any damage that might be done. If this order was not obeyed, the prætor authorised the complainant to enter upon and occupy the premises (in possessionem mittebat); and, finally, if security was still refused, the prætor gave the complainant full possession of the premises, but he was liable to be dispossessed, if within a certain time the original pro- prietor made compensation and complied with everything enjoined him. (See D. xxxix. 2. 4. 1.)

Legatorum: this was a stipulation binding the heir to pay legacies, when due, which were not yet payable; otherwise the heir might previously have spent and consumed all the inheritance. As in the previous case, the legatee received possession, if sureties were not given. (D. xxxvi. 3. 1. 2.)

A jurisdictione veniunt, that is, come from a magistrate qui jus dicit. Jurisdictio, in its general sense, includes the whole officium of the jus dicens, which is said to be latissimum, for honorum possessionem dare potest, et in possessionem muttere, pupillis non habentibus tutores constituere, judices ligitantibus dare. (D. ii. 1. 1.)
3. Conventionales sunt, quo ex conventione utrisque partis consensu prius est, neque jus sua jusdicis neque jus suus praetoris, sed ex conventione contraentium. Quorum totidem genera sunt, quod (penes dixerim) rerum contraentandarum.

4. Communes sunt stipulaciones veluti rem salvam fore pupilli: nam et pretor jubes, rem salvam fore pupillo caveri et interdum judex, si alter expediri hae res non potest: vel de rato stipulatio.

D. xlv. 1. 5. pr.

Communes stipulaciones were those sometimes directed by the pretor, sometimes by the judex. They ought properly to have preceded the conventionales.

Mention has already been made of the security a tutor or curator was obliged to give. (Bk. i. Tit. 24. pr.) It was properly given before the tutor entered on his office, and it belonged to the pretor to see that it was given. But if, before it was given, the tutor sued a debtor of the pupil, and the debtor objected that security had not been given, the judge, in order that the proceedings might not be put an end to, would direct security to be then given before him.

The stipulation de rato, or rem ratam haberi, was one entered into by a procurator bringing an action in the name of his principal that what he did would be ratified by his principal. It properly belonged to the pretor to direct that this stipulation should be entered into before the litis contestatio (see Introd. sec. 105); but if he omitted to direct this, and there was ground for distrusting the authority of the procurator, the judge would direct that the procurator should bind himself by this stipulation. (See Bk. iv. Tit. 11. 1.)

Trr. XIX. DE INUTILIBUS STIPULATIONIBUS.

Omnis res, quae dominio nostro subjicitur, in stipulationem deduci potest, sive illa mobilis sive soli sit. Everything, of which we have the property, whether it be moveable or immovable, may be the subject of a stipulation.

A stipulation is inutilis, i.e. invalid, when it produces no tie binding on the parties to it. It would seem to have been proper
to have examined here the causes which make contracts of any kind invalid, and not to limit the inquiry to stipulations. But the stipulation was so much the most important kind of contract that it is taken to represent all other kinds. Some few of the causes of invalidity noticed in this Title are peculiar to stipulations, but most are common to all contracts.

Lagrange thus classifies the reasons given in this Title for the invalidity of stipulations: they might be invalid (1) on account of their object (pr. paragr. 1, 2, 22, 24); (2) on account of the persons by whom (paragr. 7, 8, 9, 10, 12), for whom (paragr. 3, 4, 19, 20, 21), or between whom (paragr. 6) they were made; (3) on account of the manner in which they were made (paragr. 5, 17, 18, 23); (4) on account of the time (paragr. 13, 14, 15, 16, 26), or the condition (paragr. 11, 25) subject to which they were made.

1. At si quis rem, quæ in rerum natura non est ant esse non potest, dari stipulatus fuerit, veluti Stichum, qui mortuus sit, quem vivere credebat, aut hippocentaurum, qui esse non possit, inutilis erit stipulatio.

1. But, if any one stipulates for a thing which does not or cannot exist, as for Stichus, who is dead, but whom he thought to be living, or for a Hippocentaur, which cannot exist, the stipulation is void.

GAL. iii. 97.

In such a case no claim could be made for the supposed value of the thing, nor even for a sum promised under a penal clause in case of non-performance. (D. xlv. 1. 69 and 103.)

2. Idem juris est, si rem sacram ant religiosam, quam humani juris esse credebat, vel publicam, quæ usibus populi perpetuo exposita sit, ut forum vel theatrum, vel liberum hominem, quem servum esse credebat, vel rem, ejus commercium non habuit, vel rem suam dari quis stipulerit. Nec in pendenti erit stipulatio ob id, quod publica res in privatum deduci et ex libero servus fieri potest et commercium adipisci stipulator potest et res stipulatoris esse desinere potest: sed propter inutilis est. Item contra, licet initio utiliter res in stipulatum deducta sit, si postea in earum qua causa, de quibus supra dictum est, sine facto promissoria devenirit, extinguit stipulatio. Ac ne statim ab initio talis stipulatio valebit †Lucium Titium, cum servus erit, dare spondes? †et similia, quia natura sui dominio nostro exempta in obligationem deduci nullo modo possunt.

2. It is the same if any one stipulates for a thing sacred or religious, which he thought to be subject to human law, or for a public thing appropriated to the perpetual use of the people, as a forum or theatre, or for a free man whom he thought to be a slave, or for a thing of which he has not the commercium, or for a thing belonging to himself. Nor will the stipulation remain in suspense, because the public thing may become private, the freeman may become a slave, the stipulator may acquire the commercium of the thing, or the thing which now belongs to him may cease to be his; but the stipulation is at once void. So, conversely, although a thing may have been validly stipulated for originally, yet, if it afterwards falls under the class of any of the things before mentioned, without the promissor having caused the change, the stipulation is extinguished. Such a stipulation, too, as the following, is void ab initio, †Do you promise to give me Lucius Titius, when he shall become a slave? † for that which by its
Cujus commercium non habuit. For instance, if, in the days of Gaius, a peregrinus had stipulated for a fundus Italicus, or if, in the times of the Lower Empire, a heathen had stipulated for a Christian slave. (C. i. 10.) Of course, if the promissor had not the commercium of the particular thing, while the stipulator had it, the promissor was answerable to the stipulator for a breech of contract if he did not fulfil his promise. (D. xlv. 1. 34.)

Vel rem suam. It cannot belong to him more than it does; but he might stipulate for its value, or conditionally for the thing itself if it ceased to belong to him. (D. xlv. 1. 31.)

Extinguatur stipulatio. And if it was once extinguished, no alteration of circumstances would renew it. In perpetuum sublata obligatio restitui non potest. (D. xlvii. 3. 98. 8.)

Quam humani juris esse credebat. In a stipulation it made no difference that the stipulator was really ignorant that there was some character attaching to the object of the stipulation which made the stipulation invalid, as that it was sacred or public. The fact that it was sacred or public invalidated the stipulation, and the stipulator had no further remedy against the promissor. We shall find (Tit. 23. 5) that if a person purchased in ignorance a thing of this nature, he would have a remedy against the seller to indemnify him for the loss he sustained by the purchase.

3. Si quis alium daturum facturumque quid sponderit, non obligabitur, veluti si sponset, Titium quinque aureos daturum. Quodsi effecturum se, ut Titius daret, spondere, obligatur.

3. If a man engages that another shall give or do something, he is not bound, as if he engages that Titius shall give five aurei. But if he engages that he will manage that Titius shall give five aurei, he is bound.

D. xlv. 1. 88. pr.

4. Si quis alii, quam cujus juri subjectus sit, stipulatur, nihil agit. Plane soluto etiam in extranei personae conferri potest (veluti si quis ita stipulatur ‘mihi aut Seio dare spondeat?), ut obligation quidem stipulatori adquiratur, solvi tamen Seio etiam invito eo recte possit, ut liberatio ipso jure contingat, sed ille adversus Seium habeat mandati actionem. Quodsi quis sibi et aliis, cujus juri subjectus non sit, decem dari aureos stipulatus est, valebit quidem stipulatio: sed utrum totum debetur, quod in stipulationem deductum est, an vero pars dimidia, dubitatum est: sed placet, non plus quam partem dimidia ei adquiri. Ei, qui tuo juri subjectus est, si sti-

4. If any one stipulates for the benefit of a third person, other than a person in whose power he is, the stipulation is void. But it may be arranged that payment shall be made to a third person, as if a person stipulates thus, ‘Do you engage to pay to me or to Seius?’ The stipulator alone, in this case, acquires the obligation; but payment may be lawfully made to Seius even against his will; the payer will then by mere force of law be freed from his obligation, while the stipulator will have against Seius an actio mandati. If any one stipulates that ten aurei shall be paid to him and to a third person, other than a person in whose power he is, the stipulation is valid; but it has been doubted whether,
pulatus sis, tibi adquiris, quia vox tua tamquam filii sit, sicuti filii vox tamquam tua intellegitur in his rebus, qua tibi adquiri possunt.

in this case, the whole sum is due to the stipulator, or only half; and it has been decided that only half is due. But, if you stipulate for another, who is in your power, you acquire for yourself; for your words are as the words of your son, and your son's words are as yours, with respect to all things which can be acquired for you.

GAI. iii. 108; D. xlv. 1. 141. 8; D. xlv. 1. 39, 180; D. xxxix. 2. 42.

No one who was not a party to a contract could gain or lose by it. Res inter alios acta alii neque nocere neque prodesse potest (a maxim not to be found exactly in its present shape, but based on C. vii. 60. 1). And as this was true of all kinds of contracts, so was it specially of stipulations, in which a particular formula had to be spoken, and which could not properly be entered into by any one that was absent. The third person, not being a party to the contract, could have no action to enforce it, and the stipulator could not enforce it because he had no interest in it. If, indeed, he had any interest in it, that is, any legal interest, which of course might happen, a stipulation for another was binding. Si stipuler alii, cum mea interesse, ait Marcellus stipulatlonem valere. (D. xlv. 1. 38. 20, and see paragr. 20 of this Title.) And when one person wished to stipulate for another, the object might generally be effected by adding a penalty for the non-performance of the promise. A stipulation binding the promissor to give something to Titius, or, if it were not given, to pay a penalty to the stipulator, was binding. It was, indeed, nothing but a conditional contract. In the event of something not happening, which might have happened, a certain benefit was to accrue to the stipulator. (D. xlv. 1. 38. 17.) It is because the thing might have happened that such a penal clause differs in its effects from one made to enforce the performance of a thing physically impossible. (See note on paragr. 1.)

Mihi aut Seio. The third person to whom payment might be thus made at the option of the payee, was said to be solutionis gratia adjectus. (D. xlvii. 3. 95. 5.)

Sibi et alii. We learn from Gaius, that the Sabinians were of opinion that the whole sum specified was in this case due to the stipulator. Justinian adopts the contrary opinion. (GAI. iii. 103.)

Every one could stipulate and promise for his heir. Every paterfamilias could stipulate for those under his power and his slaves; every person under power and every slave could stipulate for the paterfamilias or master, and could promise so as to bind the paterfamilias or master, if authorised, directly or indirectly, to do so. (See Bk. iv. Tit. 7.)

In the later law many kinds of stipulations could be made through another person, though this was contrary to the primary notion of a stipulation. For instance, the stipulation 'rem pupilli salvam fore' (see Tit. 18. 4) could be made, for a pupil who
was infans, or absent, by a public slave, by a person appointed by
the praetor, or by a magistrate if the parties came before him.
(D. xxvii. 8. 1. 15.)

5. Praeterea inutilis est stipulatio, si quis ad ea, que interrogatus
erit, non respondeat, veluti si decem aureos a te dari stipuletur, tu quin-
que promittas, vel contra: aut si illae
pure stipuletur, tu sub condicione
promittas, vel contra, si modo sci-
cit id expressas, id est si cui sub
condicione vel in diem stipulanti tu
respondeas: 'Prementi die spondeo.'
Nam si hunc solum respondeas 'Pro-
mitto,' breviter videris in eandem
diem aut conditionem spopondisse:
nec enim necesse est in respondendo
sedem omnia repeti, quae stipulator
expresserit.

D. xlv. 1. 8, 4; D. xlv. 1. 184. 1.

Si decem aureos. Ulpian, in the Digest, decides the question
the other way. (D. xlv. 1. 1. 4.)

6. Item inutilis est stipulatio, si
ab eo stipuleris, qui juri tuo sub-
jectus est, vel si a te stipulatur.
Sed servus quidem non solum do-
minto suo obligari non potest, sed ne
alius quidem ulli: filius vero familias
alius obligari possunt.

GAI. iii. 104; D. xlvii. 7. 14.

The slave could not contract civilly with his master; but the
later law recognised that there might be a naturalis obligatio
created between them, so that if a master owed anything to a
slave in the accounts kept between them, and paid it to the slave
after he had been manumitted, the master could not recover it, as
he was paying what, by a natural obligation, he was bound to pay.
(D. xii. 6. 64.)

The filiusfamilias could bind himself civilly. Filiusfamilias ex
omnibus causis tanquam paterfamilias obligatur. (D. xlvii. 7. 39.)
He could be sued and his person taken in execution, and his
peculia could be made available for his creditors; and Justinian
permitted him to make a cessio bonorum. (C. vi. 61. 8.) To pro-
tect filii familiares, the senatusconsultum Macedonianum was passed,
by which money lent to filii familiares could not be recovered
from them. (See Bk. iv. Tit. 7. 7.)

7. Mutum neque stipulari neque
promittere posse, palam est. Quod
can neither stipulate nor promise.
et in surdo receptum est: quia et is,
And this is considered to apply also
qui stipulatur, verba promittentis et is, qui promittit, verba stipulantis audire debet. Unde aperat, non de eo nos loqui, qui tardius exandit, sed de eo, qui omnino non exaudit.

8. Furiousa nullum negotium gerere potest, quia non intellegit, quid agit.

During lucid intervals a madman could make valid stipulations or promises, as he could make a will. (Bk. ii. Tit. 12. 1.)


9. A pupil may go through any legal act, provided that the tutor takes a part in the proceeding in cases where his authorisation is necessary, as, for instance, when the pupil binds himself; for a pupil can bind others to him without the authorisation of his tutor.

10. Sed quod diximus de pupillis, utique de his verum est, qui jam aliquem intellectum habent; nam infans et qui infantiae proximus est, non multum a furioso distant, quia hujus aetatis pupilli nullum intellectum habent: sed in proximis infantiae propter utilitatem eorum benignior juris interpretatio facta est, ut idem juris habeant, quod pubertati proximi. Sed qui in parentis postestate est impubes, nec auctore quidem patre obligatur.

10. This must be understood only of pupils who already have some understanding; for an infant, or one still near to infancy, differs but little from a madman, because pupils of such an age have no understanding at all. But, in order to consult their interest, the law has been construed more favourably to those who are near to infancy, and they are allowed the same rights as those near the age of puberty. But a son in the power of his father, and under the age of puberty, cannot bind himself even if his father authorises him.

An infant was properly one qui fari non potest, a child not yet old enough to speak with understanding of what he said, i.e. who was below the age of seven years. When a child could talk, and began to have some degree of understanding, he was termed infant proximus. Theophilus, in his paraphrase of this paragraph, says, proximus infantii qualis fuerit qui septimum aut octavum annum agit. He could now pronounce, and in some measure understand, the words of a stipulation, and the law permitted him to do so with the sanction of his tutor in certain cases, such as the acquisition of an inheritance, where his personal intervention was necessary. But the law did not allow him to stipulate except
when the stipulation was clearly for his benefit. (Bk. i. Tit. 21; D. xxix. 2. 9.)

Just as the child who was older than an infant was said to be *infantice proximus*, so one a little younger than a *pubes* was said to be *pubertati proximus*. The original notion seems to have been that the child *infantice proximus* could not do things which the *pubertati proximus* could do. There was a clear difference between a child between seven and eight and a child between thirteen and fourteen. But the capacity existing in the intervening years would vary with the individual. Gradually the law recognised more and more the acts of the child over seven years, as this was considered, as the text says, the *benignior interpretatio*, the more favourable interpretation to the child, as removing doubts as to his competence, and avoiding the necessity of having recourse to a slave to stipulate for the child. (D. xlvi. 6. 6.) But, with regard to delicts, the *benignior interpretatio* would be to mark the distinction between different ages of children above seven; and so we are told (Bk. iv. Tit. 1. 18) that the *impubes* is only bound *ex foro* in case *proximus pubertati sit et ob id intellegat se delinquere.*

The *paterfamilias* could not, like a tutor, supply his authority to make up what was deficient in the capacity of the *impubes*. The concluding words of this paragraph are taken from Gains, who makes his statement more complete by adding *pubes vero qui in potestate est, proinde ac si paterfamilias obligari solet.* (D. xlv. 1. 141. 2.)

11. Si impossibilis condicio obligationibus adjiciatur, nihil valet stipulatio. *Impossibilis autem condicio habetur, cui natura impedimento est, quo minus existat, veluti si quis ita dixerit: 'si digito celum attigero, dare spondes?' At si ita stipuletur, 'si digito celum non attigero, dare spondes?' pure facta obligatio intellegitur ideoque statim petere potest.

11. If an impossible condition is added to an obligation, the stipulation is void. A condition is considered impossible of which nature forbids the accomplishment; as, if a person says, 'Do you promise if I touch the sky with my finger?' But if a stipulation is made thus, 'Do you promise if I do not touch the sky with my finger?' the obligation is considered unconditional, and so performance may be instantly demanded.

*Gai. ii. 96; D. xlv. 1. 7.*

An impossible condition in a testamentary gift was treated as if it had never been inserted. In a stipulation or any other contract it made the contract void, a difference due to the favour with which testamentary gifts were regarded. (See Bk. ii. Tit. 14. 10.)

In the stipulation, 'If I do not touch the sky,' &c., there is really no condition; there is nothing left undecided in the mind of the speaker or hearer.

12. Item verborum obligation inter absentes concepta inutilis est. Sed cum hoc materiam litium conten-

12. A verbal obligation, made between absent persons, is also void. But as this doctrine afforded matter of
tiosis hominibus prestabat, forte post tempus tales allegationes opponentibus et non presentes esse vel se vel adversarios suas conten- dentibus: ideoque nostra constitutio propter celeritatem dirimendarum litium introducta est, quam ad Cesa- rianenses advocatos scripsimus, per quam disposuimus, tales scripturas, quae presto esse partes indicant, omnimodo esse credendae, nisi ipse, qui talibus utitut improbis allegationibus, manifestissimis probationibus vel per scripturam vel per testes idoneos approbaverit, in ipso toto die, quo conficiabatur instrumentum, esse vel adversarium suum in aliis locis esse.

strife to contentious men, who alleged, after some time had elapsed, that either they or their adversaries were not pre- sent, we issued a constitution, ad- dressed to the advocates of Cesarium, in order to provide for the speedy de- termination of such suits. By this we have enacted, that written acts which declare that the contracting parties were present, shall be considered as indisputable evidence of the fact, unless the party who has recourse to such shameless allegations makes it evident, by the most manifest proofs, either by writing or by credible witnesses, that either he or his adversary was in some other place during the whole day in which the instrument was made.

GAL. iii. 188; C. viii. 88. 14.

No writing was necessary to make a verbal contract valid; but one was generally drawn up as a record of the transactions, and called instrumentum or cautio, as being a security for the stipulator. An example of a contract reduced to writing is given in D. xlv. 1. 126. 2.

18. Post mortem suam dari sibi nemo stipulari poterat, non magis quam post ejus mortem, a quo stipulabatur. Ac ne is, qui in alioque potestate est, post mortem ejus stipulare poterat, quia patris vel do-mini voce loqui videtur. Sed et si quis ita stipularet, 'pridie quam moriar' vel 'pridie quam morieris dari?' inutilis erat stipulatio. Sed cum, ut jam dictum est, ex consensu contrahentium stipulationes valent, placuit nobis etiam in hunc juris articulum necessarium indire emendationem, ut, sive post mortem sive pridie quam morietur stipulator sive promissor, stipulatio concepta est, valeat stipulatio.

18. A man could not formerly stipulate that a thing should be given him after his own death, any more than after the death of the promisor. Neither could any person in the power of another stipulate that anything should be given him after the death of the person in whose power he was, because it was his father or master who appeared to be speaking in him. And if any one stipulated thus, 'Do you promise to give the day before I die? or the day before you die?' the stipu- lation was invalid. But since all stipulations, as we have already said, derive their force from the consent of the contracting parties, we have thought it proper to introduce a neces- sary alteration in this respect, so that now, whether it is stipulated that a thing shall be given after, or imme- diately before, the death either of the stipulator or the promisor, the sti- pulation is good.

GAL. iii. 100; C. viii. 88. 11; C. iv. 11.

A stipulation 'pridie quam moriar' was held to be invalid, because the date when the thing promised became due could not be fixed until the death happened, and then the action would only be acquired for or against the heirs, exactly as in the case of a stipulation 'dabis post mortem' (GAL. iii. 100); and a stipulation in favour of the heirs only would be one in which the stipulator
had no interest (note to paragr. 4). Gaius says inelegans esse visum est ex heredis persona incipere obligationem; it was out of the due order of things that a man should enter into an obligation on which no action could be brought until after his death. Justinian does away with all these subtleties.

14. Item si quis ita stipulatus erat: 'si navis ex Asia venerit, hodie dare spondes?' inutilis erat stipulatio, quia prepostera concepta est. Sed cum Leo inclytes recordationis in dotibus eandem stipulationem, qua prepostera nuncupatur, non esset resiciendam existimavit, non bis placuit, et huic perfectum robur accommodare, ut non solum in dotibus, sed etiam in omnibus valeat hujusmodi conceptio stipulationis.

14. Also, if any one stipulated thus, 'If a certain ship arrives here-after from Asia, do you engage to give to-day?' the stipulation would be void, as being preposterous. But, since the Emperor Leo, of glorious memory, decided that such a stipulation, which is termed praepostera, ought not to be rejected with respect to marriage-portions, we have thought it right to give it complete validity, so that now every stipulation made in this way is valid, not only with respect to marriage-portions, but whatever may be its object.

C. vi. 28. 25.

Such a stipulation was said to be praepostera concepta (i.e. the things which should come post are placed praed), because the payment is to be made at once, and thus is placed before (praed) instead of after (post) the fulfilment of the condition. Under Justinian's enactment the contract was binding at once, but payment could not be enforced until the condition was fulfilled. (C. vi. 28. 25.)

15. Ita autem concepta stipulationis, veluti si Titus dicit 'cum moriar, dare spondeo.' vel 'cum morieris,' et apud veteres utilis erat et nunc valet.

15. A stipulation made thus, as if, for instance, Titus says, 'Do you promise to give when I die,' or 'when you die?' was considered valid by the ancients, and is so now.

D. xlv. 1. 45. 8.

The stipulation was said to be valid because the thing was to be given 'non post mortem, sed ultimo vitae tempore.' (Gai. ii. 232.) The moment when the performance of the engagement became due was fixed before the time when the rights of the heir were distinct from those of the deceased. A distinction was drawn between such a stipulation and one dari pridie quam mortiar (par. 13), but, as we have seen in the case of legacies, it rested on no sound reason. (Bk. ii. Tit. 20. 35.)

16. Item post mortem alterius recte stipulamur.

16. We may also validly stipulate that a thing shall be given after the death of a third person.

D. xlv. 1. 46. 1.

The death of a third person was an uncertain term, which might be as legitimately affixed to a stipulation as any other uncertain time. The reason which prevented the stipulation post mortem meam or tuam did not apply.
17. Si scriptum fuerit in instrumento, promississe aliquem, perinde habitur, atque si interrogationem precedente responsum sit.

See Paul. Sent. v. 7. 2. Ulpian says (D. ii. 14. 7. 12), that if, at the end of the instrument of an agreement, the words usually added were found, viz. rogavit Titius, spoondonit Mævius, the agreement was taken to be a stipulation unless it was expressly shown that it was in reality only a pactum.

18. Quotiens plures res una stipulatione comprehenduntur, si quidem promissor simpliciter respondet 'dare spondeo,' propter omnes tenetur: si vero unam ex his vel quaedam daturum se spoondonit, obligatio in his, pro quibus spoondonit, contrahitur. Ex pluribus enim stipulationibus una vel quaedam videntur esse perfectae: singulas enim res stipulari et ad singulas respondere debemus.

18. When many things are comprehended in one stipulation, a man binds himself to all, if he answers simply 'I promise to give.' But, if he promises to give one or some of the things stipulated for, he is bound only with respect to the things comprised in his answer. For, of the different stipulations contained in the question, only some are considered to have been answered, as for each object a question and an answer are required.

D. xlv. 1. 88. 4; D. xlv. 1. 1. 5.

This should be compared with the cases decided in paragr. 5.

19. Alteri stipulare, ut supra dictum est, nemo potest: invente sunt enim hujusmodi obligationes ad hoc, ut unusquisque sibi adquirat, quod sua interest; ceterum si alii detur, nihil interest stipulatoris. Plane si quis velit hoc facere, pecuniam stipulare conveniat, ut, nisi sua factum sit, ut comprehensum esset, committatur pone stipulatio etiam ei, cujus nihil interest: pecuniam enim cum stipulatio quis, non illud inspiciatur, quid interest ejus, sed que sit quantitas sita in condicione stipulationis. Ergo si quis stipulatur Titio dari, nihil agit; sed si addiderit pecuniam 'nisi dederis, tot aureos dare spondeo' tunc committeretur stipulatio.

19. No one, as we have already said, can stipulate for another, for this kind of obligations has been invented, that every person may acquire what it is for his own advantage to acquire; but if a thing is given to another it is no concern of the stipulator. But if any one wishes to stipulate for another, he should stipulate for a penalty payable to him, so that if the promissor does not perform his promise, the stipulation for the penalty may be valid even for a person who had no interest in the performance of the promise; for when a penalty is stipulated for, it is not the interest of the stipulator that is regarded, but the amount fixed in the condition of the stipulation. If, therefore, any one stipulates that a certain thing shall be given to Titius, this is void; but if he adds a penalty, 'Do you promise to give me so many aurei if you do not give the thing to Titius?' this stipulation binds the promissor.

D. xlv. 1. 88. 17.

20. Sed si quis stipulatur alii cum ejus interesse, placuit stipulationem valere. Nam si is, qui pupillii tutelam administrare cuperat, cessit administratione contorti

20. But, if any one stipulates for another, having himself an interest in the performance of the promise, the stipulation has been decided to be valid. Thus if he who has begun to
suò et stipulatus est, rem pupillī
salvam fore, quoniam interest sti-
pularius fieri, quod stipulatus est,
cum obligatus futurus esset pupillo,
si male res gesserit, tenet obligatio.
Ergo et si quis procuratoris suo dari
stipulatus sit, stipulatio vires habe-
bit. Et si creditori suo, quod sua
interest, ne forte vel pena commit-
tatur vel predia distrahantur, que
pignori data erant, valet stipulatio.

act as tutor afterwards gives up the
administration to his co-tutor, and
stipulates for the security of the estate
of his pupil, since it is for the interest
of the stipulator that the promise
should be performed, as he is answer-
able to the pupil for maladministration,
the obligation is binding. So if a per-
son stipulates that a thing shall be
given to his procurator, the stipulation
is effectual. So, too, is a stipulation
that a thing shall be given to a creditor
of the stipulator, the stipulator having
an interest in the performance of the
promise; as, for instance, that he may
avoid becoming liable to a penal clause,
or that his immovables, given in
pledge, should not be sold.

D. xlv. 1. 38. 20. 28.

See note on paragr. 4. The tutor was liable for all his co-tutor
did. (See Bk. i. Tit. 24. 1.)

21. Versa vice qui alium factu-
rum promisit, videtur in ea esse
causa, ut non teneatur, nisi penam
ipse promiserit.

21. Conversely, he who undertakes
for the performance of another, is
not bound unless he promises under
a penalty.

D. xlv. 1. 38. 2.

The law on this point is more accurately stated in paragr. 3.

22. Item nemo rem suam futu-
ram in eum casum, quo sua fit,
utiliter stipulatur.

22. No man can validly stipulate
that a thing which may hereafter be-
long to him shall be given him when it
becomes his.

D. xlv. 1. 87.

When the time was come, the stipulation would have nothing
on which to take effect.

23. Si de alia re stipulator sen-
serit, de alia promissor, perinde
nulla contrahitur obligatio, ac si ad
interrogetum responsum non esset,
veluti si hominem Stichum a te
stipulatus quis fuerit, su de Pam-
philio sensoris, quem Stichum vocari
credideris.

23. If the stipulator intends one
thing, and a promissor another, an
obligation is no more contracted than
if no answer had been made to the
interrogation; for instance, if any one
has stipulated that you should give
Stichus, and you understood him to
refer to Pamphilus, thinking that
Pamphilus was called Stichus.

D. xlv. 1. 187. 1.

Stipulatio ex utriusque consensu valet. (D. xlv. 1. 83. 1.)
And if the seeming consent implied in pronouncing the words of
the stipulation was vitiated by a mistake under which one party
spoke of one thing and the other of another, the stipulation was
void; but if the mistake was only with reference to something in
or relating to, the thing they were speaking of, i.e. if they were
really speaking of the same thing, but one party was under some misapprehension respecting it, the stipulation was valid. So it was valid if fraud or violence had been used to procure it; but though in such cases it was valid, the rights it gave were worthless under the jurisdiction of the prætor, who always allowed exceptiones doli, metus, &c., by which the action brought on the stipulation was repelled.

24. Quod turpi ex causa promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet.

24. A promise founded on a base consideration, as if a man engages to commit homicide or sacrilege, is not binding.

D. xlv. 1. 26, 27.

A thing was said to be promissum ex turpi causa, when it was promised, being itself illegal or immoral, or was the reward, or depended on the happening, of anything illegal or immoral.

25. Cum quis sub aliqua condicione fuerit stipulatus, licet ante condicionem decesserit, postea exstente condicione, heres ejus agere potest. Idem est et a promissoris parte.

25. If a stipulation is conditional, although the stipulator dies before the accomplishment of the condition, yet if, afterwards, the condition is accomplished, his heir can demand the execution of the promise; and so, too, the heir of the promissor may be sued.

D. xlv. 1. 57.

26. Qui hoc anno aut hoc mense dari stipulatus sit, nisi omnibus partibus præteritis anni vel mensis non recte petet.

26. A person who stipulates that a thing shall be given to him in such a year or month, cannot legally demand the thing promised until the whole year or month has elapsed.

D. xlv. 1. 42.

27. Si fundum dari stipuleris vel hominem, non poteris continuo agere, nisi tantum spatii præterierit, quo traditio fieri possit.

27. If you stipulate for a piece of ground or a slave, you cannot instantly demand the thing, but must wait until enough time has passed for delivery to have been made.

D. xlv. 1. 78. pr.

Trt. XX. DE FIDEJUSSORIBUS.

Pro eo, qui promittit, solent alii obligari, qui fidejussores appellantur, quos homines accipere solent, dum curant, ut diligentius sibi cautum sit.

It is customary that other persons, termed fidejussores, should bind themselves for the promissor, creditors generally requiring that they should do so in order that the security may be greater.

Gal. iii. 115, 117.

We have already noticed in Title 16 the cases of persons who joined in making the same stipulation or who joined in making the same promise. We now come to the cases of persons who come in as accessories to the creditor or debtor. Many of the rules of
law applying to the correi stipulandi or promittendi applied to these accessories; thus if payment was made to the accessory of the creditor, the debtor was free as against the creditor; and if the principal debtor or any of his accessories was sued, no further action could, until Justinian permitted it, be brought by the creditor against those who were not sued, the litis contestatio operating as an extinction of the debt.

Besides the principal parties to a stipulation, the stipulator and the promissor, there might be accessory parties, called respectively adstipulatores and adpromissores. The adstipulator either received the same promise as his principal did, and could, therefore, have the same actions, and equally receive or exact payment; or he only stipulated for a part of that for which the principal stipulated, and then his rights were co-extensive with the amount of his own stipulation. (Gai. iii. 113.) In the early law, the chief use of an adstipulator was, probably, to supply the place of a procurator at a time when the law refused to allow stipulations to be made by procuration. A might make a stipulation, and know that at the time when payment would be due he would be abroad. He, therefore, joined B in the stipulation, who could receive payment or bring an action in his place, and would be bound by an actio mandati to pay over to A whatever he had received.

Before the time of Justinian no one could stipulate validly for a thing after his own death (see Tit. 19. 13); and, therefore, those who wished to make such a stipulation joined an adstipulator with them, and this adstipulator could bring an action, or receive payment, after the death of the stipulator. As, in the days of Gaius, all contracts could be made by procuration, it appears from his account of the adstipulator, which is the only one we have, that the only use of the adstipulator was to make this stipulation post mortem suam valid. (Gai. iii. 117.)

The adstipulator could not transmit his right of action even to his heirs. His rights were purely personal, because he was selected by the stipulator, to whom he stood in the relation of a mandatary, from motives of personal confidence. (Gai. iii. 114.)

The adpromissores were accessory to the promise, in order to give the stipulator greater security. They were guarantees for the fulfilment of the promise (Gai. iii. 116), and these guarantees were termed sponsors when Roman citizens, as they pledged themselves by the word spondeo, a word which citizens alone could utter, and fidepromissores when peregrini (Gai. iii. 120), because, in binding themselves, they used the expression fide mea promitto.

The sponsors and fidepromissores held a position, in many respects, the exact converse of the adstipulator. They made the same promise as their principal, or one not so extensive, for they might only choose to become guarantees to a certain extent; they could not bind themselves for more than their principal was bound for. They were often employed to remove any objections that might be made to the capacity of their promissor, as, for instance,
that he was *impubes* and contracting without the consent of his tutor. Their heirs were not bound (GAI. iii. 120), and they might recover from their principal by an *actio mandati* what they had advanced for him. (GAI. iii. 127.)

By the *lex Furia* (95 B.C.), which applied only to Italy, their obligation was only binding for two years from the time when it could have been enforced against them, and the amount of the liability of all was divided equally among all living at the time when the guarantee could be enforced. (GAI. iii. 121.)

These restrictions, the limitation of the intervention of *sponsores* and *fidepromissores* to verbal contracts, and their obligation dying with them, made it necessary that there should be a more unfettered mode of becoming surety for a party to a contract. This was supplied by the introduction of the *fidejussiores*, who could bind themselves by stipulation in every kind of obligation, and who transmitted their obligation to their heirs. In the time of Justinian, *sponsores* and *fidepromissores* had been long obsolete, and as, under his legislation, stipulations *post mortem suam* were allowed, there was no longer any occasion for the intervention of *adstipulatores*, and, consequently, none of the additional parties to a verbal contract, except *fidejussiores*, are mentioned in the Institutes.

Gaius mentions other laws besides the *lex Furia*, bearing on the subject of the additional parties to a contract; and as the effect of some of their provisions is traceable in what we read with respect to *fidejussiores* in this Title, it may be as well to notice them here. (1) The *lex Apuleia* (102 B.C.) established a kind of partnership (*quandam societatem*) between the different *sponsores* or *fidepromissores*; any one of them who had paid the whole debt could recover from the others what he had paid in excess of his own share by an action *pro socio*. (GAI. iii. 122.) (2) A law, the name of which is illegible in the manuscript of Gaius, required that the creditor should give notice beforehand of the amount of the debt secured, and how many *sponsores* or *fidepromissores* there were to be; if they proved that such notice was not given, they were freed from liability. (3) The provisions of the *lex Furia* (95 B.C.) have been noticed above. (4) A *lex Cornelia* (81 B.C.), referring not only to *sponsores* and *fidepromissores*, but to all sureties, and therefore to *fidejussores* (which, perhaps, shows the date of the first introduction of *fidejussores*), provided that, with certain exceptions, no one could bind himself for the same debtor, to the same creditor, in the same year (*idem pro eodem, apud eundem, eodem anno*), for more than 20,000 sesterces; the promise was void as to the excess. (GAI. iii. 124, 125.) (5) Lastly, a *lex Publilia* gave *sponsores* an advantage over any other sureties, for they were allowed, unless reimbursed in six months, to recover from their principal what they had paid by a special action (*actio depens*), and proceed to personal execution, *manus injectio*, against him. (GAI. iii. 127, and iv. 22.)


Intercedere was the general term for paying, becoming bound for the debt of another; satisdare for the giving surety for the obligation of the principal; satisaccipere for the receiving it.

Suretyship might be created not only in the modes above mentioned, but by the surety offering himself as mandator pecuniae credendae, i.e. bidding the creditor to lend to the debtor, and becoming responsible for repayment, or by a pactum constituta pecuniae, an undertaking to pay an ascertained debt, and in this case the debt of another person. (Bk. iv. Tit. 6. 9.)

The senatusconsultum Velleianum (D. xvi. 1. 2. 1), perhaps of the date of 46 A.D., forbade women ever to bind themselves for another person.

1. In omnibus autem obligationibus adsunt possunt, id est sive re sive verbis sive litteris sive consensu contracte fuerint. Ac ne illud quidem interesse, utrum civilis an naturalis sit obligatio, cui adiiciatur fidejus sor, adeo quidem, ut pro servo quoque obligetur, sive extraeius sit, qui fidejussorem a se accipiat, sive ipse dominus in id, quod sibi naturaliter debetur.

2. Fidejussus non tantum ipse obligatur, sed etiam heredem obligatorem relinquit.

In omnibus obligationibus, including obligations arising out of delicts. (D. xlii. 1. 8. 5.) This was the principal advantage gained by the introduction of fidejussores.

3. Fidejussor et precedere obligationem et sequi potest.


GAI. iii. 119; D. xlii. 1. 8. 1, 2, and 70. 8.

1. Fidejussores may be added in every kind of obligation, i.e. whether the obligation is contracted re, verbis, litteris, or consensu. Nor is it material whether the obligation to which the fidejussor is made an additional party is civil or natural; so much so, that a man may bind himself as a fidejussor for a slave, either to a stranger or to the master of the slave, in respect of a thing due by a natural obligation to the person accepting the fidejussor from the slave.

D. xlii. 1. 4. 1.

This was the second chief point of difference between fidejussores and sponsores or fidepromissores. There was no limit to the time during which fidejussores remained bound, such as the lex Furia had laid down for the benefit of sponsores and fidepromissores.

D. xlii. 1. 6. pr. and 2.

Probably the formality of verbal contracts exacted that the words of the principal should precede those of the accessory.

4. Where there are several fidejussores, whatever is their number, each is bound for the whole debt, and the creditor may demand the whole from any of them he pleases. But,
ani compellitur creditor a singulis, qui modo solvendo sint litis contestatio tempore, partes petere. Ideoque si quis ex fidejussoribus eo tempore solvendo non sit, hoc ceteros onerat. Sed et si ab uno fidejusso re creditor totum consecutus fuerit, hujus solius detrimentum erit, si is, pro quo fidejusserit, solvendo non sit: et sibi imputare debet, cum potuerit adjuvare ex epistula divi Hadriani et desiderare, ut pro parte in se detur actio.

by a rescript of the Emperor Hadrian, the creditor is forced to divide his demand between all those fidejussores who are solvent at the time of the litis contestatio, so that, if any of the fidejussores is not solvent at that time, the rest have so much additional burden. But, if the creditor obtains his whole demand from one of the fidejussores, the whole loss falls upon him alone, if the principal debtor cannot pay; for he has no one but himself to blame, as he might have availed himself of the rescript of the Emperor Hadrian, and might have required that no action should be given against him for more than his share of the debt.

GAL. iii. 121; D. xlvi. 1. 26.

The provision of the lex Furia not applying to fidejussores, they were bound for all they had promised; and as each promised for himself alone, the one first sued had no remedy against the other fidejussores, until the rescript of Hadrian provided one, and gave him what was called the beneficium divisionis; but under the lex Furia, the liability was divided among the different sureties ipso jure, whereas the surety first sued was obliged expressly to claim the benefit given by the rescript of Hadrian (beneficium divisionis).

There were two other privileges or benefici of which the fidejussor might avail himself: one was that cedendarum actionum, by which, if the creditor, without suing the debtor, proceeded against the fidejussor, the surety, if prepared to pay the whole debt, could, before paying the creditor, compel him to make over to him the actions which belonged to the stipulator, and thus the fidejussor could sue those bound with him, or the principal debtor (D. xlvi. 1. 17), and this was often more advantageous to the fidejussor than having recourse to the rescript of Hadrian, because, if the creditor had taken pledges, they were transferred to the fidejussor, if the actions were ceded to him. If the creditor refused to cede the actions and still sued the surety, he could be repelled by an exceptio doli mali. (D. xlvi. 1. 59.)

There was also a beneficium ordinis, or, as it was otherwise termed, excursionis or discussionis, introduced by Justinian (Nov. 4. 1); by this a creditor was bound to sue the principal debtor first, and could only sue the sureties for that which he could not recover from the principal.

5. Fidejussores ita obligari non possunt, ut plus debeat, quam debet is, pro quo obligantur: nam eorum obligatio accessio est principalis obligationis nec plus in accessione esse potest quam in prin-

5. Fidejussores cannot bind themselves for more than the debtor is bound for; because their obligation is accessory to the principal obligation; and the accessory cannot contain more than the principal. They
may, however, bind themselves for less. Therefore, if the principal debtor promises ten auxeria, the fidejussor may be bound for five, but the fidejussor cannot be bound for ten when the principal debtor is bound only for five. Again, when the principal promises unconditionally, the fidejussor may promise conditionally, but the converse case is not possible. For the terms more and less are used not only with respect to quantity, but also with respect to time; it is more to give a thing instantly, it is less to give it after a time.

GAI. iii. 118, 126.

6. Si quid autem fidejussor pro reo solverit, ejus recipierandĭ causa habet cum eo mandati judicium.

6. If a fidejussor has made payment for the debtor, he may have an actio mandati against him to recover what he has paid.

GAI. iii. 127.

If he had intervened without the knowledge of the principal, he would have an actio negotiorum gestorum, not mandati (Tit. 27. 1); and he would have neither of these actions if he had intervened in defiance of the wishes of the principal, though it was doubtful whether he had not an actio utilis. (D. xvii. 1. 40.) Justinian declared that he should have no action at all. (C. ii. 19. 24.)


7. A fidejussor may bind himself in Greek, by using the expression τῷ ἐμῷ πίστει καλέω (I order upon my faith), λέγω (I say), θέλω or βουλομαι (I wish); if he uses the word φημὶ, it will be equivalent to λέγω.

D. xlv. 1. 8. pr.

The appropriate Latin formula was, 'Idem fide mea esso jubeo,' but this formula was probably never insisted on, as the formula 'spondeo' and 'idem fide mea promitto' were.

8. In stipulationibus fidejusseror rum scendi est generaliter hoc accipi, ut, quodcumque scriptum sit quasi actum, videat etiam actum: ideoque constat, si quis se scripserit fidejus isse, videri omnia sollemniter acta.

8. It is a general rule in all stipulations of fidejussores, that whatever is stated in writing to have been done, is considered really to have been done. If, therefore, any one states in writing that he has bound himself as a fidejussor, it is presumed that all the necessary forms were observed.

D. xiv. 1. 80.

Cautio was the general term for the documentary evidence of a contract.
Tit. XXI. DE LITTERARUM OBLIGATIONE.

Olim scriptura fiebat obligatio, quae nominibus fieri dicebatur: quae nominas, hodie non sunt in usu. Plane si quis debere se scripsit, quod numeratum ei non est, de pecunia minime numerata post multum temporis exceptionem opponere non potest: hoc enim sepissime constitutum est. Sic fit, ut et hodie, dum queri non potest, scriptura obligatur: et ex ea nascitur condition, cessante sicilicet verborum obligatione. Multum autem tempus in hac exceptione antea quidem ex principalibus constitutionibus usque ad quinquennium procedebat: sed ne creditores diutius possint suis pecunias forsitan defraudari, per constitutionem nostram tempus coartatum est, ut ultra biennii metas hujusmodi exceptione minime exten- datur.

Formerly there was made by writing a kind of obligation, which was said to be made nominibus (by booking debts). These nomina are now no longer in use. But if any one states in writing that he owes a sum which has never really been told out to him, he cannot, after a long time has elapsed, use the exception non numerata pecunia, i.e. that the money has not been told out. This has been often decided by imperial constitutions; and thus, even at the present day, as he cannot relieve himself from payment, he is bound by the writing, and the writing gives rise to a condition, in the absence, that is, of any verbal obligation. The length of time fixed as barring this exception, was, under imperial constitutions antecedent to our time, not less than five years. But, that creditors might not be exposed too long to the risk of being defrauded of their money, we have shortened the time by our constitution, and this exception cannot now be used beyond the space of two years.

GAL. iii. 128–184; C. iv. 80. 14.

A contract was said to be formed litteris when it originated in a certain entry or statement of it being made in the books of the creditor with the consent of the debtor. Regularity in keeping accounts, and in entering all matters of business in a private ledger, was considered one of the first duties of a Roman citizen. Cicero speaks of a failure in this duty as an almost insupportable act of negligence and dishonesty. (See pro Roscio, 3. 1 and 3.) Events, as they occurred, were jotted down in rough memoranda called adversaria, and these were transferred at least once a month to the ledger (codex or tabulae). It was probably only this ledger which had any legal importance. If any one put down in his ledger that he had advanced such a sum of money to another (expensum ferre), this entry (expensilatio) was an admissible proof of the fact. If the debtor also had made a corresponding entry in his ledger (acceptum referre, acceptilatio), the tallowing of the two together made what was called an obligatio litteris. These two entries had, in fact, exactly the same effect as if the two parties had entered into a stipulation. But this was not all: the creditor was not to be placed entirely at the mercy of his debtor, whose wilful or accidental negligence, preventing a proper entry, might make the
obligation fail. The real source of the obligation was taken to be the consent of the debtor to the entry made by the creditor. If the debtor made a corresponding entry in his ledger, this was a conclusive proof that he had consented to the creditor's entry; but if he did not, then the creditor might still prove, in any way that he could, that he had really made his entry with the debtor's consent. Of course, if he had really paid the money over, this, if proved, would show beyond a doubt that the debtor had consented.

The foundation of this contract *litteris* being either the payment of a sum certain by the creditor, or simply the statement in the *codex* that a sum certain was due by the debtor, the obligation was always for a sum certain, and was therefore enforced by *condictio certi*, more usually termed simply *condictio*.

As the creditor put down the name of his debtor, the word *nomen* came to signify a debt; and Gaius speaks of *nomina transcripticia.* He says *transcriptio* took place (1) *a re in personam*, as when something being already owed, as, for instance, under a contract of sale or of letting to hire, the debtor assented to the creditor making an entry of the debt (GAI. iii. 129): this operated as a *novatio* (see Introd. sec. 89) of the old debt, and the creditor could now employ a *condictio* to enforce his claim; (2) the *transcriptio* took place *a persona in personam*, viz. when one man took on himself the debt of another. (GAI. iii. 130.) In both cases the effect was that the debtor recognised that a fictitious loan had been made to him. He assented to its being recorded in the *codex* that he had received in account what he owed on the sale, or what the third person, whose debt he was taking over, had received.

These contracts were peculiar to Roman citizens. *Peregrini* had, as a substitute, *syngraphae*, signed by both parties, or *chirographa*, signed only by the debtor, and retained by the creditor. The *syngraphae* and *chirographa* were not mere proofs of a contract, but were instruments on which an action could be brought, and the making of which operated as a novation of an existing debt.

In every period of the law, if there was a formal verbal contract, the written contract was thought subsidiary, and was merged in the stipulation: as the text says, *nasceitur condictio, cessante scilicet verborum obligatione*.

An entry by a creditor might either profess to create an obligation (the *obligatio litteris* properly so called), or to operate as a *novatio*. In the former case, it was open to the alleged debtor to show that he had never consented, i.e. that there was no contract. In the latter case, when the debtor had not really received the money, the pretor permitted him to repel the action of the creditor by an exception called the *exceptio non numerata pecunia*, by which the debtor insisted that the money which formed the consideration of the obligation had never been told or counted out to him; and here, contrary to the usual rule as to
exceptions (Bk. iv. Tit. 13. pr. note), the burden of proof was considered to fall on the plaintiff, i.e. the creditor. It was for him to prove that he had paid the money, not for the debtor to prove that he had not.

This power of calling on the creditor to prove that he had really made the loan was extended to cases where the debtor had not gone through the form of the contract litteris, but had merely given a general acknowledgment of debt (cautio), such as is spoken of in the text. Although cautiones were not properly contracts, but proofs of a contract, yet, as they were protected by the same exception (C. iv. 30. 3), they were equivalent to and superseded contracts litteris. It will be noticed that the text uses the words scriptura obligetur, as if the obligation was created by the writing. This may account for Justinian at once telling us that contracts litteris were obsolete, and yet giving them a place in the Institutes.

After a certain number of years—first one, then five, and fixed by Justinian at two—the debtor was bound by the writing conclusively. (C. iv. 30. 14.) During this period, however, the debtor who had not really received the money need not wait to be sued; he might protest in a public act against any writing by which he admitted, or was alleged to have admitted, a debt, or bring an action against the creditor to compel him to give it up (C. iv. 30. 7); and a constitution in the Code (iv. 30. 14. 4) permitted him to make his exception perpetual by a formal announcement to the creditor of his intention to do so, and by his going through certain forms. If it was proved that the debtor had falsely denied having received what he had really received, Justinian ordered by a Novel (18. 8) that he should pay double the amount.

Trt. XXII. DE CONSENSU OBLIGATIONE.

Consensu fluent obligationes in emptionibus venditionibus, locatio- nibus conductionibus, societatis, mandatis. Ideo autem istis modis consensu dictur obligatio contrahi, quia neque scriptura neque presentia omnimodo opus est, ac ne dari quidquam necesse est, ut substantiam capiat obligatio, sed sufficient eos, qui negotium gerunt, consentire. Unde inter absentes quoque talia negotia contrahuntur, veluti per epistulam aut per nuntium. Item in his contractibus alter alteri obligationur in id, quod alterum alteri ex bono et aequo prestare oportet, cum aliquo in verborum obligationibus aliquis stipuletur, aliquis promittat.

Obligations are formed by the mere consent of the parties in the contracts of sale, of letting to hire, of partnership, and of mandate. An obligation is, in these cases, said to be made by the mere consent of the parties, because there is no necessity for any writing, nor even for the presence of the parties; nor is it requisite that anything should be given to make the contract binding, but the mere consent of those between whom the transaction is carried on suffices. Thus these contracts may be entered into by those who are at a distance from each other by means of letters, for instance, or of messengers. In these contracts each party is bound to the other to render him all that equity demands, while in verbal obligations one party stipulates and the other promises.

GAL. iii. 185-188.
We now pass to contracts which belong to the *jus gentium*, which have nothing of the peculiar characteristics of the old civil law of Rome, and which are perfected by the simple consent of the parties. As is remarked in the concluding words of the text, these contracts by simple consent, unlike the contracts of which we have hitherto spoken, are bilateral; there is something which binds both parties; whereas the older and peculiarly Roman contracts were only unilateral. In a stipulation, for instance, it was only the *promissor* that was bound. *Commodatum*, *depositum*, and *pignus* were only bilateral in the sense that they gave rise to *actiones contravariae* under certain circumstances, so that then both parties were bound by them. These contracts 'consensu' were not enforced by actions *stricti juris*, such as were proper to the peculiarly Roman contracts of *mutuum*, stipulation, and contracts made *litteris*, but by actions *bonae fidei*, i.e. pretorian actions, in which equitable principles were permitted to govern the decision. (See Intro. sec. 106.)

Trit. XXIII. DE EMPTIONE ET VENDITIONE.

Emptio et venditio contrahitur, simulaque de pretio convenerit, quamvis nondum pretium numeratum sit ae ne arra quidem data fuerit. Nam quod arre nomine datur, argumentum est emptionis et venditionis contracte. Sed hie quidem de emptionibus et venditionibus, qua sine scriptura consistunt, optinere oportet: nam nihil a nobis in hujusmodi venditionibus innovatum est. In his autem, qua scriptura conficiuntur, non alter perfectam esse emptionem et venditionem constituunt, nisi et instrumenta emptionis fuerint conscripta vel manu propria contrahentium, vel ab alio quidem scripta, a contrahente autem subscripta et, si per tabellionem fiunt, nisi et completiones acceperint et fuerint partibus absoluta. Donec enim aliquid ex his deest, et penitentiae locus est et potest emptor vel venditor sine poena recedere ab emptione. Ita tamen impune recedere eis concedimus, nisi jam arrarum nomine aliquid fuerit datum: hoc etenim subsecuto, sive in scriptis sive sine scriptis venditio celebrata est, is, qui recusat adimplere contractum, si quidem emptor est, perdit, quod dedit, si vero venditor, duplum restituere compellitur, licet nihil super arris expressum est.

The contract of sale is formed as soon as the price is agreed upon, although it has not yet been paid, nor even an earnest given; for what is given as an earnest only serves as proof that the contract has been made. This must be understood of sales made without writing; for with regard to these we have made no alteration in the law. But, where there is a written contract, we have enacted that a sale is not to be considered completed unless an instrument of sale has been drawn up, being either written by the contracting parties, or at least signed by them, if written by others; or if drawn up by a *tabellio*, it must be formally complete and finished throughout; for as long as any of these requirements is wanting, there is room to retract, and either the buyer or seller may retract without suffering loss: that is, if no earnest has been given. If earnest has been given, then, whether the contract was written or unwritten, the purchaser, if he refuses to fulfil it, loses what he has given as earnest, and the seller, if he refuses, has to restore double; although no agreement on the subject of the earnest was expressly made.

Gal. iii. 189; C. iv. 21. 17.
The contract of sale belonging to the *jus gentium* was attended with none of those material symbols which characterised the formation of contracts under the civil law. Directly one person agreed to sell a particular thing, and another to buy it, for a fixed sum of money, the contract was complete; no thing need be delivered, no money paid, in order that an obligation should arise. On the mutual consent being given, the seller was bound to deliver, the buyer to pay the price. The change which Justinian here introduced is that, when, in giving this mutual consent, they agree that the terms of the contract shall be reduced to writing, they shall be considered not to have consented to the contract until all the formalities have been gone through.

The *arva* were either signs of a bargain having been struck, as, for instance, when the buyer deposited his ring with the seller (D. xix. 1. 11. 6), or consisted of an advance of a portion of the purchase-money. They were also intended as a proof that the purchase had been made. Justinian gave these deposits a new character by making them the measures of a forfeit in case either party wished to recede from his bargain, it being open to either party to retract if he chose to incur this forfeiture. This power of retracting by forfeiture of the deposit, or double its value, was a great change in the law; and when Justinian says *nihil in hujusmodi venditionibus innovatum est*, he must be understood only to be referring to unwritten contracts of sale in which there was no deposit made as earnest. It will be seen from the text that this power of retraction was given whether the contract was made with writing or without.

Besides a buyer and a seller, there must, in a contract of sale, be a fixed price and a particular thing sold. The jurists are very minute in their distinctions of the nature of the thing sold. There is a distinction with regard to things future and uncertain forming the object of a sale, which is worth mentioning. Either a proportionate price may be agreed to be paid on a greater or lesser number of things that may be actually realised, as 'so much a head for all the fish I catch to-day,' which is termed *rei sperate emptio*; or a definite sum may be agreed on as the price of the possibility of any number of things, more or less, being realised, as 'so much for the chance of all the fish I catch to-day;' and this was termed *spei emptio*. (D. xviii. 1. 8. 1.)

1. *Pretium antem constitui opor-tet: nam nulla emptio sine pretio esse potest. Sed et certum pretium esse debet. Alioquin si inter aliquos conveniret, ut, quanti Titius rem stasmaverit, tanti sit empta: inter veteres satis abunde-que hoc dubitabatur, sive constat venditio sive non. Sed nostra decisio ita hoc constituit, ut, quotiens sic composita sit venditio 'quanti ille stasmaverit,' sub hac condicione sta-

1. It is necessary that a price should be agreed upon, for there can be no sale without a price. And the price must be fixed and certain. If the parties agree that the thing shall be sold at the sum at which Titius shall value it, it was a question much debated among the ancients, whether in such a case there is a sale or not. We have decided, that when a sale is made for a price to be fixed by a third person, the contract shall be binding
ret contractus, ut, si quidem ipsa, qui nominatus est, pretium definie-
rit, omnimodo secundum ejus esti-
mationem et pretium persolvatur et res tradatur, ut venditio ad effec-
tum perducatur, empiore quidem ex empto actione, venditore autem ex 
vendito agente. Sin autem ille, qui 
nominatus est, vel noluerit vel non 
potuerit pretium definire, tunc pro 
nihilo esse venditionem, quasi nullo 
pretio statuto. Quod jus cum in 
venditionibus nobis placuit, non est 
absurdum et in locationibus et con-
ductionibus trahere.

GAL. iii. 140 ; C. iv. 88. 15.

2. Item pretium in numerata pecunia consistere debet. Nam in 
ceteris rebus an pretium esse possit, veluti homo aut fundus aut toga 
alterius rei pretium esse possit, valde 
querebatur. Sabinus et Cassius 
etiam in alia re putant posse pretium 
consistere: unde illud est, quod 
vulgo dicebatur, per permutationem 
rum emptionem et venditionem 
contra eamque speciem emptionis 
venditionisque vetustissimam esse: 
argumentoque utebantur Greco 
poeta Homero, qui aliquae parte 
exercitum Achivorum vinum sibi com-
parasse uit permutatis quibusdam 
rebus, his verbis:

"Ενθεν ἃρι οἰνίζοντο καρπομόωντες 
Αχαίοι,
"Ἀλλοι μὲν χαλκῷ, ἄλλοι δ’ αἴθουν σι-
βῷρᾳ,
"Ἀλλοι δὲ μνεῖς, ἄλλοι δ’ αἰτήσι βά-
έσσι,
"Ἀλλοι δ’ ἀνδραπίδεσσι.

Dispersa schola auctores contra 
sentiebant alidique esse existimab-
vant permutationem rum, alidium 
emptionem et venditionem. Alio-
quim non posse rem expediri, permu-
tatis rebus, quae videatur res venisse 
et quasi pretii nomine data esse: 
nam utranque videri et venisse et 
pretii nomine datum esse, rationem 
non pati. Sed Proculi sententia 
decentis, permutationem propriam 
esse speciem contractus a vendi-
tione separatam, meritio prevaleuit, 
cum et ipse allis Homericis versibus 
adjuvatur et validioribus rationibus 
argumentatur. Quod et antiores 
divi principes admiscerunt et in 
nostris digestis latius significatur.

GAL. iii. 141 ; D. xviii. 1. 1 ; C. iv. 64. 7.
A sale and an exchange differ so little that it might seem natural to treat the promise to exchange as raising an obligation equally with the promise to deliver a thing sold; it was indeed the opinion of the Sabinians that it did so; but this opinion did not prevail, and the law recognised no obligation as existing under an agreement to exchange unless one party had delivered to the other the thing he had promised. *Ex plació permutionis re nulla secuta, constat nemini actionem competere.* (C. iv. 64. 3.) Thus the distinction between sale and exchange was that in the former the contract was made *consensu*, in the other *re*: when one party had delivered the thing, the other was obliged to give the other thing. *Permutatio ex re tradita initium obligationi praebet.* (D. xix. 4. 1. 2.)

In a contract of sale the seller was not bound to make the buyer absolute master (*dominus*) of the thing sold, as he would have been in a stipulation. (D. xviii. 1. 25. 1.) What he was bound to do was this: 1st. He was bound to deliver the thing itself (*praestare, tradere*) (D. xix. 1. 11. 2), to give free and undisturbed possession of it (*possestionem vacuum tradere*) (D. xix. 1. 2. 1), and to give lawful possession of it (*praestare licere habere*). (D. xix. 1. 30. 1.) 2ndly. He was bound, if the buyer was disturbed in his possession by the real owner (which was termed *evictio*), to recompense him for what he lost. (D. xix. 1. 11. 2.) And 3rdly. To secure the buyer against secret faults; if such faults were discovered, either compensation might be claimed by an *actio estimatoria*, reducing the price to a greater or less amount, according as the seller had or had not knowledge of the defect (D. xix. 1. 13), or, at the option of the buyer, the contract might be rescinded by an *actio reddhibitoria*, and the thing returned (which was termed *reddhibitio*—*reddhibere est facere ut rursus habeat venditor quod habuerit*, D. xxi. 1. 21. pr.). In order to fortify his position, the buyer could stipulate with the seller, and make the seller promise that he would give, not the free possession only, but the *dominium* of the thing, and that he would pay the buyer double the price if the buyer was evicted. The buyer would then have an action *ex stipulatu* to enforce the undertaking. Even if there was no such stipulation actually made, yet after it had become usual to make such stipulations, custom was held to have so far imported the promise into the contract of sale that the buyer, in bringing the action appropriate to his contract, *actio ex empto*, could obtain double the price in case of eviction, as this action was *bonas fidei*, i.e. the parties could be placed in a fair position towards each other, and it was considered that to have given the promise to pay double the price in case of eviction was a duty of the seller. (D. xxi. 2. 2.)

The buyer was bound to make the seller the real owner of the money paid as the price (*emptor nummos venditoris facere cogitetur*, D. xix. 1. 11. 2), and was also bound to pay interest on the purchase money from the day when he had received the thing sold. (D. xix. 1. 13. 20.)
The lines cited in the text are from II. vii. 472; probably the alii versus alluded to are those describing the exchange between Glancus and Diomede (II. vi. 235).

3. Cum aetem emptio et venditio contracta sit (quod offici diximus, simulatque de pretio convenerit, cum sine scriptura res agitur), pecunia rei venditae statim ad emptorem pertinet, tamen ea res emptoris tradita non sit. Itaque si homo mortuus sit vel aliqua parte corporis iussus fuerit, aut sedes totae aut aliqua ex parte incendio consumpta fuerint, aut fundus vi fluminis rotus vel aliqua ex parte ablatus sit, sive etiam inundatione aquae aut arborebus turbine dejectis longe minor aut deterior esse cuperit: emptoris damnun sit, cui nescens est, licet rem non fuerit nactus, pretium solvere. Quidquid enim sine dolo et culpa venditoris accidit, in eo venditor securus est. Sed et si post emptionem fundo aliquid per alluvionem accessit, ad emptoris commodum ejus esse debet, cujus periculum est. Quoqui fugerit homo, qui venit, aut subreptus fuerit, ictu ut neque dolus neque culpa venditoris interveniat, animadvertisse erit, et custodiens ejus usque ad traditionem venditori susceperit. Sane enim, si susceperit, ad ipsius periculum est casus pertinet: si non susceperit, securus erit. Idem et in ceteris animalibus ceterisque rebus intelligimus. Utique tamen vindicationem rei et conditionem exhibere debet empori, quia sane, qui rem nondum emptori tradidit, adhuc ipse dominus est. Idem est etiam de furti et de dammi injurie actione.

3. As soon as the sale is contracted, that is, in the case of a sale made without writing, when the parties have agreed on the price, all risk attaching to the thing sold falls upon the purchaser, although the thing has not yet been delivered to him. Therefore, if the slave sold dies or receives an injury in any part of his body, or the whole or a portion of the house is burnt, or the whole or a portion of the land is carried away by the force of a flood, or is diminished or deteriorated by an inundation, or by a tempest making havoc with the trees, the loss falls on the purchaser, and although he does not receive the thing, he is obliged to pay the price, for the seller does not suffer for anything which happens without any fraud or fault of his. On the other hand, if after the sale the land is increased by alluvion, it is the purchaser who receives the advantage, for he who bears the risk of harm ought to receive the benefit of all that is advantageous. But if a slave who has been sold runs away or is stolen, without any fraud or fault on the part of the seller, we must inquire whether the seller undertook to keep him safely until he was delivered over; if he undertook this, what happens is at his risk; if he did not undertake it, he is not responsible. The same would hold in the case of any other animal or any other thing. But the seller is in any case bound to make over to the purchaser his right to a real or personal action, for the person who has not delivered the thing is still its owner; and it is the same with regard to the action of theft, and the action damni injuria.

D. xviii. 6. 8. pr.; D. xviii. 1. 35. 4.

The contract of sale was complete when the price had been fixed, but the thing sold did not pass to the buyer thereby. The seller retained the proprietorship (dominium) until he delivered it to the buyer, and the buyer received it, or until the property in it was passed by the buyer having paid the price, or given security for it, or in some way satisfied the seller (cere soluto vel fidejussore dato vel alias satisfacto, D. xiv. 4. 5. 18). Until this happened, the seller retained the thing in his custody, and if it had, meanwhile, any accretion, or suffered any diminution, he was still the
dominus of the thing which was increased or decreased. But his obligation bound him to deliver the thing exactly in the state in which it might happen to be at the time of delivery; and so it made no real difference to him whether there was an accretion or diminution. If the thing was lost by accident, the loss fell on the buyer and not on the seller, the dominus; so res domino perit could not be said of him. But, whatever happened to the thing sold, the price fixed on remained due. For, the obligation of the buyer being a distinct and independent obligation, the price could not alter, but remained fixed. The seller was, however, answerable for the care with which he preserved the thing while in his custody, periculum rei ad emptorem pertinet, dummodo custodiam venditor ante traditionem prestet (D. xlvii. 2. 14. pr.); and he was not only bound to guard against gross and ordinary negligence (dolum et culpam praestare, D. xiii. 6. 5. 2), but to preserve it more carefully even than his own property, diligentiam prestet exactiorum quam in suis rebus adhibaret (D. xviii. 6. 3). He was bound to exercise the care of a bonus paterfamilias. In the text the case of a slave is taken, and a bonus paterfamilias might exercise the diligence proper to him, and yet a slave might run away. The loss would fall on the buyer, unless the seller had specially undertaken that he would keep him safely.

The actio jurti and the actio damni injurie are noticed in Tit. 1 and 4 of the Fourth Book. If the thing was stolen or injured by a third person, without the fault of the seller, the buyer suffered the loss, but the seller was obliged to cede to the buyer the actions which as dominus he had against the thief or the doer of the injury.

4. Empotio tam sub condicione quum pure contrahit potest. Sub condicione veluti 'si Stichus intra certum diem tibi placuerit, erit tibi emptus aureis tot.'

4. A sale may be made conditionally or unconditionally; conditionally, as, for example, 'If Stichus suits you within a certain time, he shall be purchased by you at such a price.'

GAL. iii. 146.

The exact opposite might be contracted for; if within a certain time you find Stichus does not suit you, let it be considered you have not bought him. The jurists then said that the sale was a pura emploio, quae sub condicione resolutur. (D. xviii. 2. 2. pr.; D. xli. 4. 2. 5.) Stichus is sold, but within a certain time the contract may be rescinded.

The generic name for the accessory agreements which modified the principal contract was pacta. Some of these pacta relating to the contract of sale are treated of at considerable length in the Digest (D. xviii. 2 and 3), different names being appropriated to those most frequently in use; as, for instance, the in diem addictio, when the thing was sold, but if the seller had a better offer within a certain time, the contract might be rescinded (D. xviii. 2); and the lex commissoria, which was a general agreement for the rescis-
sion of the contract if either party violated its terms, and was especially used to enable the seller to demand back the thing sold, if the price was not paid by a certain day. (D. xviii. 3.)

We may observe that the Code (iv. 44. 2 and 8) permits a seller at all times to get a judicial order rescinding a contract if he has not received half the real value, but the contract will remain binding if the buyer elects to pay the residue of the proper price.

5. Loca sacra vel religiosa, item publica, veluti forum, basilicam, frustra quis sciens emit, quas tamen si pro privatis vel profanis, deceptus a venditore, emerit, habebit actionem ex empto, quod non habere ei liceat, ut consequatur, quod sua interest, deceptum eum non esse. Idem juris est, si hominem liberum pro servo emerit.

5. A sale is void when a person knowingly purchases a sacred or religious place, or a public place, such as a forum or basilica. If, however, deceived by the vendor, he has supposed that what he was buying was profane or private, as he cannot have what he purchased, he may bring an action ex empto to recover whatever it would have been worth to him not to have been deceived. It is the same if he has purchased a free man, supposing him to be a slave.

D. xviii. 1, 4, 5, 6. pr.; D. xviii. 1. 62. 1.

This paragraph is probably inserted in order to contrast the effects of a contract of sale with those of a stipulation. In the strict civil law, ignorance that a thing was not a subject of commerce would not help the person who had stipulated for it. But in a contract of sale, if the seller had, and the buyer had not, known the real character of the thing he was buying, the buyer could recover against the seller anything he lost by entering into the bargain; for instance, he would not only receive back the purchase-money, but also would be entitled to interest upon it from the date of its payment.

The contract of sale gave rise to two actions bonae fidei, the actio ex vendito or venditi, belonging to the seller, and the actio ex empto or empti, mentioned in the text, belonging to the buyer. The buyer had also the actio a estimatoria, and the actio redhibitoria. (See note to par. 2.)

Tr. XXIV. DE LOCATIONE ET CONDUCTIONE.

Locatio et conductio proxima est emptioni et venditioni iisdemque juris regulis consistit. Nam ut empto et vendito ita contrahitur, si de pretio convenerit, sic etiam locatio et conductio ita contrahis interlegitur, si merces constituta sit. Et competit locatori quidem locati actio, conducitori vero conducti.

The contract of letting on hire approaches very nearly to that of sale, and is governed by the same rules of law. As the contract of sale is formed as soon as a price is fixed, so a contract of letting on hire is formed as soon as the amount to be paid for the hiring has been agreed on; and the letter has an action locati, and the hirer an action conducti.

D. xix. 2. 2. pr. and 15. pr.
The contract of letting on hire (locatio conductio), like that of sale, was complete by the mere consent of the parties, and, like it, produced only personal obligations, and not any real rights. The hirer was, however, not even entitled to the possessio; the letter still remained the possessor in the eye of the law, his duty not being praestare rem licere habere, but praestare re frui, uti licere.

There were three principal heads of this contract: 1, locatio conductio rerum, when one person let a thing and another hired it; 2, locatio conductio operarum, when one person let his services and another hired them, without reference to any object in respect of which the services were to be performed; 3, locatio conductio operis faciendi, when one person contracted that a particular piece of work should be done, and another contracted to do it. If in the last-named contract we look at the labour, &c., expended on the work, we should naturally call the person who did the work the locator, as it was he who let out his services for its performance; but the Roman jurists generally looked at the work itself that was to be done, and spoke of the person who contracted for its performance, i.e. gave it out, as its locator, and the person who engaged to perform or execute it, i.e. took it in, as the conductor. The price of, or consideration for, the letting, was properly called merces, sometimes pretium (D. xix. 2. 28. 2), and, in the case of the letting of houses or land, pensio or reditus. In particular contracts, the conductor had special names, as the hirer of a house was called inquilinus, of a farm colonus.

The duty of the letter was to guarantee the hirer against eviction, and to reimburse him for any useful or necessary expenses he had incurred; the duty of the hirer was to take care as a bonus paterfamilias of the thing hired (see par. 5), to give up the thing hired at the end of the term for which it was let, and to pay the price agreed on.

The text gives us the names of the personal actions which belonged to the letter and the hirer respectively, the former having the actio locati, the latter the actio conducti. But actions of a very different kind were sometimes connected with this contract. In the case of land let to hire, certain instruments of farming and other property of the hirer were held as a security for the payment of the rent, and a real action, termed the actio Serviana, because first introduced by the prætor Servius, was given to the letter to enforce his right to these things in case of non-payment of the rent; this action was gradually extended in its effects, and the extended action, under the name of actio quasi-Serviana, was used to enforce the rights of a creditor over anything given in pledge. (See Bk. iv. Tit. 6. 7.) The prætor, too, gave an interdict, termed the interdictum Salvianum (similarly extended under the name of interdictum quasi-Salvianum), by which the letter got possession of things pledged for the rent of land. (See Bk. iv. Tit. 15. 3.)
1. Et quae supra diximus, si alieno arbitrio pretium permissum fuerit, eadem et de locatione et conductione dicta esse intellegamus, si alieno arbitrio merces permissa fuerit. Qua de causa si fulloni polienda curandave sunt sarcinatori sarcienda vestimenta quis dederit nulla statim mercede constituta, sed postea tantum daturnus, quantum inter eos conveniret, non propri locatio et conductio contrahi intellegitur, sed eo nomine præscriptis verbis actio datur.

Gal. iii. 148; D. xix. 2. 25. pr.

Qua de causa, i.e., 'the price ought to be determined, and therefore,' &c.; the passage is taken rather unconnectedly out of Gaius.

Actio præscriptis verbis. (See note 7 on Tit. 13. pr.) Or an actio mandati might be brought. (Tit. 26. 13.)

2. Præterea sicut vulgo quærebatur, an permutatis rebus emptio et venditio contractur: ita quæri solet de locatione et conductione, si forte rem aliquam tibi utendam sive fruendum quis dederit et invicem a te aliam utendam sive fruendum acceperit. Et placuit, non esse locationem et conductionem, sed proprium genus esse contractus. Veluti si, cum unum quis bovem haberet et vicinus ejus unum, placuerit inter eos, ut per denos dies invicem boves commodaret, ut opus facerent, et apud alterum bos peribit: neque locati vel conducti neque commodati competit actio, quia non fuit gratuitum commodatum, verum præscriptis verbis agendum est.

Gal. iii. 144;

2. Moreover, just as the question was often asked whether a contract of sale was formed by exchange, a similar question arose with respect to the contract of letting on hire, in case any one gave you a thing to use or take the fruits of, and in return receive from you something else of which he was to have the use or fruits. It has been decided that this is not a contract of letting to hire, but a distinct kind of contract. For example, if two neighbours have each an ox, and agree each to lend the other his ox for ten days to make use of, and one of the oxen dies while in the care of the person to whom it does not belong, there will not be an actio locati or conducti, nor will there be an actio commodati, since the loan was not gratuitous, but the parties have to sue by an action præscriptis verbis.

Gal. iii. 144;

3. Adeo autem familiaritatem aliquam inter se habere videntur emptio et venditio, item locatio et conductio, ut in quibusdam causis quæri solet, utrum emptio et venditio contractur, an locatio et conductio. Ut ece de prædiis, quæ perpetuo quibusdam fruenda traduntur, id est ut, quamdiu pensio sive redditus pro his domino prestetur, neque ipsi conductori neque heredi ejus,

3. Contracts of sale and contracts of letting on hire are so nearly connected, that in some cases it is questioned whether the contract is one or the other. For instance, when lands are delivered over to be enjoyed for ever, that is, that as long as the rent is paid for the land to the owner, he cannot take away the land from the hirer or his heir, or from any one to whom the hirer or his heir has sold
cuive conductor heresve ejus id praeedium vendiderit aut donaverit aut dotis nomine dederit aliove quo modo alienaverit, auferre liceat. Sed talis contractus quia inter veteres dubitabatur et a quibusdam locatio, a quibusdam venditio existimabatur: lex Zenoniana latet est, que emphyteuseos contractui propriae statutum naturam neque ad locationem neque ad venditionem inclinantem, sed suas pactioibus fulciendam, et si quidem aliquid pactum fuerit, hoc ita optimis, ac si natura talis esset contractus, sin autem nihil de periculo rei fuerit pactum, tunc si quidem totius rei interitus accesserit, ad dominum super hoc redundare periculum, sin particulares, ad emphyteuticarium hujusmodi damnum venire. Quo jure utimur.

GAL. iii. 145; C. iv. 66. 1.

We have already given an account of emphyteusis in the note to Bk. ii. Tit. 5. 6.

The law would naturally contemplate the contract under which the emphytena entered as a locatio conductio; but the dominus seemed to have parted with so much of his interest, that it appeared doubtful whether it ought not rather to be considered as a sale. Zeno (about A.D. 476) enacted that it should be regarded as a separate form of contract.

4. Item quaecuravit, si cum aurifici Titio convenerit, ut is ex auro suo certi ponderis certaeque formae anulOS ei faceret et appiceret verbi gratia aureos decem, utrum emptio et venditio contrahi videatur, an locatio et conductio? et Cassius dixit, materie quidem emptionem venditionemque contrahi, opere autem locationem et conductionem. Sed placuit, tantum emptionem et venditionem contrahi. Quodsi summ aurum Titius dederit, mercede pro opera constituta, dubium non est, quin locatio et conductio sit.

GAL. iii. 147; D. xiv. 2. 2. 1.

4. It is also questioned whether, when Titius has agreed with a goldsmith to make him rings of a certain weight and pattern, out of gold belonging to the goldsmith himself, the goldsmith to receive, for example, ten aurei, the contract is one of sale or letting on hire. Cassius says that there is a sale of the material, and a letting on hire of the goldsmith's work; but it has been decided that there is only a contract of sale. But if Titius gives the gold, and a sum is agreed on to be paid for the work, there is no doubt that the contract is then one of letting to hire.

5. Conductor omnia secundum legem conductionis facere debet et, si quid in lege praeterrimum fuerit, id ex bono et sequo debet prestarere. Qui pro usu aut vestimentorum aut argentii aut jumenti mercedem aut dedit aut promisit, ab eo custodia talis desideratur, qualem diligentis-

5. The hirer ought to do everything according to the terms of his hiring, and if anything has been omitted in these terms, he ought to supply it according to the rules of equity. He who has given or promised a sum for the hire of clothes or silver or a beast of burden, is required to bestow as
simus paterfamilias suis rebus adhibetur. Quam si prosterit et aliquo casu rem amiserit, de restituenda ea non tenebitur.

great care on the safe custody of the thing he hires as the most careful paterfamilias bestows on the custody of his own property. If he bestows such care, but loses the thing through some accident, he is not bound to restore it.

D. xix. 2. 25. 8. 7.

The distinction between the cases of a sale and of a letting on hire is to be noticed. Here the risk of fortuitous loss is with the owner, i.e. the locator, in accordance with the general rule; but in sale the risk of fortuitous loss is not with the owner, the seller, but with the buyer.

6. Mortuo conductore intra temporae conductionis, heres ejus eodem jure in conductionem succedit.

6. If the hirer dies during the time of his hiring, his heir succeeds him in the hiring on the same terms.

C. iv. 65. 10.

And the same may be said of the locator; but in a locatio conductio of personal services or of a thing to be done by a special person, the death of the person who let out his services terminated the contract.

The contract, in the case of a locatio conductio rei, was also terminated by the sale of the thing hired. The buyer was not considered bound by the contract. Emptori fundi necesse non est stare colonum cui prior dominus locavit, nisi ea legi emit (C. iv. 65. 9); but the conductor could demand compensation from the locator. The contract ceasing if the thing was sold serves clearly to distinguish the interest of the conductor from a usufruct. The conductor had no real interest in the thing, but only a personal right against the locator, while the usufructuary had a servitude, i.e. a real right, in the thing. The whole of the thing over which the usufruct extended could not be sold, because part of it, namely the usufruct, had already been parted with.

The contract was also terminated if the rent was two years in arrear (D. xix. 2. 54. 1); if the conductor grossly misused the thing hired (C. iv. 65. 3); if the locator had indispensable need of it, si propriis usibus dominus esse necessarium eam probavit (C. ib.); or if the conductor was prevented from getting benefit from it, as by armed force. (D. xix. 2. 13. 7.)

TIT. XXV. DE SOCIETATE.

Societatem coire solemus aut to torum bonorum, quam Greci specialiter διοικητας appellant, aut unius aliquidus negotiationis, veluti mancipiorum emendorum vendendorumque, aut olei, vini, frumenti emendi vendendiue.

A partnership is formed either of the whole goods of the contracting parties, to which the Greeks give the special name of διοικητας, or for some particular business, as the sale or purchase of slaves, oil, wine, or wheat.

GAI. iii. 148.
The text, borrowed from Gaius, gives the general division of partnerships into two classes according as they are universal or particular. In the Digest we have a further division by distinguishing five kinds of partnership. (D. xvii. 2. 5, 7.)

1. Societas universorum bonorum, in which everything belonging or accruing in any way to each partner is held in common. Here the property belonging to each partner at the time when the partnership was formed became the property of all, without delivery (D. xvii. 2. 1. 1, 2); after-acquired property had to be delivered to the partnership (D. xvii. 2. 74).

2. Societas universorum quae ex quaeven tu veniunt, i.e. of all things which are gained or acquired by each partner through business transactions; but not of things belonging or accruing in other ways, such as inheritances or legacies. (D. xvii. 2. 7, 8, 9.)

3. Societas negotiationis alicuius, formed to carry on a particular business.

4. Societas vestigalis, formed to carry on the farming of one or more branches of the public revenues—a mere branch of the last, but subject to special rules. (D. xvii. 2. 59.)

5. Societas rei unius, when one or more particular things are held in common.

1. Et quidem si nihil de partibus lucri et damni nominatim converterit, equales scilicet partes et in lucro et in damno spectantur. Quodsi expressae fuerint partes, haec servari debent: nec enim numquam dubium fuit quin valeat conventio, si duo inter se pacti sunt, ut ad unum quidem due partes et damni et lucri pertinent, ad alium tertia.

1. If the proportions of gain and loss have not been specially agreed on, the shares of gain and loss are looked on as equal. But if they have been agreed on, effect ought to be given to the agreement; for, indeed, the validity of the agreement has never been questioned, if two partners have agreed that two-thirds of the gain and loss should belong to the one, and one-third to the other.

GAI. iii. 150.

Æquales partes, i.e. one equal share of the whole, not proportional to what each contributes. (D. xvii. 2. 80.)

Hæ servari debent: subject, however, to this qualification, that one partner can get a greater share of the profits than the others only if he has given more to the partnership, whether in money or in labour. (D. xvii. 2. 29. pr.)

2. De illa sane conventione quæsitum est, si Titius et Seius inter se pacti sunt, ut ad Titium lucri due partes pertinent, damni tertia, ad Seium due partes damni, luceri tertia, an rata debet haberri conventio? Quintus Mucius contra naturam societatis talem pacti rem esse existimavit et ob id non esse ratam habendam. Servius Sulpicius, Sulpicius sententia prevaluit, contra sentit, quia sepe quorundam ita pretiosa est opera in societate, ut

2. But doubts have been raised as to the following agreement. Supposing Titius and Seius have agreed that two-thirds of the profit and one-third of the loss shall belong to Titius, and two-thirds of the loss and one-third of the profit shall belong to Seius, ought such an agreement to be valid? Quintus Mucius considered it as contrary to the nature of partnership, and as therefore not to be held valid. Servius Sulpicius, on the contrary, whose opinion has prevailed, thought it valid,
A partnership in which one partner was totally excluded from gain was void. The jurists called it a leonina societas, as the other partner would have the lion’s share. (D. xvii. 2. 29. 2.)

With respect to the power of one partner to bind another, a point not touched on by Justinian, we may observe that, as between the partners themselves, any one who acted in behalf of the rest was their mandatory, and, beyond acts of pure administration of their affairs, could only be empowered to act by their express desire (mandatum). If he was so empowered, he had an action against them for all expenses and losses he incurred, and was bound to account to them for the profits. With regard to third persons, as the Roman law, strictly speaking, took no notice of any one who was not a party to the particular contract, they could not sue, or be sued by, the remaining partners, who were not parties. The pretor, however, allowed the remaining partners to sue if they had no other means of protecting their interests (D. xiv. 3. 1, 2); and the stranger to sue, if the partners had benefited by the contract. (D. xvii. 2. 82.)

8. Illud expeditum est, si in una causa pars fuerit expressa, veluti in solo lucro vel in solo damno, in altera vero omissa: in eo quoque, quod pretermissem est, eandem partem servari.

4. Manet autem societas eo usque, donec in eodem consensu perseveraverint: at cum aliquis renuntiaverit societati, solvitur societas. Sed plane si quis callide in hae renuntiaverit societati, ut ob-
veniens aliquod lucrum solus habeat, veluti si totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renuntiaverit societati, ut hereditatem solus lucrasceret, cogitetur hoc lucrum communicare; si quid vero alius lucrasceret, quod non captaverit, ad ipsum solum pertinet: si vero, cui renuntiatum est, quidquid omnino post renuntiatum societatem adquiritur, soli conceditur.

secret motive, such as that he may alone enjoy a gain which he knows awaits him; as, for instance, if an inheritance has been left to a member of a partnership embracing all the property of each of the partners, and he renounces the partnership to enjoy alone the advantage of an inheritance left him; he is compelled to share this source of gain with his partners. But if he gains anything without such previous design, he alone profits by it: while the partner who has received his renunciation alone takes all that is acquired after the renunciation of the partnership has been made.

Gal. iii. 151; D. xvii. 2. 65. 8.

The contract of partnership may have different modifications. It may be made during or from a certain time or conditionally. (D. xvii. 2. 1. pr.) But there can be no partnership to last for ever, as no one can be forced to remain a partner against his will. (D. xvii. 2. 70.) Any partner may renounce, i.e. withdraw, when he pleases, but if the time during which the partnership is to last has been fixed, he cannot escape liability during that period, and even if no time has been fixed he must not so retire as to force on a disadvantageous sale of partnership property. (D. xvii. 2. 65. 5 and 6.)

The remaining paragraphs of this Title treat of the modes in which the partnership may be dissolved. Ulpian, enumerating the causes of the dissolution of partnership, says, ‘Societas solvitur ex personis, ex rebus, ex voluntate, ex actione.’ (D. xvii. 2. 63. 10.) Ex personis, when one of the parties is dead or incapacitated, as by confiscation (publicatio) of goods, when the treasury succeeds to his persona (paragr. 7); ex rebus, when the purpose of the partnership is affected, or its subject-matter has ceased to exist, as in the case of cession of goods (paragr. 8); ex voluntate, when one partner renounces; and ex actione, when one partner compels a dissolution of partnership by action. We may add ex tempore, if the partnership was only temporary.

5. Solvitur adhuc societas etiam morte socii, quia qui societatem contrahit, certam personam sibi elegit. Sed et si consensu plurium societatis coitam sit, morte unus socii solvitur, et si plures superant, nisi si in coeunda societate aliter conventerit.

5. A partnership is also dissolved by the death of a partner, as he who enters into a partnership chooses a particular person to whom he binds himself. And even if there are more than two partners, the death of any one dissolves the partnership although more than one survive, unless on the formation of the partnership it has been otherwise agreed.

Gal. iii. 152; D. xvii. 2. 65. 9.

Although, in forming the partnership, the parties might agree that, if any one ceased to be a partner, the rest should still continue partners, or, to speak more accurately, should immediately and
without fresh agreement form a new partnership, yet no one could validly make it part of the contract that his heirs should, on his death, be admitted partners, the contract being personal. There was an exception made to this rule in the case of societates vectigales. (D. xvii. 2. 59. pr.)

6. Item si alicujus rei contracta societas sit et finis negotio impositus est, finitur societas.

6. If the partnership has been formed for a single transaction, when the transaction is completed, the partnership is ended.

D. xvii. 2. 65. 10.

7. Publicatione quoque distrahi societatem manifestum est, scilicet si universa bona socii publicentur: nam cum in ejus locum alius succedat, pro mortuo habetur.

7. It is evident, also, that a partnership is dissolved by confiscation, as if all the property of a partner is confiscated; for this partner, as another person succeeds into his place, is considered dead.

D. xvii. 2. 65. 12.

8. Item si quis ex socii, mole debiti pregravatus, bonis suis cesserit et ideo propter publica aut propter privata debita substantia ejus veneat, solvitur societas. Sed hoc casu si adhuc consentiant in societatem, nova videtur incipere societas.

8. So, too, if one of the partners, borne down by the weight of his debts, makes a cession of his goods, and his property is therefore sold to satisfy his debts, public or private, the partnership is dissolved. But in this case, if the parties agree still to continue partners, a new partnership would seem to be begun.

GAI. iii. 158. 154.

The *persona* of an individual might, we know, be destroyed even in his lifetime and passed on to a successor, as, for instance, by the *maxima* and *media capitis* *diminutio*, and by the *publicatio* or confiscation of all the goods of the *diminutus*, which was one of their consequences, so that the *fiscus* was his successor (D. xlviii. 20. 1), or by the sale of his property in the mass either for the profit of the treasury in the case of criminals (*sectio bonorum*, the old form of *publicatio*), or of private individuals in certain cases of insolvency (*emptio bonorum*), or when he had made a *cessio bonorum* under the *lex Julia*. (See Tit. 12 of this Book.) In the time of Justinian sales in one mass of a whole patrimony were obsolete, and therefore confiscation (*publicatio*), when the *fiscus* was the successor, and *cessio bonorum* are alone mentioned here; the latter, however, as taking away the fortune of the partner, and not as destroying his *persona*.

Of course the partnership might be immediately renewed with the partner whose goods had been confiscated or ceded to creditors, if the other partners were willing to enter into what was really a new partnership, as it might if the partner had lost his *civitas* by the *media diminutio*; for partnership, being a contract of the *jus gentium*, could be formed with a stranger. (GAI. iii. 154.) The *minima capitis* *diminutio* did not cause a dissolution of the
partnership, and a person arrogated or emancipated still remained a partner. (D. xvii. 2. 65. 11; Poste's Gaius, 426.) The arrogator, however, did not become a partner, as a new partner could not be introduced without the consent of the others. Societas quemadmodum ad heredes socii non transit, ita nec ad arrogatorem, ne aliquin invititus quis socius efficaciut cui non vult. (D. xvii. 2. 65. 11.)

9. Socius socio utrum eo nomine tantum teneatur pro socio actione, si quid dolo commiserit, sicut is, qui deponi apud se passus est, etiam culpa, id est desidiae atque negligentiae nomine, quiescitum est: praevaluit tamen, etiam culpa nomine teneri sum. Culpa antem non ad exactissimam diligentiam dirigenda est: sufficit enim talen diligentiam in communibus rebus adhibere socium, quamuis suis rebus adhibere solet. Nam qui parum diligentem socium sibi adsumit de se queri, hoc est suae id imprudentiae imputare debit.

9. It has been questioned whether one partner can only be made answerable to another by the action pro socio, if he has been guilty of malicious wrong, as a depository is, or whether also for a fault, that is, for carelessness and negligence. The opinion has prevailed that he is also answerable for a fault, but the fault is not to be measured by a standard of the most perfect carefulness possible. It is sufficient that he should be as careful of things belonging to the partnership as he is of his own property. For he who accepts as partner a person of careless habits, has only himself to blame, that is must set it down to the score of his own imprudence.

D. xvii. 2. 72.

Societas jus quodammodo fraternitatis in se habet. (D. xvii. 2. 63. pr.) Hence, while each partner had, if sued, an allowance (termed the beneficium competentiae) made for him, and was only held responsible to the extent of his means (Bk. iv. Tit. 6. 38), yet, on the other hand, if he was condemned in an action pro socio, he was marked with infamy. (D. xvii. 2. 63. pr., 1–3; D. iii. 2. 1.)

The action pro socio was the remedy in almost every case that could arise between partners. It was employed, for instance, to enforce accounts, to get compensation for losses, and to dissolve the partnership. If any partner was guilty of a delict against his partners, such as theft, he would be made amenable by such actions as the actio furti, vi honorum raptorum, or leges Aquiliae, of which we read in the Fourth Book. There was also another action incident to partnerships, called the actio commune divid undo, which was brought to procure a partition, by the iudex, of the common property. (D. xvii. 2. 43; Introd. sec. 103.)

Tit. XXVI. DE MANDATO.

Mandatum contrabitur quinque modis, sive sua tantum gratia aliquis tibi mandet, sive sua et tua, sive aliena tantum, sive sua et aliena, sive tua et aliena. At si tua tantum gratia tibi mandatum sit, superva-

The contract of mandate is formed in five modes; according as a mandator gives you a mandate for his benefit only, or for his benefit and for yours, or for the benefit of a third person only, or for his benefit and that of a
cuum est mandatum et ob id nulla third person, or for your benefit and ex eo obligatio nee mandati inter that of a third person. A mandate vos actio nascitur. made for your benefit only is useless, and does not produce between you any obligation or action mandati.

D. xvi. 1. 2. pr.; GAL. iii. 156, 156.

In the theory of Roman law one person could not represent another. The person who actually made the contract, who uttered the binding words, or went through the binding formalities, was the only legal contractor; he alone could sue and be sued. The law would not take notice that it was really in behalf of another that he made the contract.

But a friend on whom reliance could be placed might be persuaded to make the contract in his own name. Honour and friendship would then effect what the law would not compel. This friend would give up all that he gained by the contract to the person at whose request he entered into it. The promise to perform this act of friendship was given, in the old times of Roman manners, with an appropriate formality. The person really interested took the friend by the right hand, and told him that he placed in his hand the trust he was anxious to have discharged. The trust, or commission itself, was hence called mandatum (manu datum). Plautus thus describes the ceremony (Captiv. ii. 3):

TYND. Hæc per dexteram tuam, te dextera retinens manu,
Obsequo, infidelior mihi ne fuas, quam ego sum tibi.
Tu hoc age, tu mihi herus nunc es, tu patronus, tu pater;
Tibi commendo spes opesque meas.

PH. Mandasti satis.

The execution of a mandatum was thus a discharge of an office of friendship. Originem ex officio atque amicitia trahit. (D. xvii. 1. 1. 4.) And it never lost the traces of its origin. It was always necessarily gratuitous: the mandatarius, i.e. the person charged with the mandatum, was obliged to bestow on it the care of the most diligent paterfamilias (C. iv. 35. 13), and if he failed to discharge the trust, and was condemned in an actio mandati, he was stamped with infamy. (D. iii. 2. 1; Introd. sec. 48.)

When the introduction of the praetorian system furnished a method by which every equitable claim could be enforced, friends who entered into such an agreement were obliged to discharge their reciprocal duties. The praetor, by the actio mandati directa given to the mandator, compelled the mandatarius to account for all he received, and to pay over the profits, and, by the actio mandati contraria given to the mandatarius, compelled the mandator (i.e. the person who requested the favour) to reimburse, with interest, the mandatarius for all expenses incurred, to indemnify him for all losses, and to free him from all obligations contracted in the execution of the mandate. It is in this sense that the contracts of mandatum may be said to be bilateral.

The praetorian law went a great step further, by allowing the
mandator to bring equitable actions against, and to be sued by, the third party, with whom the mandatarius contracted. First as to actions brought by the mandator. Whatever direct actions the mandatarius would properly have brought or was liable to, the mandator was allowed to bring in the shape of actiones utiles; and if the mandator sued or intended to sue, the mandatarius could not sue. As, for instance, where the mandatarius would have brought a condicio, or an actio empti or venditi, the mandator was allowed to bring a condicio utilis, or an actio utilis empti or venditi. (D. xix. 1. 13. 25.) In the case of a special mandate, these actions were allowed as of course; in the case of a general mandate, only when the mandator had no other way of protecting his interests (D. xiv. 3. 2): a mandate being termed special when one man charged another with the execution of one or more particular things, and general when he asked him to represent him in all his affairs.

Secondly as to actions brought against the mandator. There were some acts, of a solemn character, in which one citizen could not at no time of Roman law act for another, such as bringing any of the legis actiones, mancipation, making testaments, or the cretio or aditio of an inheritance. (Bk. ii. Tit. 9. 5, note.) Nor did the civil law ever permit any one, except a son or a slave (Tit. 28), to contract for another so as to make the person for whom he contracted directly responsible or directly able to sue on the obligation. But the prætorian system gradually recognised the intervention of an agent. A cognitor, i.e. a person authorised formally to conduct a suit, was allowed to act on behalf of the plaintiff or defendant, and fully represented his principal. (See Bk. iv. Tit. 10. pr., note.)

The manager of a shop (institor) and the captain of a ship (magister navis) were permitted to bind their employers (Bk. iv. Tit. 7. 2), and by an extension of the actions appropriate to these cases, i.e. by allowing a utilis actio quasi institoria (D. xvii. 1. 10. 5), the prætor made all employers liable for acts of their agents authorised by or profitable to them, and allowed actions to be brought directly against the employer without regard to the procurator or agent; and this was the mode in which the mandator was made responsible. The prætor also gave the mandator the right to sue directly without the consent of the agent (D. iii. 3. 68); a right not given by the actiones institoriae and exercitoriae except in special cases. Thus, ultimately, obligations were acquired by or against the mandator through the agent, and not for him by the agent.

1. Mandantis tantum gratia intervenit mandatum, veluti si quis tibi mandet, ut negotia ejus gereres, vel ut fundum ei emeres, vel ut pro eo sponderes.

1. A mandate is made for the benefit of the mandator only; if, for instance, any one gives you a mandate to transact his business, to buy an estate for him, or to become surety for him.

D. xvii. 1. 2. 1.
This is the usual case of a *mandatum*. Justinian employs here, it may be remarked, the word *sponderes*, although *sponsores* no longer existed. (See Tit. 20.)

2. *Tua et mandantis, veluti si mandet tibi, ut pecuniam sub usu ris crederes ei, qui in rem ipsius mutuaretur, aut si, volente te agere cum eo ex fidejussoria causa, mandet tibi, ut cum reo agas periculo mandantis, vel ut ipsius periculo stipuleris ab eo, quem tibi deleget in id, quod tibi debuerat.*

2. A mandate is made for your benefit and that of the mandator; if, for instance, he gives a mandate to you to lend money at interest to a person who borrows it for the purposes of the mandator; or if, when you are about to sue him as a *fidejussor*, he gives you a mandate to sue the principal at his risk, or to stipulate at his risk for payment of something owed by him to you, with a person whom he appoints as his substitute.

D. xvii. 1. 2. 4; D. xvii. 1. 45. 7. 8.

*Volente te agere cum eo ex fidejussoria causa.* Under the law anterior to Justinian, the creditor could sue either the debtor or the *fidejussor*, but not both. If he elected to sue the latter, the *fidejussor* might give him a *mandatum* to sue the debtor, and then, if the creditor did so, the *fidejussor* would be freed from any obligation as *fidejussor*, but would be bound as *mandator*; and thus the mandate would be for the benefit of the *fidejussor*, because he would be sued after the principal, and for the benefit of the creditor, because he could sue the principal first and then the surety in his quality of *mandator*, whereas he could not ordinarily sue both the principal and the surety, but was obliged to make his choice between them, as the *litis contestatio* in the action he first brought extinguished the obligation they had jointly made. This could not be of any use after Justinian had decided that the principal debtor should be sued first, and then, if there was any deficiency, the *fidejussor*. (See Tit. 20. 4.)

*Ab eo quem tibi deleget.* The debtor points out to the creditor a third person who owes the debtor a sum equal to his debt to the creditor, and asks the creditor to stipulate with this third person for payment of the amount due from the debtor. If the third person does not pay, the debtor is held responsible as *mandator*. The creditor thus benefits, as he has two persons to sue, and the debtor benefits, because he employs his creditor to collect a debt due to him.

3. *Aliena tantum causa inter venit mandatum, veluti si tibi mandet, ut Titii negotia gereres, vel ut Titio fundum emeres, vel ut pro Titio sponderes.*

3. A mandate is made for the benefit of a third person, if, for example, the mandator bids you manage the affairs of Titius, or buy an estate for Titius, or become surety for Titius.

D. xvii. 1. 2. 2.

4. *Sua et aliena, veluti si de communibus suis et Titii negotiis gerendis tibi mandet, vel ut sibi et Titio fundum emeres, vel ut pro eo*  

4. A mandate is made for the benefit of the mandator and of a third person, if, for example, the mandator gives you a mandate to manage affairs
et Titio sponderes. common to himself and Titius, or to buy an estate for himself and Titius, or to become surety for himself and Titius.

D. xvii. 1. 2. 8.

5. Tua et aliena, veluti si tibi mandet, ut Titio sub usuris crederes. Quodsi ut sine usu ris crederes, aliena tantum gratia intercedit mandatum.

5. A mandate is made for your benefit and for that of a third person, if, for instance, the mandator bids you to lend money at interest to Titius. Were the money to be lent without interest, the mandate would be only for the benefit of a third person.

D. xvii. 1. 2. 5.

6. Tua tantum gratia intervenit mandatum, veluti si tibi mandet, ut pecunias suas potius in emptiones prediorum colloces, quam feneres, vel ex diverso ut feneres potius, quam in emptiones prediorum colloces. Cujus generis mandatum magis consilium est quam mandatum et ob id non est obligatorium, quia nemo ex consilio mandati obligatur, etiam si non expediat ei, cui debitum, cum liberum cuique sit apud se explorare, un expediat consilium. Itaque si otiosam pecuniam domi te habentem hortatus fuerit aliquis, ut rem aliquam emeres vel eam crederes, quamvis non expedierit tibi eam emisse vel credidisses, non tamen tibi mandati tenetur. Et adeo haec sua sunt, ut quiesitum sit, an mandati tenetur, qui mandavit tibi, ut Titio pecuniam fenerares: sed obtinuit Sabini sen- tentia, obligatorium esse in hoc casu mandatum, quia non alter Titio credidisses, quam si tibi mandatum esset.

6. A mandate is made for your benefit only, if, for example, the mandator bids you invest your money in the purchase of land rather than put it out to interest, or conversely. Such a mandate is rather a piece of advice than a mandate, and consequently is not obligatory, as no one is bound by giving advice, although it be not judicious, as each may judge for himself what the worth of the advice is. If, therefore, you have a sum of money lying idle in your house, and any one advises you to make a purchase with it, or put it out to interest, although it may not be advantageous to you to have made this purchase, or to have lent your money, yet your adviser is not bound by an action mandati. So much so, that it has been questioned whether a person is bound by this action who has given you a mandate to lend your money at interest to Titius. But the opinion of Sabinius has prevailed, that such a mandate is obligatory, as you would not have lent your money to Titius unless the mandate had been given to you.

GAI. ii. 156; D. xvii. 1. 2. 6.

It was a very narrow line which divided the expression of a mere opinion advising another person to do a thing, and such a request to him to do it as involved the responsibilities of a mandatum. Everything depended on the intention of the parties. The question was, did the person who expressed the opinion, or made the request, mean to say that, if the opinion would not be adopted, or the request granted, unless he made himself responsible for the consequences, he was willing to become responsible? If he did mean this, he was treated as a mandator.

A mandator stood in this and similar cases almost exactly in the place of a fidejussor. Neque enim multum referre præ- sens quis interrogatus fidejubeat, an absens mandet. (D. xvii. 1.
32. Accordingly, in the Digest and the Code, the two are treated of under the same head, de fidejussoribus et mandatoribus. For the mandate might be an intercessio, i.e. a mode in which a third party steps in between two others as a surety for one of them, and was subject to the general rules common to accessory contracts, such as the prohibition of the senatusconsultum Velleianum with respect to women, the beneficium discussionis under Justinian, i.e. that the principal should be sued first, the beneficium divisionis under Hadrian's rescript, i.e. that the liabilities of co-sureties should be divided, and, to some extent, the beneficium cedendarum actionum. (See Tit. 20. 4.) But the mandatum, being a distinct and not an accessory contract, was, in some points, distinguished from a fidejussio. 1. The mandator was sometimes considered more responsible than the fidejussor. If a minor borrowed money under a guarantee, and was restitutus in integrum, Ulpian says it was doubtful whether the loss should fall on the creditor or the fidejussor; but he is clear it ought to fall on the mandator if the guarantee was given by mandate, not by fidejussio. (D. iv. 4. 13. pr.) 2. The debtor and the fidejussor being liable for the same debt, the litis contestatio in a suit against the debtor released the fidejussor; but this was not so in the case of the mandator, who was bound by a separate contract. Justinian altered the law, and made the action against the fidejussor survive, thus, as he says, placing him in the position of the mandator. (C. viii. 41. 28.) 3. If once there was a litis contestatio in a suit against the fidejussor, it was no longer open to the fidejussor to demand that the actions against the debtor and the other fidejussores should be ceded to him, for the litis contestatio had extinguished them; but neither the litis contestatio nor judgment against the debtor affected the claim of the mandator for the cession of actions. (D. xlvi. 3. 95. 10.) 4. The fidejussor could only claim that the actions which the creditor actually had should be ceded to him; but the mandator was altogether released if the creditor had abandoned the right of bringing any action he could have brought, because, the contracts being distinct and the creditor bound by a bilateral contract to the mandator, if he had not fulfilled his duty, the mandator was free from his obligation. (D. xlvi. 3. 95. 11.)

7. Illud quoque mandatum non est obligatorium, quod contra bonos mores est, veluti si Titius de furto aut danno faciendo aut de injuria facienda tibi mandet. Licet enim ponsam istius facti nomine pristiteris, non tamen ullam habes adversus Titium actionem.

7. A mandate, again, is not obliga-
tory which is contrary to boni mores; as, for instance, if Titius gives you a mandate to commit a theft, or do a harm or injury; for although you pay the penalty of what you may do, you have not in such a case an action against Titius.

Gal. iii. 157; D. xvii. 1. 22. 6.

8. Is, qui exsequitur mandatum, non debet excedere fines mandati. Ut ecce si quis usque ad centum

8. A mandatary must not exceed
the limits of the mandate; for instance, if a mandator bids you buy land or
aureos mandaverit tibi, ut fundum emeres vel ut pro Ticio sponderes, neque plures emere debes neque in amplionem pecuniam fidejubere; aliquin non habebis cum eo mandati actionem: adeo quidem, ut Sabino et Cassio placuerit, etiam si usque ad centum aureos cum eo agere velit, inutiliter te acturum. Diversae scholae auctores recte te usque ad centum aureos acturum existimant: que sententia sane benignior est. Quod si minoris emersis, habebis scilicet cum eo actionem, quoniam qui mandat, ut sibi centum aureorum fundus emeretur, utique mandasse intellectur, ut minoris, si posit, emeretur.

Qui excessit, aliud quid facere videtur. (D. xvii. 1. 5.) Sabinus, in giving the opinion mentioned in the text, insisted very rigorously on the effect of the thing done being aliud quid.

9. Recte quoque mandatum contractum, si, dum adhuc integra res sit, revocatum fuerit, evanescit. 9. The mandate, although validly formed, is extinguished, if before it is begun to be executed it is revoked.

The power of revoking the mandate, if the revocation did not harm the mandatarius, i.e. if the matter was still res integra, gives a peculiar feature to this contract. The contract was formed, and yet it was not certain to come into operation.

10. Item si adhuc integro mandato mors alterius interveniat, id est vel ejus, qui mandaverit, vel ejus, qui mandatum susceperit, solvitur mandatum. Sed utilitatis causa receptum est, si mortuo eo, qui tibi mandaverit, tu ignorans, cum deceassis, executas fueras mandatum, posse te agere mandati actione: aliquin justa et probabilis ignorantiam damnum tibi afferat. Et huic simile est, quod placuit, si debitores manumissit dispensatore Titii per ignorantiam liberto solverint, liberari eos: cum aliquin stricta juris ratione non possent liberari, quis aliique solvissent, quam cui sovvere debuerint. 10. A mandate is also extinguished, if, before it is begun to be executed, the mandator or mandatory dies. But motives of convenience have given rise to the decision, that if, after the death of the mandator, you, in ignorance of his decease, execute the mandate, you may bring an action mandati; otherwise you would be prejudiced by what was allowable and natural ignorance. Similarly it has been decided that, if debtors make a payment to the steward of Titius, after he has been enfranchised, in ignorance of his enfranchisement, they are freed from their obligation, although, in strict law, they could not be freed, as they have made the payment to a person other than him to whom they ought to have made it.
Manumisso. It would be the same if the slave had not been enfranchised, but had been sold, or had his office of dispensator taken from him without the knowledge of the debtors. (D. xlvi. 3. 51.)

11. Mandatum non suspicer liberum est: susceptum autem volummandum aut quam primum renuntiaendum est, ut aut per semet ipsum aut per alium sando rem mandator exequatur. Nam nisi ita renuntiatur, ut integra causa mandatoris reservetur sando rem explicandi, nihil minus mandati actio locum habet, nisi si justa causa intercessit aut non renuntiandi aut interemptive renuntiandi.

11. Every one is free to refuse accepting a mandate, but if it is once accepted, it must be executed, or else renounced with all despatch so as to permit the mandator carrying out his purpose himself or through another. For, unless the renunciation is made so that the mandator is still in a position to do this, an action mandati may be brought in spite of the renunciation of the mandatory, unless some good reason has prevented him making the renunciation, or making it within a proper time.

D. xvii. 1. 22. 11.

Nisi si justa causa. For example, a sudden and serious illness, a deadly enmity springing up between the mandator and the mandatarius, or the insolvency of the former. (D. xvii. 1. 23–25.) In the execution of the mandate the mandatarius was bound to use the diligence of a bonus paterfamilias. (Tit. 27. 1.)

12. Mandatum et in diei differri et sub condicione fieri potest.

12. A mandate may be made to take effect from a particular time, or may be made conditionally.

D. xvii. 1. 1. 8.


18. Lastly, it may be observed that unless a mandate is gratuitous, it will take the form of some other contract; for, if a consideration is fixed on, it is a contract of letting on hire. And generally we may say, that in every case in which, whenever, the duty being undertaken without pay, there is a contract of mandate or deposit, in every such case, if pay is received, the contract is one of letting to hire. If, therefore, a person gives his clothes to a fuller to be scoured or cleaned, or to a tailor to be mended, without any pay being agreed on or promised, an action mandati may be brought.

GAL. ii. 162; D. xvii. 1. 1. 4.

Although the execution of the mandatum was necessarily gratuitous, yet, without making the contract a locatio conductio, a mandator might offer a reward to the mandatarius, not exactly in payment of, but in gratitude for, his services. Such a remuneration was called honorarium, or sometimes salarium, a term that was especially applied to the remuneration offered to those who exercised the liberal professions, such as philosophers, rhetoricians,
physicians, advocates, &c. These *honoraria* could not be made the subject of an action; but the magistrate, pretor, or preses of the province pronounced *extra ordinem* (see Introd. sec. 108) whether they were due and what was the proper amount. (D. l. 13. 1.)

**Trt. XXVII. DE OBLIGATIONIBUS QUASI EX CONTRACTU.**

Post *genera contractuum enumerata* dispiciamus etiam de *his obligations, quae non proprie quidem ex contractu nasce intelleguntur, sed tamen, quia non ex maleficio substantiam capiunt, quasi ex contractu nasce videntur.* Having enumerated the different kinds of contracts, let us treat of those obligations which do not spring, properly speaking, from a contract, but yet, as they do not take their origin from a delict, seem to arise, as it were, from a contract.

If obligations were to be considered as always arising either *ex contractu* or *ex delicto*, one man could only be bound to another in one of two ways: either by a mutual exercise of will he had entered into an agreement with him, or he had done him some injury which he ought to repair. But there were many instances in which justice required that he should be considered bound, where no contract had been made, and where nothing to which the law gave the technical term of *delictum* had been committed. Such cases, however, if separately examined, would approach either to an *obligatio ex contractu* or to one *ex delicto*. If it more nearly resembled the former, the binding tie was called an *obligatio quasi ex contractu*; if the latter, it was called an *obligatio quasi ex delicto*. (See Introd. sec. 87, 88.)

The leading distinction between obligations *ex contractu* and those *quasi ex contractu* is, that in the former one person chooses to bind himself to another, in the latter he is placed in such circumstances that he is thereby bound to another. To take, for instance, the examples given in the Title: if I take upon me the management of my neighbour's affairs, become tutor, have things in common with others who are not my partners, accept an inheritance, or receive money not due to me, the mere fact of my so conducting myself imposes upon me certain duties which the law will force me to fulfil. Of course, if I make an express agreement in any of these cases, I am then bound by the agreement, and not by the circumstances of my position. It is only in the absence of any agreement that I am bound by an *obligatio quasi ex contractu*. An *obligatio quasi ex contractu* does not rest on any contract at all; it rests on a fact or event, but there is an analogy between a contract and the kind of fact or events which give rise to an *obligatio quasi ex contractu*, for they both create rights *in personam*. (See *Austin*, Jurisprudence (ed. 1869), p. 944.) The instances of obligations *quasi ex contractu* which follow are only meant as examples, not as an exhaustive list.
1. Igitur cum quis absentis negotia gesserit, utroquo inter eos nascuntur actiones, quae appellantur negotiorum gestorum: sed domino quidem rei gestae adversus eum, qui gessit, directa competit actio, negotiorum antem gestori contraria. Quas ex nullo contractu proprio nasci manifestum est: quippe ita nascuntur iste actiones, si sine mandato quique alienis negotiis gerendis se obtulerit: ex qua causa ii, quorum negotia gesta fuerint, etiam ignorantes obligantur. Idque utilitatis causa receptum est, ne absentium, qui subita festinatione coacti, nulli demandata negotiorum suorum administratione, peregrae profecti essent, deserentur negotia: quae sane nemo curaturus esset, si de eo, quod quis impendisset, nullam habiturus esset actionem. Sicut autem is, qui utiliter gesserit negotia, habet obligatum dominum negotiorum, ita et contra iste quoque tenetur, ut administrationis rationem reddat. Quo casu ad exactissimam quique diligentiam compelitur reddere rationem: nec sufficit talem diligentiam adhibere, qualem suis rebus adhibere soleret, si modo alius diligentior commodius administratus esset negotia.

2. Tutores quoque, qui tutela judicio tenetur, non proprie ex contractu obligati intelleguntur (nullum enim negotium inter tutorem et pupillum contrahitur): sed quia sane non ex maleficio tenetur, quasi ex contractu teneri videntur. Et hoc autem casu mutus sunt actiones: non tantum enim pupillus cum tutore habet tutela actionem, sed et ex contrario tutor cum pupillo habet contraria tutela, si vel imponderr aliquid in rem pupillii vel pro eo fuerit obligatus aut rem suam credi.

1. Thus, if a person has managed the affairs of another in his absence, they have reciprocally actions negotiorum gestorum, the action belonging to the owner against him who has managed his affairs being an actio directa, and the action given to this person against the owner being an actio contraria. It is evident that these actions cannot properly be said to arise from a contract, for they arise only when one person has, without receiving a mandate, taken upon himself the management of the affairs of another, and consequently those whose affairs are thus managed are bound by an obligation, even without their knowing it. It is from motives of convenience that this has been admitted, to prevent the entire neglect of the affairs of absent persons, who may be forced to depart in haste, without having entrusted the management to any one; and certainly no one would pay any attention to their affairs, unless he could recover by action any expenses he might be put to. On the other hand, just as he who has advantageously managed the affairs of another makes this person liable to him by an obligation, so he himself is bound to render an account of his management. And the standard which he is bound to observe in rendering an account, is that of the most exact diligence, nor is it sufficient that he should use such diligence as he employs in the management of his own affairs, that is, if it is possible that a person of greater diligence would be likely to manage the affairs of the absent person better.

D. iii. 5. 2; D. xliv. 7. 5. pr.; C. ii. 18. 20.

Etiam ignorantes. If the owners had known of the part taken in the management of their affairs, there would have been a mandatum tacitum.

2. Tutores, again, who are liable to the action tutela, are not, properly speaking, bound by a contract, for there is no contract made between the tutor and the pupil; but as they are certainly not bound by a delict, they seem to be bound quasi ex contractu. In this case, too, there are reciprocal actions, for not only has the pupil an action tutela against the tutor, but, in his turn, the tutor has an actio contraria tutela against the pupil, if he has incurred any expenses in managing the pupil's property, or has entered
tori ejus obligaverit. into an obligation for him, or given his own property as security to the pupil's creditors.

D. xlv. 7. 5. 1.

We should add here the corresponding case of the curator. His negotiorum gestio did not give rise to a special action, but to the actio negotiorum gestorum contratia, of which he could avail himself to reimburse himself for all reasonable expenses. (D. iii. 5. 3. 5; D. xxvii. 3. 4. 3.)

Quasi ex contractu teneri videntur. The exact translation would be 'seem to be bound by a tie analogous to that by which persons are bound under contracts'; but as this is too long a phrase to repeat every time the words quasi ex contractu occur, the Latin has been retained in the translation.

3. Item si inter aliquos communis sit res sine societate, veluti quod pariter eis legata donatae esset, et alter eorum aliter ideo tenetur communi dividundo judicio, quod solus fructus ex ea re perceperit, aut quod socius ejus in eam rem necessariae impensae fecerit: non intellegitur proprie ex contractu obligatur esse, quippe nihil inter se contraxerunt: sed quia non ex maleficio tenetur, quasi ex contractu teneri videtur.

8. So, again, if a thing is common to two or more persons, without there being any partnership between them, as, for instance, if they have received a joint legacy or gift, and one of them is liable to the other by an action communi dividundo, because he alone has enjoyed the fruits of the thing, or because the other party has incurred expenses necessary for the thing, he cannot be properly said to be bound by a contract, for no contract has been made; but as he is not bound by a delict, he is said to be bound quasi ex contractu.

D. xvii. 2. 31, 34.

Necessarias impensas. Useful expenses, and not merely necessary ones, could be recovered. (D. x. 3. 11.)

4. Idem juris est de eo, qui coheredito familiæ eriscundæ judicio ex his causis obligatus est.

4. It is the same with regard to a person who is bound to his co-heir under similar circumstances by an action familiae eriscundæ.

D. xvii. 2. 84.

The actio familiae eriscundæ was that by which any one heres applied to the judge to make a fair division of the inheritance. (See Introd. sec. 103.)

5. Heres quoque legatorum nominem non proprie ex contractu obligatur intellegitur; neque enim cum herede neque cum defuncto illum negotium legatarius gessisse proprie dixit potest: sed quia ex maleficio non est obligatus heres, quasi ex contractu debere intellegitur.

5. The heir, too, is not, properly speaking, bound in regard to legacies by a contract, for the legatee cannot be properly said to have made a contract with the heir or with the deceased; but, as the heir is not bound by a delict, he is considered to be bound quasi ex contractu.

D. xlv. 7. 5. 2.

The circumstance of accepting the inheritance imposed on the
heir the obligation of carrying out the testator's wishes, and this he was compelled to do by the actio ex testamento. If a particular thing was given as a legacy, so that the legatee could bring a vindicatio, he might exercise his choice between the personal and the real action.

6. Item is, cui quis per errorem non debitum solvit, quasi ex contractu debere videtur. Adeo enim non intellegitur proprii ex contractu obligatus, ut, si certorem rationem sequamur, magis, ut supra diximus, ex distractu quam ex contractu possit dici obligatus esse: nam qui solvendi animo pecuniam dat, in hoc dare videtur, ut distractu potius negotium quam contractat. Sed tamen proinde is, qui acceptit, obligatur, ac si mutuum illi dare tur, et ideo conditione tenetur.

6. A person to whom money not due has been paid by mistake, is bound quasi ex contractu. For so far is he from being bound by a contract, that, to reason strictly, we may say, as we have said before, that he is bound rather by the dissolution than by the formation of a contract; for a payment is generally made to dissolve, not to form, a contract; and yet he who receives it in the case we have mentioned is bound exactly as if it had been given him as a mutuum, and is therefore liable to a condictio.

D. xlii. 7. 5. 8.

If a person knowingly made a payment not due, he could not recover what he paid, as the payment was treated as a gift (D. l. 17. 53); nor could he, if he paid what was due by a natural, though not by a legal, obligation, or if he paid sooner than he need have done what he must pay at a certain date; but he could recover if he paid, under a conditional undertaking, before the event had happened. (D. xii. 6. 64.) Whether the error which would permit him to recover might be one arising from ignorance not only of fact but of law, is uncertain. We find on the one hand such statements as Juris ignorantia suum petentibus non nocet (D. xxii. 6. 7), and on the other such as Regula est juris quidem ignorantiam cuique nocere (D. xxii. 6. 9; C. i. 18).

The word 'pay,' 'solvo,' must be taken in a much more extended sense than the payment of money. It must be considered as including anything given to or done for another.

It is here said that the person who receives what is not due is bound not merely quasi ex contractu, but as if he had been bound by a particular contract, viz. mutuum. So the persons interfering in the affairs of another, the tutor and the curator, are bound as if by a mandate, and the persons mentioned in paragr. 3 and 4 as if they were bound by the particular contract of societas.

The remedy of the person who had paid by mistake was termed condictio indebiti, and if the thing paid or given over was money, or anything of which an equal quantity could be given in return, the action was precisely like the condictio certi protecting a mutuum. (See Tit. 13. 2. note 7.) But if it was not of this nature, if, for example, a freedman, bound to render some services to his patron, had by mistake rendered other services, he could recover the value of the services rendered, and this was an uncertain amount. This does not resemble the position of a person recover-
7. Ex quibusdam tamen causis repeti non potest, quod per errorem non debitum solutum sit. Namque definirex veteres, ex quibus causis inftiando lis crescit, ex his causis non debitum solutum repeti non posse, veluti ex lege Aquilia, item ex legato. Quod veteres quidem in his legatis locum habere voluerunt, que certa constituta per damnationem cuicumque fuerunt legata: nostra autem constitutio cum unam naturam omnibus legatis et fideicommissis induluit, huissumodi augmentum in omnibus legatis et fideicommissis extendi voluit: sed non omnibus legataris prebuit, sed tantummodo in his legatis et fideicommissis, que sacrosanctis ecleasis ceterisque venerabilibus locis, que religionis vel pietatis intuitu honorificantur, derelicta sunt, que si indebita solvantur, non repetuntur.

GAL. ii. 288, and iv. 9, 171; C. iv. 5. 4; C. i. 2. 28.

This penalty, first exacted from those who denied that a judgment pronounced against them had been pronounced, was extended to cases of refusing to pay legacies given per damnationem, to cases under the lex Aquilia (Bk. iv. Tit. 3), and to many other cases. (Bk. iv. Tit. 6. 19, 23.)

In all cases where by denying his liability the person liable might have an increased amount ultimately recovered against him, it was considered that paying the thing for which he was, or for which he thought himself, liable, was but a mode of escaping from paying a penalty, and that it was paid in order to attain security. If, therefore, it was discovered that the thing need not have been paid, yet, as the person who paid it had paid it to purchase security, he could not recover it back.

Nostra constitutio. This constitution is not to be found in the Code, but we have provisions in the Code bearing on the subject. (See C. vi. 43. 2. 1–3.)

Oeteris venerabilibus locis. Such, for instance, as monasteries, asylums for strangers, orphans, the aged, &c. (C. i. 2. 23.)
Trt. XXVIII. PER QUAS PERSONAS NOBIS OBLIGATIO ADQUIRITUR.

Expositis generibus obligationum, quae ex contractu vel quasi ex contractu nascentur, admonendi sumus, adquiri vobis non solum per vosmet ipsos, sed etiam per eae quoque personas, quae in vestra potestate sunt, veluti per servos vestros et filios: ut tamen, quod per servos quidem vobis adquiritur, totum vestrum fiat, quod autem per liberos, quos in potestate habetis, ex obligatione fuerit acquisitum, hoc dividatur secundum imaginem rerum proprietatis et usufructus, quam nostra discretit constituit: ut, quod ab actione commodum perveniat, hujus usumfructum quidem habeat pater, proprietas autem filio servetur, sicut patre actionem movente secundum novelli nostrae constitutionis divisionem.

After having gone through the different kinds of obligations which arise from a contract, or arise quasi ex contractu, we may observe that you may acquire an obligation, not only by yourselves, but also by those who are in your power, as your slaves or children. But there is this distinction in acquiring by slaves or by children, that what is acquired for you by your slaves is entirely yours, while that which has been acquired by an obligation through children in your power is divided as to the ownership and usufruct according to the scheme as to the ownership and usufruct of things laid down in our constitution. Thus, of all that is gained by an action, the father will have the usufruct, and the ownership will be reserved for the son, that is to say, when the action is brought by the father in conformity with what is laid down by our new constitution.

GAL iii. 168; C. vi. 61. 8. 3.

By acquiring an obligation is meant that we become creditors, and have a right to the action necessary to enforce the obligation.

As to the division of the usufruct and ownership, see Bk. ii. Tit. 9. 1. It is the object of the obligation, it may be observed, not the obligation itself, that is thus divided between the father and the son. Only the father could bring the action to enforce the obligation (patre actionem movente). (C. vi. 61. 8. 3.)

1. Item per liberos homines et alienos servos, quos bona fide possidetis, adquiritur vobis, sed tantum ex duabus causis, id est si quid ex operis suis vel ex re vestra adquirant.

2. Again, acquisition is made for you by freemen, and by slaves belonging to others, whom you possess bona fide, but only in two cases, namely, when it arises from their labours, or from something belonging to you.

GAL iii. 164.

See Bk. ii. Tit. 9. 4.
Per liberos homines, i.e. by persons really free, but whom we bona fide believe to be slaves.

2. Per sum quoque servum in quo usumfructum vel usum habetis, similiter ex duabus istis causis vobis adquiritur.

2. Acquisition is equally made for you in the same two cases by a slave of whom you have the usufruct or use.

GAL. iii. 165; D. vii. 8. 14. pr.
See Bk. ii. Tit. 9. 4.

In the case of a slave of whom we have only the use, we can only acquire when the two cases unite, i.e. when his labour is expended on something that is our property, for we cannot derive any benefit from his labour expended elsewhere.

3. Communem servum pro dominica parte dominis adquirere certum est, excepto eo, quod uni nominatim stipulando aut per traditionem accipiendoe illi soli acquirit, veluti cum ita stipuletur: "Titio domino meo dare spondes?" sed si unius domini jussu servus fuerit stipulatus, licet anteae dubitabatur, tamen post nostram decisionem res expedita est, ut illi tantum adquirat, qui hoc ei facere jussit, ut supra dictum est.

3. A slave held in common undoubtedly acquires for his different owners in proportion to their interests in him, excepting that, in stipulating or receiving by tradition for one only, whom he mentions by name, he acquires only for this one; for instance, if he stipulates thus, 'Do you engage to give to Titius my master?' But if the slave has stipulated by order of one master only, in spite of former doubts, there is no question since our constitution, but that he acquires, as we have already said, for him alone who has given him the order.

Gal. iii. 167; C. iv. 27. 2.

The text only notices the acquisition of obligations through others as recognised by the civil law, i.e. through slaves and sons in potestate, and does not notice the praetorian changes by which the principal acquired obligations through his agent. (See Tit. 26. pr.)

Trr. XXIX. QUIBUS MODIS OBLIGATIO TOLLITUR.

Tollitur autem omnis obligatio solutione ejus, quod debetur, vel si quis, consentiente creditor, aliiu pro alio solvent. Nec tamen interesse, quis solvat, utrum ipse, qui debet, an alius pro eo: liberatur enim et alio solvenste, sive sciente debitoor sive ignorantve vel invito soluto fiat. Item si reus reversor, etiam ii, qui pro eo interveniuntur, liberantur. Idem ex contrario contignt, si fidejusor solvent: non enim solus ipse liberatur, sed etiam reus.

Every obligation is dissolved by the payment of the thing due, or of something else given in its place with the consent of the creditor. And it makes no difference whether it is the debtor himself who pays, or some one else for him; for the debtor is freed from the obligation, if payment is made by a third person, and that either with or without the knowledge of the debtor, or even against his will. If the debtor pays, all those who have become surety for him are thereby freed, just as, on the other hand, if a surety pays, not only he himself is freed, but the principal is freed also.

Gal. iii. 168; D. xlvi. 3. 58, 58. 2, and 48; D. xlvi. 1. 66.

We now pass to considering how an obligation once formed may be dissolved. Solvere, to unloose, dissolve the tie, is the appropriate term for the process, in whatever way it may be accomplished—Solutionis verbum pertinet ad omnem liberationem quoquo modo factum (D. xlvi. 3. 54)—although most generally
applied to the payment of money, as the mode by which contracts are usually terminated. It is by a slight extension of the strict use of the word that a person was said not solvere obligationem, but solvere pecuniam.

The civil law, which imposed forms on the formation of a contract, imposed corresponding forms on its dissolution. And when these were fulfilled, the debtor was said to be freed from his obligation 'ipso jure.' In later times, in cases where these forms had not been gone through, but yet equity demanded that the debtor should be considered free, the pretor allowed him to repel, by an exception, the creditor who sued him; and it has thence been said, 'obligatio aut ipso jure aut per exceptionem tollitur.'

When it is said in the text that if the fidejussor pays the principal is freed, the case must be understood to be referred to of a fidejussor paying, without using his right of having the actions ceded to him. Payment might be made to the creditor or his authorised agent, to the tutor or curator, or to the pupil if authorised.

Of course, in every stage of the law, payment put an end to the contract. The claims of the contracting parties were satisfied, and nothing more remained to be done. But, supposing payment was not made, but one of the parties was willing to release the other, or one party could claim, for some reason, to be released, certain solemn forms had been entered into, which could not be made of no effect by the mere consent of the parties. Such forms were too solemn in the eyes of the law to lose their power unless other forms equally solemn were gone through. Accordingly, in such cases, where no real payment was made, there was what Gaius calls an imaginaria solutio (iii. 169), varying in the method in which it was made according to the forms, nexum, verbis, or litteris, with which the contract had been formed.

If, for instance, the contract had been formed per as et libram, not less than five witnesses and a libripens were called together. The debtor struck the scale with a piece of money and gave it to the creditor in the name of the whole sum owing. (Gai. iii. 174.) This form was also adopted in cases where payment of a legacy given per damnationem was remitted, probably because the testament was itself supposed to be made per as et libram, and also in cases where payment of money due by a judicial sentence was remitted, probably because the most formal mode of imaginary payment was adopted when the debt had been contracted in a way which the law considered as specially solemn. (Gai. iii. 175.) This form of imaginary payment was also applicable wherever anything certain of those things which 'pondere, numero (and probably also mensura) constant' was due.

If the contract had been made 'verbis,' the debtor asked the creditor if he held what was due as received, 'Quod ego tibi promisi, habesne acceptum?' The creditor answered that he did, 'Habeo.' The creditor was said 'acceptum ferre,' and the process
was called 'acceptilatio.' (See next paragr., and Gal. iii. 169, 170.)

If the contract had been made 'litteris,' the debtor probably entered on his tabula the expenditure (expensatio) of the sum due, with the consent of the creditor, but we cannot learn anything from Gaius on the subject.

If the contract had been made 'res,' the mere return of the thing was a sufficient sign that the contract was at an end. There was a visible act, and the whole object of the forms by which contracts were made and dissolved was to substitute visible acts for mere expressions of consent. Where the contract, as belonging to the jus gentium, could be made merely by consent, it could also be dissolved by consent. (See paragr. 4.)

1. Item per acceptilationem tollitur obligatio. Est autem acceptilatio imaginaria solutio. Quod enim ex verborum obligatione Titio debetur, id si velit Titius remittere, poterit sic fieri, ut patiatur huc verba debitorem dicere: 'Quod ego tibi promisi, habesme acceptum?' et Titius respondeat 'Habeo;' sed et Graece potest acceptum fieri, dummodo sic fiat, ut Latinis verbis solet: ἔχεις λαβων δημόρια τόσα; ἔχω λαβὼν. Quo genere, ut diximus, tantum esse obligationes solvuntur, quae ex verbis consistunt, non etiam cetera: consentaneum enim visum est, verbis factam obligationem posse aliis verbis dissolvi. Sed id, quod ex alia causa debetur, potest in stipulationem deduci et per acceptilationem dissolvi. Sicut autem quod debetur, pro parte recte solvitur, ita in parte debiti acceptilatio fieri potest.

1. An obligation is also put an end to by acceptilatio. This is an imaginary payment; for if Titius wishes to remit payment of that which is due to him by a verbal contract, he can do so by permitting the debtor to put to him the following question, 'Do you acknowledge to have received that which I promised you?' Titius then answering, 'I do.' The acknowledgment may also be made in Greek, provided it is made as it would be in Latin, ἔχεις λαβὼν δημόρια τόσα; ἔχω λαβὼν. In this way verbal contracts are dissolved, but not contracts made in other ways: it seemed natural that an obligation formed by words should be able to be dissolved by words; but anything due by any other kind of contract may be made the subject of a stipulation, and the debtor be freed by acceptilation. And as part of a debt may be paid, so acceptilation may be made of a part only.

Gal. iii. 169, 170, 172; D. xlv. 4. 8. 4; D. xlv. 4. 9.

Properly the acceptilatio only operated as a release when the contract had been made verbis, but it was held, in all cases, to contain by implication a pact or agreement not to sue, and therefore an exceptio could be grounded on it to repel the creditor who had entered into it. Si acceptilatio inutilis fuit, tacita pactione id actum videtur, ne peteretur (D. ii. 14. 27. 9). The jurists, however, found a means of making the acceptilatio extend to every kind of contract. It was looked on as a stipulation which operated as a novation of the old contract, that is, which did away with the former contract, and substituted a new one in its place.

2. Est prodita stipulatio, quae vulgo Aquiliana appellatur, per quam stipulacionem contingit, ut omnium rerum obligatio in stipula.

2. A stipulation has been invented, commonly called the Aquilian, by which every obligation, whatever may be the thing it concerns, is put into the
form of a stipulation, and afterwards dissolved by acceptance. This Aquilian stipulation effects a novation of all obligations, and was framed in the following terms by Gallus Aquilinus:

'Whatever for any cause you are or shall be or might be bound to give or do for me, either now or at a future day; everything for which I have or shall have an actio with you, a peticio from you, or a persecutio against you; everything of mine which you have, hold, or possess, or might possess, or which you have made yourself not to possess through some wilful fault of your own, whatever shall be the value of each of these things, so much Aulus Agerius stipulated should be given him in money, and Numerius Negidius engaged to give it;' on the other hand, Numerius Negidius put to Aulus Agerius the question, 'All that I have promised you to-day by the Aquilian stipulation, do you acknowledge it as received?' and Aulus Agerius answered, 'I acknowledge it as received,' or 'I have entered it as received.'

This Aquilinus Gallus was the friend of Cicero, whose colleague he was in the praetorship (b.c. 65). He was the pupil of Mucius, and the teacher of Sulpicius, and is mentioned in the Digest (i. 2. 2. 42) as of great authority with the people. He is said to have devised a means by which postumi sui might be instituted (D. xxviii. 2. 29. pr.; see Bk. ii. Tit. 13. 1, note); and Cicero informs us that he was also the author of certain forms in the actions of theft (De Off. iii. 14.)

We may remark with what care and forethought Aquilinus Gallus has made his formula applicable to all possible cases. 'Causa' is the generical expression. 'Oportet, oportebit oportetvue' embrace the present, the future, and the conditional. 'Presens in diemve' (some texts add 'aut sub conditione') refer to what are termed the modalities to which contracts are liable. 'Actio' is the 'actio in personam;' 'peticio' is the 'actio in rem;' 'persecutio' is the extraordinary proceeding before a magistrate; 'habes' refers to 'dominium;' 'tenes' to physical detention; 'possides' to possession. The expression, 'dolove malo fecisti, quo minus possiederis,' was added to express the obligation which bound a person who had fraudulently destroyed a thing in his possession to prevent the owner reclaiming it. The stipulatio Aquiliana was equally applicable if the object was to effect a novation intended to operate as the foundation of a new contract to be really fulfilled by both the parties. (D. ii. 15. 2. and 9. 2.)

Stipulatus est, spopondit; this is the language of the cautio, or written record of the stipulation and the acceptilatio.

3. An obligation is also dissolved by novation, as, for instance, if Seius stipulates with Titius for that which is due to Seius from you. For by the intervention of a new debtor a new obligation arises, and the former obligation is extinguished by being transferred into the latter; so much so, that it may happen, that although the latter stipulation is void, yet the former, by the effect of the novation, ceases to exist; as, for instance, if Titius stipulates with a pupil not authorised by his tutor for a debt due to Titius from you, in this case Titius loses his whole claim, for the first debtor is freed, and the second obligation is void. But the case is different if it is a slave with whom he stipulates, for then the original debtor remains bound as if no one had made a subsequent stipulation. But if it is the original debtor himself with whom you make the second stipulation, there will be no novation, unless the subsequent stipulation contains something new, as, for instance, the addition or suppression of a condition, a term, or a surety. In saying that if a condition is added there is a novation, we must be understood to mean that the novation will take place if the condition is accomplished, but that if it is not accomplished, the former obligation remains binding. The ancients were of opinion that the novation only took place when the second obligation was entered into for the purpose of making the novation, and doubts consequently arose as to when this intention was to be supposed to exist, and different presumptions were laid down by those who treated the subject according to the different cases they had to settle. In consequence, our constitution was published, in which it was clearly decided that novation shall only take place when the contracting parties have expressly declared that their object in making the new contract is to extinguish the old one; otherwise the former obligation will remain binding, while the second is added to it, so that each contract will give rise to an obligation still in force, according to the provisions of our constitution, which may be more fully learned by reading the constitution itself.

GAI. iii. 176, 177, 179; D. xli. 2. 6, 8, 1, et seq.; C. viii. 41. 8.
Novation is the dissolution of one obligation by the formation of another. Ulpian says: ‘Novatio est prioris debiti in aliam obligationem vel civilem vel naturalem transfusio atque translatio: hoc est, cum ex precedenti causa ita nova constitutur, ut prior perimatur. Novatio enim a novo nomen accepti, et a nova obligatione.’ (D. xlvi. 2. 1. pr.)

Every kind of contract could be superseded by novation, but the new contract must be either litteris (see Tit. 21) or by stipulation, and the predominance of the use of stipulations as the instruments of novation was so great that the jurists generally refer to it alone. Qualiscumque obligatio sit quæ pracessit, novari verbis potest. (D. xlvi. 2. 1. 1.)

It was necessary that the obligation superseded should be existing at the time; but whether it was civil, pretorian, or natural was immaterial. (D. xlvi. 2. 1. 1.) And it was also necessary that the stipulation which superseded it should be binding, either civilly or naturally. In the text we have two instances of contracts which are not binding civilly, owing to the incapacity of the parties, one made with a pupil, and one with a slave, and a distinction is drawn between them. The stipulation made with the pupil is a stipulation, though only one binding naturally: the pupil is a Roman citizen, and can pronounce the word spondeo; but a stipulation made with a slave, except when the slave speaks merely as the mouthpiece of his master, is no stipulation at all. The slave cannot use the words of the formulary. There is no contract verbis to supersede the existing obligation.

By a novation a new debtor might be substituted, even without the consent of the original debtor. If it was done with the consent of the original debtor, the new debtor was termed delegatus, and the process delegatio. If it was done without his consent, the new debtor was termed the expromissor, and the process expromissio; but these terms, expromissor and expromissio, were also used in a wider sense, as implying the new debtor and the mode of contracting generally, without implying that the consent of the old debtor had not been given to the substitution. (D. xiii. 7. 10.)

Of course, if both parties to the original contract were willing, a new creditor could be substituted as well as a new debtor, by a novation; and if a new debtor was delegated who already owed a debt to the old debtor, there would necessarily be a change of creditor as well as debtor. A owes to B, and B to C an equal sum. If B tells A to pay C, C has a new debtor, and A a new creditor.

In the passage of Gaius (iii. 177) on which the text is based, it is said that if a sponsor was added, there was a new contract. Sponsores being obsolete, Justinian substitutes fidejussor; but although a contract might be extinguished by a surety being added, this would not be so if the parties did not mean it to have this effect.

If the original contract was made in any other way than by a stipulation, it could be superseded by a stipulation containing the
same terms. But if it was made by a stipulation, then, unless some alteration was made in it, the new stipulation would be, in fact, the old one, and there could be no novatio, unless some new term was added. But suppose a new stipulation was made with a condition introduced into it, was the old stipulation extinguished at once by novation? The text lays down the general principle that it was not extinguished, as it is said in the Digest (xlvi. 2. 14) non statim fit novatio. sed tunc demum cum condition extulerit; the old contract endured until the condition was accomplished, and if the condition failed the old contract remained binding. But some of the jurists said that to extinguish the first contract might be the intention of the parties in making the second contract, or it might not. The question of novation was therefore a question of the intention of the parties in each particular case. Justinian lays down in the text that, unless the parties expressly declare it to be their wish that the first contract shall be extinguished by the second, the first contract shall be considered as subsisting.

In personal actions something like novation took place at two points of the suit (Gai. iii. 180)—at the litis contestatio (see Intro. sec. 105), and when judgment had been given. After the litis contestatio, the plaintiff could sue in a fresh action on what was, at this period of the suit, ascertained to be his legal position, but not on the contract itself. After judgment was given, he could sue on the judgment. But in both cases all the beneficial accessories of the original contract were continued on to the new—such, for instance, as pledges given in security remained, and interest continued to run on, lite contestata usuque currunt (D. xxii. 1. 35), and so this juridical novation did not, like novation proper, quite supersede the original contract. (D. xlvi. 2. 29.)

4. Moreover, those obligations which are formed by consent alone, are dissolved by the expression of a contrary wish. If Titius and Seius have agreed that Seius shall purchase an estate at Tusculum for a hundred aurei, and then, before the contract has been executed, that is, before the price has been paid, or delivery made of the estate, they agree to abandon the agreement for the sale, they are mutually freed from their obligation. It is the same in the contract of letting on hire, and, as we have just said, in all other contracts formed by consent alone.

D. xlvi. 3. 80; D. xviii. 5. 5. 1.

This paragraph must be understood with the limitation that the contract could only be rescinded integris omnibus, i.e. if each party could possibly be placed in the position he held before. The text rather loosely expresses this by 're nondum secuta.' If all things were not integra, but the parties agreed to make them so, this
would be a new contract extinguishing the old contract by novation, not an extinction of the contract by mere consent.

There were other modes by which a contract was dissolved, as if the subject of the contract being a thing certain perished without the fault of any party; or if the qualities of debtor and creditor were united in the same person, as, for instance, if the debtor became heir of the creditor, which is termed *confusio*; or if one debt was set off against another (*compensatio*), which, however, if the actions proper to the contract were actions *stricti juris*, would only give rise to an exception, and not to an extinction of the contract: in actions *bonae fidei*, where equitable grounds of defence need not be stated in the formula, the *compensatio* would be necessarily taken notice of, and in such cases the contract may be said to have been virtually (see Bk. iv. Tit. 6. 39) put an end to by the *compensatio*. There were also many other things which, although they left the contract still subsisting, prevented an action being brought on it. These will be treated of in the next book under the head of exceptions.
Liber Quartus.

Trt. I. DE OBLIGATIONIBUS, QUÆ EX DELICTO NASCUNTUR.

Cum expositum sit superiore libro de obligationibus ex contractu et quasi ex contractu, sequitur, ut de obligationibus ex maleficio dispiciamus. Sed illae quidem, ut suo loco tradidimus, in quattuor genera dividuntur: haec vero unius generis sunt, nam omnes ex re nascuntur, id est ex ipso maleficio, veluti ex furto aut rapina aut damno aut injuria.

As we have treated in the preceding Book of obligations arising ex contractu and quasi ex contractu, we have now to treat of obligations arising ex maleficio. Of the obligations treated of in the last Book, there are, as we have said, four kinds; of those we are now to treat of, there is but one kind, for they all arise re, that is, from the actual wrongdoing, as, for example, from theft, from robbery, or damage, or injury.

 GAL. iii. 182; D. xlv. 7. 4.

This part of the Institutes only treats of delicta, i.e. violations of the rights of property, of status, in short of any of the rights in rem, such as liberty, security, and reputation, so far as they produce obligations and are the grounds of private actions. It is not the evil intent which makes an act a delict. Many acts done with evil intent are excluded from delicts, many done without evil intent are included among them. Those acts only were delicts which had been characterised and provided against as such by the ancient civil legislation, and to which a particular action was attached. (See Introd. sec. 88.) In this and the three following Titles we have the four principal kinds of delicts treated of, viz. furtum, vi bona rapta, damnî injuria, and injuria.

All the obligations attached to delicts are said in the text nasci ex re, i.e. from the evil act or thing done, ex ipso maleficio, to contrast them with the various modes in which obligations ex contractu are formed.

Ut de obligationibus ex maleficio dispiciamus. Many texts read, ut de obligationibus ex maleficio et quasi ex maleficio dispiciamus.

1. Furtum est contractatio rei 1. Theft is the fraudulent dealing fraudulosa vel ipsius rei vel etiam with a thing itself, or with its use, or
usus ejus possessionis: quod lege its possession; an act which is prohi-
naturali prohibitum est admittere. bited by natural law.

D. xlvii. 2. 1. 3.

The definition of theft includes the term contractatio rei, to show that evil intent is not sufficient; there must be an actual touching or seizing of the thing; fraudulosa to show that the thing must be seized with evil intent; and rei, usus, possessionis, to show the different interests in a thing that might be the subject of theft. It might seem that it would have made the definition more complete to have said contractatio rei alienæ. Perhaps the word aliena was left out because it was quite possible that the dominus or real owner of a thing should commit a theft in taking it from the possessor, as, for instance, in the case of a debtor stealing a thing given in pledge; and yet the res was scarcely aliena to the dominus.

Many texts, after the words contractatio fraudulosa, add luci fuciendo gratia, i.e. with a design to profit by the act, whether the profit be the that of gaining a benefit for oneself, or that of inflicting an injury on another. These words are found in the passage of the Digest (xlvii. 2. 1. 3) from which this definition of theft is taken, but the authority of the manuscripts seems against admitting them here.

Only things moveable could be the subject of theft. (D. xlvii. 2. 25.) But this phrase included things moved from the soil, such as trees, fruit, crops, chalk, &c. (D. xlvii. 2. 25. 2 and 57.)

2. Furtum autem vel a furvo id est nigro dictum est, quod clam et obscure fit et plerumque nocte: vel a fraude: vel a ferendo, id est aferendo: vel a Greco sermone, qui φησας appellant fures. Immo etiam Greci ἐπὶ τοῦ φήσεi φησας dixerunt.

2. The word furtum comes either from furrum, which means 'black' because it is committed secretly and obscurely, and usually in the night; or from fraus; or from ferre, that is 'taking away,' or from the Greek word φῆσα, meaning a thief, which again the Greeks say, comes from φῆσαι, to carry away.

D. xlvii. 2. 1.

3. Furtorum autem genera duo sunt, manifestum et nec manifestum. Nam conceptum et oblatum species potius actionis sunt furto coherentes quam genera furtorum, sicut inferius apparebit. Mani-
festum fur est, quem Greci εἰρ' αὐτοφήσας appellant: nec solum is, qui in ipso furto reprehenditur, sed etiam is, qui eo loco reprehenditur, quo fit, veluti qui in domo furtum fecit et, nondum aegresseus jaunum, reprehensus fuerit, et qui in oliveto olivarum aut in vineto uvarum fur-
tum fecit, quamdiu in eo oliveto aut in vineto fur reprehensus sit: immo ulteriori furtum manifestum

3. Of theft there are two kinds, theft manifest and theft not manifest; for the thefts termed conceptum and oblatum are rather kinds of actions attaching to theft than kinds of theft, as will appear below. A manifest thief is one whom the Greeks term εἰρ' αὐτοφήσας, being not only one taken in the fact, but also one taken in the place where the theft is committed; as, for example, before he has passed on his way out through the door of the house where he has committed a theft, or in a plantation of olives or a vineyard where he has been stealing olives or grapes. We must also extend mani-
ifest theft to the case of a thief seen or
extendendum est, quamdiu eam rem fur tenens visus vel deprehensus fueris sive in publico sive in privato vel a domino vel ab alio, antequam eo pervenerit, quo perferre ac depo- nere rem destinasset. Sed si per- tulus, quo destinavit, tametsi depre- hendatur cum re furtiva, non est manifestus fur. Nec manifestum furtum quid sit, ex his, que diximus, intelligitur: nam quod mani- festum non est, id scilicet nec manifestum est.

Gal. iii. 188-185; D. xlvii. 2. 3. and 5.

The distinction between furtum manifestum and nec mani- festum is found in the law of the Twelve Tables, which affixed to a furtum manifestum the penalty of death if committed by a slave, and the penalty of being given over as a slave to the person injured if committed by a freeman; and attached to a furtum nec manifestum the penalty of double the value of the thing stolen, whether committed by a freeman or a slave. The praetor retained the penalty fixed in the latter case, but in the former altered the penalty to the payment of four times the value of the thing stolen, whether the theft was committed by a slave or a freeman. (Gal. iii. 189.)

Gaius tells us that the juris- trists were divided on the point of what it was that constituted a furtum manifestum; some thinking the thief must be taken in the act, some that he need only be taken on the spot, some that he need only be taken with the thing stolen on him before he had transported it to its destination (this is the opinion received in the text), and some that time and place were immaterial so that he was taken with the thing stolen on him. (Gal. iii. 189, 190.)

4. Conceptum furtum dicitur, cum apud aliquem testibus pres- sentibus furtiva res quesita et inventa sit; nam in eum prorsa actio constituta est, quamvis fur non sit, que appellatur concepti. Oblatum furtum dictur, cum res furtiva ab aliquo tibi obliata sit eaque apud te concepta sit, utique si ea mente tibi data fuerit, ut apud te potius quam apud eum, qui de- derit, conciperetur: nam tibi, apud quem concepta sit, prorsa adversus eum, qui obtulit, quamvis fur non sit, constituta est actio, que appel- latur obligati. Est etiam prohibiti furti actio adversus eum, qui furtum querere testibus presentibus violen- tem prohiberet. Præterea poena constituatur edicto praetoris per ac- tionem furti non exhibiti adversus eum, qui furtivam rem apud se que-
sitam et inventam non exhibuit. Sed haec actiones, id est conceptii et oblati et furti prohibiti nec non furti non exhibiti, in desuetudinem abierunt. Cum enim requisitio rei furtive Hodie secundum veterem observationem non fit: merito ex consequentia etiam prostatae actiones ab usu communis recesserunt, cum manifestissimum est, quod omnes, qui scientes rem furtivam susceperint et celaverint, furti nec manifesti obnoxii sunt.

too, by means of the action furti non exhibiti, a penalty provided by the edict of the praetor against a person who has not produced a thing stolen which has been searched for and found in his house. But these actions, conceptii, oblati, furti prohibiti, and furti non exhibiti, have fallen into disuse; for search for things stolen is not now made according to the ancient practice, and therefore these actions have naturally ceased to be in use, as all who knowingly have received and concealed a thing stolen are liable to the action furti nec manifesti.

GAL. iii. 186–188.

To the furtum conceptum and the furtum oblatum a penalty of triple the value of the thing stolen was affixed by the Twelve Tables, and retained by the praetor. To the furtum prohibitum, not noticed in the Twelve Tables, a penalty of quadruple the value was affixed by the praetor. (GAI. iii. 192.) The Twelve Tables noticed a kind of furtum conceptum of which no mention is made here; it was called furtum lance licioque conceptum. The searcher entered the house of the supposed receiver, having nothing on his person but a cinature (licium) round his waist, and a plate (lana) which he held with both his hands, so that there could be no suspicion that he had brought in with him the thing supposed to be stolen. If he then found the thing in the house, the receiver was punished as if he had committed a furtum manifestum. (GAI. iii. 192.) This mode of search and the action founded on it were suppressed by the lex Aëbutia. (AUL. GELL. Noct. Att. xvi. 10.) The actions furti concepti, oblati, and prohibiti, were still in use in the time of Gaius.

Ulpian (D. l. 16. 13. 1) explains the meaning of the word poena. Poena is the punishment of an offence, noex vindicta. It is contrasted with multa. Poena is a punishment imposed by some general law, affecting possibly the caput and existimatio of the person punished. Multa is a fine, imposed ex arbitrio by magistrates and the præsides provinciarum; a money fine in later law (pecuniaria), a fine of cattle and sheep in earlier times (pecuaria).

The value of the thing was the rei verum pretium, its worth under all the circumstances of the case. So if a slave was stolen, who was in a position to enter on an inheritance at his master's bidding, and then died before entering, the pretium hereditatis, the value of the inheritance thus lost, was calculated in the value of the slave stolen. (D. xlvi. 2. 50. pr.)

5. Poena manifesti furti quadrupli est tam ex servi personas quam ex liberi, nec manifesti dupli.

5. The penalty for manifest theft is quadruple the value of the thing stolen, whether the thief be a slave or a freeman; that for theft not manifest is double.

GAI. iii. 189, 190.
6. Furtum autem fit non solum, cum quis intercipienti causa rem alienam amovet, sed generaliter cum quis alienam rem invito domino contractat. Itaque sive creditor pignore sive is, apud quem res deposita est, ea re utatur sive is, qui rem utendum acceptis, in illum usum eam transferat, quam cujus gratia ei data est, furtum committit. Veluti si quis argumentum utendum acceptis quasi amicos ad cenam inviteretur et id peregre secum tulerit, aut si quis equum gestandi causa commodatum sibi longius aliquo duxerit, quod veteres scripserunt de eo, qui in aciem equum perduxisset.

Gal. iii. 195, 196; D. xlii. 2. 54. pr.

6. It is theft, not only when any one takes away a thing belonging to another, in order to appropriate it, but generally when any one deals with the property of another contrary to the wishes of its owner. Thus, if the creditor uses the thing pledged or the depositary the thing deposited, or a person who has received a thing to make use of it in one way employs it in another way, it is a theft; for example, if any one borrows plate on the pretence of intending to invite friends to supper, and then carries it away with him to a distance, or if any one borrows a horse, as for a ride, and takes it much farther than suits such a purpose, as if, to use a suggestion made in the writings of the ancients, he has taken it into battle.

7. Placuit tamen, eos, qui rebus commodatis alter uterentur, quam utendas acciperent, ita furtum committere, si se intellegant id invito domino facere eumque, si intellexisset, non permissurum, ac si permissurum credant, extra crimenvideri: optima sane distinctione, quis furtum sine affectu furandi non committitur.

Gal. iii. 197; D. xlii. 3. 87. pr.

7. A person, however, who borrows a thing, and applies it to a purpose other than that for which it was lent, only commits theft, if he knows that he is acting against the wishes of the owner, and that the owner, if he was informed, would not permit it; for if he really thinks the owner would permit it, he does not commit a crime; and this is a very proper distinction, for there is no theft without the intention to commit theft.

8. Sed et si credat aliquis, invito domino se rem commodatam sibi contractare, domino autem volente id fiat, dicitur furtum non fieri. Unde illud quiescit est, cum Titius servum Mævi sollicitaverit, ut quasdam res domino subriparet et ad eum perferret, et servus id ad Mævium pertulerit, Mævius, dum vult Titium in ipso delicto reprehendere, permisit servo quasdam res ad eum perferre, utrum furti an servi corrupti judicio tenestur Titius, an neutro? Et cum nobis super hac dubitatione suggestum est et antiquorum prudentium super hoc altercationes perspeximus, quibusdam neque furti neque servi corrupti actionem praestantibus, quibusdam furti tantummodo: nos hujusmodi calliditati obviam untes, per nostram decisionem sanximus, non sumum furti actionem, sed etiam servi corrupti contra eum dari: licet enim

8. And even if the borrower thinks he is applying the thing borrowed contrary to the wishes of the owner, yet if the owner as a matter of fact approves of the application, there is, it is said, no theft. Whence the following question arises: Titius has urged the slave of Mævius to steal from his master certain things, and to bring them to him; the slave informs his master, who, wishing to seize Titius in the act, permits the slave to take certain things to Titius: is Titius liable to an action furti, or to one servi corrupti, or to neither? This doubtful question was submitted to us, and we examined the conflicting opinions of the ancient jurists on the subject, some of whom thought Titius was liable to neither of these actions, while others thought he was only liable to the action of theft; and to prevent such subtleties, we have decided that in this case both these actions may be brought. For, although
is servus deterior a sollicitatore minimae factus est et idee non concurrente regulae, que servi corrupti actionem introducerent, tamen consilium corruptoris ad perniciem prohibitatis servi introductum est, ut sit ei penalis actio imposita, tamquam re ipsa fuisset servus corruptus, ne ex hujusmodi impunitate et in alium servum, qui possit corrumpi, tale facinus a quibusdam pertentetur.

the slave has not been corrupted, and the case does not seem therefore within the rules of the action servi corrupti, yet the intention to corrupt the slave is indisputable, and he is therefore to be punished exactly as if the slave had been really corrupted, lest his impunity should incite others to act in the same criminal way towards a slave more easy to corrupt.

Gal. iii. 198; C. vi. 2. 20.

Was the slave corrupted? No; he had given a signal proof of his fidelity. Was the thing stolen? No; the owner had consented to its being taken. Thus had reasoned those who refused either action. Justinian avoids these subtleties, and decides that crime shall at any rate be punished, and reparation be made for a wrongful act. As to the actio servi corrupti, see D. xi. 3.

9. Interdum etiam liberorum hominum furtum fit, veluti si quis liberorum nostrorum, qui in potestate nostra sunt, subreptus fuerit.

9. Sometimes there may be a theft of free persons, as if one of our children in our power is carried away.

Gal. iii. 199.

Gaius adds, as an example, the case of a wife in manu being stolen. It was not the value of the person stolen which in such cases formed the measure of the penalty, for the value of a free person could not be calculated; but it was the loss occasioned by the theft to the person in whose power the subject of the theft was.

10. Aliquando autem etiam sui rei quia furtum committit, veluti si debitor rem, quam creditori pignoris causa dedit, subræxerit.

10. A man may even commit a theft of his own property, as if a debtor takes fraudulently from a creditor a thing he has pledged to him.

Gal. iii. 200; D. xlvii. 2. 66. pr.

11. Interdum furti tenetur, qui ipse furtum non fecerit: qualis est, cujus ope et consilio furtum factum est. In quo numero est, qui tibi nummos excuseit, ut aliquus eos raparet, aut obstitut tibi, ut aliquus rem tuam surriseret, vel oves aut boves tuas fugaverit, ut aliquus ess exciperet: et hoc veteres scripsersunt de eo, qui panno rubro fugavit armamentum. Sed si quid eorum per lasciviam et non data opera ut furtum admitteretur, factum est, in factum actio dari debet. At ubi ope Mævii Titius furtum fecerit, ambo furti tenentur. Ope consilio ejus quoque furtum admitti videtur, qui scatás forte fenestria supponit aut ipsas fenestras vel ostium effringit, ut alius furtum faceret, quive ferra-

11. A person may be liable to an action of theft, although he has not himself committed a theft, as, for instance, a person who has lent his aid and planned the crime. Among such is one who makes your money fall from your hand that another may seize upon it; or places himself in your way that another may carry off something belonging to you; or drives your sheep or oxen that another may make away with them, as, to take an instance given by the old lawyers, by frightening a herd with a piece of scarlet cloth. But if such acts are only the work of reckless folly, with no design of assisting in the commission of a theft, the proper action is one in factum. But if Mævius assists Titius to commit a robbery, both are liable to an
menta ad effringendum aut scalae, ut fenestris supponerentur, commodaverit, sciens, cujus gratia commodaverit. Certe qui nullam operam ad furtum faciendum adhibuit, sed tantum consilium dedit atque hortatus est ad furtum faciendum, non tenetur furti.

action of theft. A person, again, assists in a theft who places ladders under a window, or breaks a window or a door, that another may commit a theft; or who lends tools to break a door, or ladders to place under a window, knowing the purpose to which they are to be applied. But a person who does not actually assist, but only advises and urges the commission of a theft, is not liable to an action of theft.

GAI. iii. 203; D. xlvi. 2. 54. 4; D. xlvii. 2. 36.

12. Hi, qui in parentium vel dominorum potestate sunt, si rem eis subripiant, furtum quidem illis faciunt et rebus in furtivam causam cadit nec ob id ab ullo usucapi potest, ante quem in domini potestate revertatur; sed furti actio non nascitur, quia nec ex alia ullo causa potest inter eos actio nasci: si vero ope consilii alterius furtum factum fuerit, quia utique furtum commissit, conveniunt illi furti tenetur, quia verum est, ope consilii ejus furtum factum esse.

12. Those who are in the power of an ascendant or master, if they steal anything belonging to the person in whose power they are, commit a theft against him. The thing stolen, in such a case, is considered to be furtiva, and therefore no right in it can be acquired by usucaption before it has returned into the hands of the owner; but no action of theft can be brought, because the relation of the parties is such that no action whatever can arise between them. But if the theft has been committed by the assistance and advice of another, as a theft is actually committed, this person will be subject to the action of theft, as a theft is undoubtedly committed through his aid and advice.

D. xlvii. 2. 17. pr.; D. xlvii. 2. 36. 1.

18. Furti autem actio ei competit, cujus interest, rem salvam esse, licet dominus non sit: itaque nec domino aliter competit, quam si ejus intresit, rem non perire.

18. An action of theft may be brought by any one who is interested in the safety of the thing, although he is not the owner; and the proprietor, consequently, cannot bring this action unless he is interested in the thing not perishing.

GAI. iii. 208; D. xlvii. 2. 10.

The right to bring the actio furti may belong to several persons at the same time. For instance, both the owner and the usufructuary had sufficient interest in the thing to support an action. But mere interest in a thing was not sufficient unless the thing had been delivered to, and was or had been in the possession of, the plaintiff. A person, for instance, to whom a thing was due by stipulation, could not bring an actio furti if the thing was stolen; he could only compel the actual owner to allow him to bring an actio furti in the owner's name; nor could an unsecured creditor bring an actio furti for a thing stolen from his debtor. (D. xlvii. 2. 14. 1 and 49.)

14. Unde constat, creditorem de pignore subrepto furti agere posse,

14. Hence, a creditor may bring this action if a thing pledged to him
etiam si idoneum debitorem habeat, quia expedit ei, pignori potius incumbere quam in personam agere; adeo quidem ut, quamvis ipse debitor eam rem subripuerit, nihilominus creditoris competat actio furti.

**Gal. iii. 204; D. xlvi. 2. 12. 2.**

15. Item si fullo polienda curandave aut sarcinator sarcienda vestimenta mercede certa acceperit eaque furto amiserit, ipse furti habet actionem, non dominus, quis domini nihil interest, eam rem non perisse, cum judicio locati a fullone aut sarcinatore rem suam persequi potest. Sed et borne fidei emptori, subreptae, quam emerit, quamvis dominus non sit, omnimodo competet furti actio, quemadmodum et creditoris. Fulloni vero et sarcinatores non aliter furti competere placuit, quam si solvendo sint, hoc est si domino res estimationem solvere possint: nam si solvendo non sunt, tunc quia ab eis suum dominus consequi non possit, ipsi domino furti actio competet, quia hoc casu ipseus interest, rem salvam esse. Idem est et si in parte solvendo sint fullo aut sarcinator.

15. So, too, if a fuller receives clothes to scour or clean, or a tailor receives them to mend, for a certain fixed sum, and has them stolen from him, it is he and not the owner who is able to bring an action for theft, for the owner is not considered as interested in their safety, having an action *locati*, by which he may recover the thing stolen, against the fuller or tailor. But if a thing is stolen from a *bome fide* purchaser, he is entitled, like a creditor, to an action of theft, although he is not the proprietor. But an action of theft is not maintainable by the fuller or tailor, unless he is solvent, that is, unless he is able to pay the owner the value of the thing lost; for if the fuller or tailor is insolvent, then the owner, as he cannot recover anything from them, is allowed to bring an action of theft, as he has in this case an interest in the safety of the thing. And it is the same although the fuller or tailor is partially solvent.

**Gal. iii. 205; D. xlvi. 2. 12. pr.; D. xlvi. 2. 20. 1.**

The owner has no interest in recovering the penalty if he can get compensation from the person whose services he has hired to the full amount of any loss he sustains by the theft; but he would still be able to bring an action, i.e. a *vindicatio*, an *actio ad exhibendum*, or a *condictio*, to get the thing itself, or its value, from the thief. (See paragr. 19.)

16. Que de fullone et sarcinatore diximus, eadem et ad eum, cui commodata res est, transferenda veteres existimabant: nam ut ille fullo mercedem accipiendo custodiam prestat, ita is quoque, qui commodo utendi percipit, similiter necesse habet custodiam prestare. Sed nostra providentia etiam hoc in decisionibus nostris emendavit, ut in domini sit voluntate, sive commodati actionem adversus eum, qui rem commodatam accipit, movere desiderat, sive furti adversus eum, qui rem subripuit, et alterutra

16. What we have said of the fuller and tailor was applied by the ancients to the borrower on gratuitous loan. For as the fuller, by accepting a sum for his labour, makes himself answerable for the safe keeping of the thing, so does a borrower by accepting the use of the thing he borrows. But our wisdom has introduced in our decisions an improvement on this point, and the owner may now bring an action *commodati* against the borrower, or of theft against the thief; but when once his choice is made, he cannot change his mind and have recourse to the
earum electa dominum non posse ex penitentia ad alteram venire actionem. Sed si quidem furem elegerit, illum, qui rem utendum acceptit, penitus liberari. Sin autem commodator veniat adversus eum, qui rem utendum acceptit, ipsi quidem nullo modo competere posse adversus furem furti actionem, eum autem, qui pro re commodata convenit, posse adversus furem furti habere actionem, ita tamen, si dominus sciens, rem esse subreptam, adversus eum, cui res commodata fuit, perve nit: sin autem nescius et dubitans, rem non esse apud eum, commodati actionem instituit, postea autem, re comperta, voluit remittere quidem commodati actionem, ad furti autem pervenire, tunc licentia ei concedatur et adversus furem venire, nullo obstacle ei opponendo, quoniam incertus constitutus movit adversus eum, qui rem utendum acceptit, commodati actionem (nisi dominio ab eo satisfactum est: tunc stenim omnimodo furem a domino quidem furti actione liberari, suppositum autem esse i, qui pro re sibi commodata domino satisfecit), cum manifestissimum est, etiam si ab initio dominus actionem instituit commodati ignarus, rem esse subreptam, postea autem, hoc ei cognito, adversus furem transivit, omnimodo liberari eum, qui rem commodatam acceptit, quaecumque causa exitum dominus adversus furem habuerit: eadem definitione obtinente, sive in partem sive in solidum solvendo sit is, qui rem commodatam acceptit.

Gal. iii. 206; C. vi. 22. 1, 2.

The concluding words of the paragraph mean that the owner is put to his election once for all, and if he sues the borrower, and finds the borrower cannot pay, he cannot have recourse to an actio furti against the thief.

17. Sed is, apud quem res deposita est, custodiem non prestat, sed tantum in eo obnoxius est, si quid ipse dolo malo fecerit: qua de causa si res ei subrepta fuerit, quia restituendae ejus nomine depositi non tenetur nec ob id ejus interest, rem salvam esse, furti agere non potest, sed furti actio domino competit.

17. A depository is not answerable for the safe keeping of the thing deposited, but is only answerable for wilful wrong; therefore, if the thing is stolen from him, as he is not bound by the contract of deposit to restore it, and has no interest in its safety, he cannot bring an action of theft, but it is the owner alone who can bring this action.

Gal. iii. 207; D. xlvii. 2. 14. 8.
We must, in all cases of theft, bear in mind that an actio furti might also be brought against any one who had ‘ope consilio’ participated in the theft, and the whole amount of the penalty could be recovered separately against each thief and each person taking an indirect part in the theft. (D. xlvi. 2. 21. 9.)

Custodiam non prestat is equivalent to saying that he is not answerable for culpa levis.

18. In summa scendium est, quae situm esse, an impubes rem alienam amovendo furtum faciat. Et placet, quia furtum ex affectu consistit, idemum obligare eo crimen imponatur, si proximus pubertatis sit et ob id intellegant, se delinquere.

18. It must be finally observed, that the question has been asked whether, if a person under the age of puberty takes away the property of another, he commits a theft. The answer is, that as it is the intention that makes the theft, such a person is only bound by the obligation springing from the delict if he is near the age of puberty, and consequently understands that he is doing wrong.

GAL. iii. 206.

See Bk. iii. Tit. 19. 10 note.

19. Furti actio sive duplæ sive quadruplæ tantum ad poema persecutionem pertinet: nam ipsius rei persecutionem extrinsecus habet dominus, quam aut vindicando aut condiciendo potest anuerre. Sed vindicatio quidem adversus possessorem est, sive fur ipse possidet sive alius quilibet; conductio autem adversus ipsum furem heredemve ejus, licet non possidet, competit.

19. The action of theft, whether brought to recover double or quadruple, has no other object than the recovery of the penalty. For the owner has also a means of recovering the thing itself, either by a vindicatio or a conductio. The former may be brought against the possessor, whether the thief or any one else; the latter may be brought against the thief or the heir of the thief, although not in possession of the thing stolen.

GAL. iv. 8; D. xlvi. 2. 54. 8.

The thief and those who assisted him had to pay a penalty as a punishment for their wrongdoing; but something more remained for the thief himself to do; he had to restore the thing stolen or its value. The owner could bring a vindicatio or an actio ad exhibendum, which were both actiones arbitrarie (Tit. 6. 31); that is, the thief was directed to restore the thing or exhibit it, and if he did not do so, then the judge condemned him to pay what, under the circumstances, it was reasonable he should pay. These actiones might be brought against any possessor, against the thief, or any one who had received possession from the thief. As a general rule the person who could bring a vindicatio could not bring a conductio for the same thing; for in the vindicatio he asserted that the property in the thing was his, whereas in the conductio he asserted that the defendant ought to make over (dare oportere) the property in the thing to him, and these were inconsistent assertions. In the case of theft, however, the plaintiff had an option given him odio furiwm to bring what was termed a con-
dictio furtiva (Tit. 6. 14), and it might sometimes be advantageous to have this option. For example, the thing might have perished, and it was a rule that res extinctae vindicari non possunt. Extinctae res, licet vindicari non possint, condici tamen furibus possunt (Gal. ii. 79).

This condicio furtiva might be brought against the heirs of the thief, whereas the actio furti, which inflicted a punishment for a personal wrongful act, could only be brought against the thief himself. Every action against a thief or those who assisted him might be brought by the heirs of any one entitled to bring it. (See Tit. 12.)

Trt. II. VI BONORUM RAPTORUM.

Qui res alienas rapit, tenetur quidem etiam furti (quis enim magis alienam rem invito domino contraetat, quam qui vi rapit? Ideoque recte dictum est, eum improbum furem esse): sed tamen propriam actionem ejus delicti nomine pretor introduxit, quae appellatur vi bonorum raptorum et est intra annum quadrupli, post annum simplici. Quae actio utilis est, etiam si quis unam rem, licet minimam, rapuerit. Quadruplum autem non totum pena est et extra penam rei persecutio, sicut in actione furti manifesti diximus: sed in quadruplo inest et rei persecutio, ut pena tripli sit, sive comprehendatur raptor in ipso delicto sive non. Ridiculum est enim, levioris esse condicionis eum, qui vi rapit, quam qui clam amovet. A person who takes by force a thing belonging to another is liable to an action of theft, for who can better be said to take the property of another against his will than he who takes it by force? And he is therefore rightly said to be an improbus fur. The pretor, however, has introduced a peculiar action in the case of this delict, called vi bonorum raptorum; by which, if brought within a year after the robbery, quadruple the value of the thing taken may be recovered; but if brought after the expiration of a year, then the single value only can be recovered. This action may be brought even against a person who has only taken by force a single thing, even of the most trifling value. But this quadruple of the value is not altogether a penalty, the recovery of the thing being something additional, as in the action of furtum manifestum; for the recovery of the thing is included, so that the penalty is only of three times the value. And it is the same, whether the robber was or was not taken in the actual commission of the crime. For it would be ridiculous that a person who uses force should be treated more leniently than he who secretly removes a thing.

Gal. iv. 8.

The edict of the pretor, introducing this action, ran as follows: Si cui dolo malo, hominibus coactis, damnis quid factum esse dicetur, sive cujus bona rapta esse dicentur: in eum qui id fecisse dicetur judicium dabo. (D. xlvii. 8. 2. pr.)

It was necessary that the act of violence should be committed with evil intent (dolo malo). If, for instance, a publicanus
carried off a flock of sheep, thinking that some offence had been committed against the *lex vectigalis*, although he was mistaken, this action could not be brought against him. (D. xlvii. 8. 2. 20.) Even if the thief was alone, or one thing, however small, was carried off, yet the action might be brought, although the words *hominibus coactus* and *bona rapta* occur in the edict. It, like the action of theft, could only be brought if the thing or things taken were moveables. (C. ix. 33. 1.)

The text explains how the amount recovered under it differed from that recovered under an *actio furti*. Under the *actio vi bonorum raptorum* the thing itself was recovered, or its value if the thief no longer had it in his possession, and also three times the estimated value of the thing itself; while the *actio furti* was only penal. (See paragr. 19 of last Title.)

The plaintiff might, if he pleased, bring the *actio furti* instead; and he might bring this action after the expiration of a year prevented his bringing that *vi bonorum raptorum*. If he first brought the latter action, he could not afterwards bring the *actio furti*; but he could first bring the *actio furti*, and afterwards bring the *actio vi bonorum raptorum* for the excess recoverable by that action. (D. xlvii. 8. 1.)

This action united in its effects the *vindicatio* or *condictio*, and also the recovery of a penalty. As it was partly penal, it could not be brought against the heirs of the thief. (D. xlvii. 8. 2. 27.) The offence of taking goods by force could also be made the subject of a criminal charge. (Tit. 18. 8.)

1. Quia tamen ita competit haec actio, si dolo malo quisque rapuerit: qui aliquo errore inductus, suam rem esse, et imprudentis juris eo animo rapuit, quasi domino liceat rem suam etiam per vim auferre possessoribus, absolvit debet. Cui scilicet conveniens est, nec furti teneri eum, qui soidem hoc animo rapuit. Sed ne, dum talia ex cogitentur, inveniatur via, per quam raptores impune suam exercent avaritiam: melius divalibus constitutionibus pro hac parte prospectum est, ut nemini liceat vi rapere rem mobilem vel se moventem, licet suam sandem rem existiment: sed si quis contra statuta fecerit, rei quidem sua dominio cadere, sin autem aliena sit, post rei restitutionem etiam restitutionem ejusdem rei præstare. Quod non solum in mobilibus rebus, quae rapi possunt, constitutiones optinere censuerunt, sed etiam in invasionibus, que circa res soli flunt, ut ex hac causa omni rapina homines abstineant.

1. As, however, this action can only be brought against a person who robs with the intent of committing a wilful wrong, if any one takes by force a thing, thinking himself, by a mistake, to be the owner; and, in ignorance of the law, believing it permitted to an owner to take away, even by force, a thing belonging to himself from persons in whose possession it is, he ought to be held discharged of this action; and on the same principles a person carrying off a thing under similar circumstances would not be liable to an action of theft. But lest robbers, under the cover of such an excuse, should find means of gratifying their avarice with impunity, the imperial constitutions have made a wise alteration, by providing that no one may carry off by force a thing that is moveable, or moves itself, although he thinks himself the owner. If any one acts contrary to these constitutions, he is, if the thing is his, to cease to be owner of it; if it is not, he is not only to restore the thing taken, but also to pay its value. The constitutions have
declared these rules applicable, not only in the case of moveables of a nature to be carried off by force, but also to forcible entries made upon things pertaining to the soil, in order that every kind of violent robbery may be prevented.

D. xlvii. 8. 2. 18; C. viii. 4, 7.

The constitution referred to was enacted in A.D. 389 by the Emperors Valentinian, Theodosius, and Arcadius. It provided a much more effectual remedy for forcible disturbance than had been given by the interdict unde vi. It applied, which the interdict did not, to moveables as well as immovable, and it not only made the wrongdoer give up the thing, but it made him, if he was the owner, lose the property in the thing, and, if he was not the owner, pay its value. (See Tit. 15. 6.)

2. In hac actione non utique spectatur, rem in bonis actoris esse: nam sive in bonis sit sive non sit, sit tamen ex bonis sit, locum hae actio habebit. Quare sive commodata sive locata sive etiam pignerata sive deposita sit apud Titium sic, ut intersit ejus, eam non suferri, veluti si in re deposita culpam quoque promisit, sive bona fide possideat, sive usumfructum in ea quis habeat vel quod aliud jus, ut intersit ejus, non rapi: dicendum est, competere ei hanc actionem, ut non dominium accipiat, sed illud solum, quod ex bonis ejus, qui rapinam paseus est, id est quod ex substantia ejus ablatum esse proponatur. Et generaliter dicendum est, ex quibus causis furti actio competit in re clam facta, ex ipsidem causis omnes habere hanc actionem.

D. xlvii. 8. 2. 22-24.

In order to make the punishment of an open and flagrant violation of law more severe than that of a secret theft, the very slightest interest in the thing taken was sufficient to enable a plaintiff to bring the action vi bonorum raptorum. For instance, a mere depositary could bring it, although his interest was not great enough to permit of his bringing an actio furti.
Tit. III. DE LEGE AQUILIA. 266 B.C.

Damni injuriae actio constituitur per legem Aquiliam. Cujus primo capite cautum est, ut si quis hominem alienum alienamve quadrupedem, que pecudum numero sit, injuria occiderit, quoti ea res in eo anno plurimi fuit, tantum domino dare damnetur.

The action damni injuriae is established by the lex Aquilia, of which the first head provides, that if any one shall have wrongfully killed a slave, or a four-footed beast, being one of those reckoned among cattle, belonging to another, he shall be condemned to pay the owner the greatest value which the thing has possessed at any time within a year previously.

Gal. iii. 210; D. ix. 2. 2. pr.

The lex Aquilia was, as Ulpian informs us (D. ix. 2. 1), a plebiscitum made on the proposition of the tribune Aquilius. It made an alteration in all the previous laws, including those of the Twelve Tables, which had treated of damage wrongfully done (de damno injuria). Theophilus says it was passed at the time of the secession of the plebs, meaning, probably, that to the Janiculum, in the year 468 a.u.c. (Paraphrase on paragr. 15.)

A fragment of Gaius in the Digest (D. ix. 2. 2. pr.) contains the terms of this first head of the lex Aquilia: 'Quis servum servarem alienum alienamve quadrupedem vel pecudum injuria occiderit, quanti id in eo anno plurimi fuit, tantum æs dare domino damnas esto.'

1. Quod autem non precise de quadrupede, sed de ea tantum, que pecudum numero est, cavetur, eo pertinet, ut neque de feris bestiis neque de canibus cautum esse intellegamus, sed de his tantum, que propriis pasci dicuntur, quales sunt equi, muli, asini, boves, oves, capre. De suis quoque idem placit : nam et sues pecorum appellatio continetur, quia et hi gregatim pascentur: sic denique et Homerus in Odyssea ait, sicut Ælius Marcianus in suis institutionibus refert:

Δής τὸν γε σύνεσον παρήμενον· αἱ δὲ πόσοινα
Πάρ Κώρακος πέτρη, ἐπὶ τε κρίνῃν Ἀρεθυσαγ.

D. ix. 2. 2; D. xxxii. 65. 4.

The passage is from Od. x.iii. 407.

2. Injuria autem occidere intellegitur, qui nullo jure occidit. Itaque qui latronem occidit, non teneatur, utique si aliter periculum effugere

2. To kill wrongfully is to kill without any right; consequently, a person who kills a robber is not liable to this action, that is, if he could not
It was not necessary to consider the intent with which the
damage was done. Was it done 'nullo jure'? if so, the lex
Aquila applied.

8. Ac ne is quidem haec lege tenetur, qui casu occidit, si modo culpa
ejus nulla invenitur: nam aliquin non minus quam ex dolo ex culpa
quisque haec lege tenetur.

8. Nor is a person made liable by
this law, who has killed by accident,
provided there is no fault on his part,
for this law punishes fault as well as
wilful wrongdoing.

4. Consequenter, if any one playing or practising with a javelin,
pierces with it your slave as he goes by, there
is a distinction made. If the accident
is caused by a soldier, while practising
in the Campus Martius, or other place
appropriated to military exercises,
there is no fault on his part; but any
one else besides a soldier causing a
similar accident is chargeable with a
fault, and the soldier himself would be
in fault, if he inflicted such an injury
in any other place than one appropriated
to military exercises.

D. ix. 2. 9. 4.

5. Item si putator ex arbore dejecto ramo servum tuum transeun-
tem occiderit, si prope viam publicam ant vicinalem id factum est
neque praclamavit, ut casus evitari posset, culpa reus est: si praca-
clamavit, neque ille curavit cavere, extra culpam est putator. Æque
extra culpam esse intellegitur, si seorsum a via forte vel in medio
fundo caedebat, licet non praclamavit, quia eo loco nulli extraneo
jus fuerat versandi.

D. ix. 2. 81.

6. Si preterea si medicus, qui servum tuum secuit, dereliquerit cura-
tionem atque ob id mortuos fuerit servus, culpa reus est.

6. So, again, a physician who has
performed an operation on your slave,
and then neglected to attend to his
cure, so that the slave dies, is guilty of
a fault.

D. ix. 2. 8. pr.

7. Imperitia quoque culpæ ad-
numeratur; veluti si medicus ideo
servum tuum occidit, quod sum
mala secuerit aut perperam ei me-
dicamentum dederit.

7. Unskilfulness is also reckoned as
a fault, as if a physician kills your
slave by unskilfully performing an
operation on him, or by giving him
wrong medicines.

D. ix. 2. 7. 8; D. ix. 2. 8. pr.; D. l. 17. 182.
8. Impetu quoque mularum, quae mulio propter imperitiem retine- nere non potuerit, si servus tuus oppressus fuerit, culpae reus est mulio. Sed et si propter infirmitatem retine- nere eas non potuerit, cum alius firmior retinere potuisse, aequae culpae tenetur. Eadem placuerunt de eo quoque, qui, cum quae vehemeretur, impetus ejus aut properee infirmitatem aut propter imperitiem suam retinere non potuerit.

D. ix. 2. 8. 1.

9. His autem verbis legis 'quanti id in eo anno plurimi fuerit' illa sentence exprimitur, ut si quis hominem tuum, qui hodie claudus aut hucus amicus erit, occiderit, qui in eo anno integer aut acutus fuerit, non tanti tenetur, quanti hic hodie erit, sed quanti in eo anno plurimi fuerit. Qua ratione creditum est, penalem esse hujus legis actionem, quia non solum tanti quasque obligatur, quantum damni dedeit, sed aliquando longe pluris: ideoque constat, in heredem eam actionem non transire, quae transitura fuisse, si ultra damnum numquam lis estimarentur.

GAI. iii. 214;

10. Illud non ex verbis legis, sed ex interpretatione placuit, non solum perempti corporis estimationem habendam esse secundum ea, quae diximus, sed eo amplius quidquid praeterea, peremtto eo corpore, damni vobis adatum fuerit, veluti si servum tuum heredem ab aliquo institutum ante quis occiderit, quam is iusue tuo adire: nam hereditatis quoque amissae rationem esse habendam constat. Item si ex pari mularum unam vel ex quadraginta equorum unum occiderit, vel ex comedibus unus servus fuerit occisus: non solum occisi sit estimatio, sed eo amplius id quoque computatur, quanto deprestati sunt, qui supersunt.

GAI. iii. 212;

11. Liberum est autem ei, cujus servus fuerit occisus, et privato judicio legis Aquilise damnnum persequi et capitaeh criminiis eum reum facere.

GAI. iii. 213.

10. It has been decided, not by virtue of the actual wording of the law, but by interpretation, that not only is the value of the thing perishing to be estimated as we have said, but also the loss which in any way we incur by its perishing; as, for instance, if your slave having been instituted heir by some one is killed before he enters at your command on the inheritance, the loss of the inheritance should be taken account of. So, too, if one of a pair of mules, or of a set of four horses, or one slave of a band of comedians, is killed, account is to be taken not only of the value of the thing killed, but also of the diminished value of what remains.

D. ix. 2. 22. 1.

11. The master of a slave who is killed may bring a private action for the damages given by the lex Aquilia and also bring a capital charge against the murderer.

GAI. iii. 213.
A crimen capitale was one which affected the caput of the condemned. The lex Cornelia (D. ix. 2. 23. 9; see also Title 18. 5 of this Book) gave the master the power to bring a criminal accusation against the murderer. The Code (iii. 35. 3) contains a rescript of the Emperor Gordian, stating it as undoubted law that a criminal accusation did not prevent a master also bringing a private action under the lex Aquilia. The crimen capitale could be brought only in cases of murder, not in cases of homicide.

12. Caput secundum legis Aquilae in usu non est. Aquilia is not now in use.

Gai. iii. 215; D. ix. 2. 27. 4.

We learn from Gaius (Gai. iii. 215) that the second head of the lex Aquilia gave an action for the full value of the injury sustained to a stipulator, whose claim was extinguished by an ad-stipulator releasing the debtor by acceptation. (See Bk. iii. Tit. 29. 1.) The stipulator might also have brought an actio mandati against the ad-stipulator, if he preferred doing so; but, as we see from Title 16 of this Book (paragr. 1), proceeding under the lex Aquilia gave the plaintiff the advantage of having the amount he recovered doubled if the defendant denied his liability. (Gai. iii. 216.)

18. Capite terto de omni cetero damno cavetur. Itaque si quis servum vel eam quadrupedem, quae pecudnum numero est, vulneraverit sive eam quadrupedem, quae pecudnum numero non est, veluti canem aut feram bestiam, vulneraverit aut occiderit, hoc capite actio constituatur. In ceteris quoque omnibus animalibus, item in omnibus rebus, quae anima careant, damnum injuria datum haec parte vindicatur. Si quid enim usum aut ruptum aut fracturam fuerit, actio ex hoc capite constituitur: quamquam potuerit sola rupti appellatio in omnes istas causas sufficiere: ruptum enim intellegitur quoque modo corruptum. Unde non solum usta aut fracta, sed etiam scissa et collisae et effusa et quoque modo perempta atque deteriora facta hoc verbo continentur: denique responsum est, si quis in alienum vinum aut oleum id immiserit, quo naturalis bonitas vini vel olei corrupseret, ex hac parte legis sum teneri.

Gai. iii. 217; D. ix. 2. 27. 18, 15.

The terms of this third head of the Aquilian law are given by Ulpian (D. ix. 2. 27. 5): 'Ceterarum rerum, praeter hominem'.
et pecudem occisos, si quis alteri damnum facit, quod usserit, fregerit, ruperit injuria, quoti enas erit in diebus triginta proximis, tantum res domino dare damnas esto.'

14. Illud palam est, sicut ex primo capite ita demum quisque tenetur, si dolo aut culpa ejus homo aut quadrupes occisus occasive furit, ita ex hoc capite ex dolo aut culpa de cetero damno quemque tenei. Hoc tamen capite non quanti in eo anno, sed quanti in diebus triginta proximis res fuerit, obligatur is, qui damnum dederit.

15. Ac ne ' plurimi ' quidem verbum adjicitur; sed Sabino recte placuit, perinde habendam estimationem, ac si etiam haec parte ' plurimi ' verbum adjectum fuisse: nam plebem Romanam, que Aquilio tribuno rogante hanc legem tulit, contentam fuisse, quod prima parte eo verbo usa est.

16. Ceterum placuit, ita demum ex hae lege actionem esse, si quis [precipue] corpore suo damnum dederit. Ideoque in eum, qui alio modo damnum dederit, utiles actiones dari solent: veluti si quis hominem alienum aut pecus ita inclusit, ut fame necaretur, aut iumentum tam vehementer egerit, ut rumperetur, aut pecus in tantum exagitaverit, ut precipitaretur, aut si quis alieno servo persuaserit, ut in arborem ascenderet vel in putum descendaret, et is ascendendo vel descendendo aut mortuus fuerit aut aliqua parte corporis ieiunus erit, utilis in eum actio datur. Sed si quis alienum servum de ponte aut ripa in flumen dejecerit et is suffocatus fuerit, eo, quod projecerit corpore suo, damnum dedisse non difficiliter intellegi poterit idoque ipsa lege Aquilia tenetur. Sed si non corpore damnum fuerit datum neque corpus leuum fuerit, sed alio modo damnum aliqui contigisse, cum non sufficit neque directa neque utilis Aquilia, placuit eum, qui obnoxius fuerit, in factum actione teneri: veluti si quis, misericordia

14. It is evident that, as a person is liable under the first head, if by wilful injury or by his fault he kills a slave or a four-footed beast, so, by this head, a person is liable for every other damage, if there is wrongful injury or fault in what he does. But under this head, the offender is bound to pay the greatest value the thing has possessed. not within the year next preceding. but the thirty days next preceding.

15. Even the word plurimi, i.e. of the greatest value, is not expressed in this case. But Sabinus was rightly of opinion, that the estimation ought to be made as if this word was in the law, since it must have been that the plebeians, who were the authors of this law on the motion of the tribune Aquilius, thought it sufficient to have used the word in the first head of the law.

16. But the direct action under this law can only be brought if any one has, with his own body, done damage, and consequently utiles actiones are given against the person who does damage in any other way. For instance, a utilis actio is given against one who shuts up a slave or a beast, so as to produce death by hunger; who drives a beast so fast as to seriously injure it, or scares cattle so that they rush over a precipice, or persuades another man's slave to climb a tree, or go down into a well, and the slave in climbing or descending is killed or maimed. But if any one has flung the slave of another from a bridge or a bank into a river, and the slave is drowned, then, as he has actually flung him down, there can be no difficulty in deciding that he has caused the damage with his own body, and consequently he is directly liable under the lex Aquilia. But if no damage has been done by the body of the wrongdoer, and the body of the object affected has not been injured, but damage has been done to the person or thing in some other way, then, since the actio directa and the actio utilis are
ductus, alienum servum compeditum solverit, ut fugeret.
both inapplicable, it has been decided that an actio in factum shall lie against the wrongdoer; for instance, if any one through compassion has loosened the fetters of a slave, to enable him to escape.

Gal. iii. 219; D. ix. 2. 88. 1; D. iv. 3. 7. 7.

If the injury was done, to use the language of the jurists, corpore corpori, that is, with direct bodily force to the body of a slave or beast, the actio (legis) Aquilii had place. If it was done corpore, but indirectly and not corpore, the actio utilis Aquilii had place. If it was done neither to the body, nor yet with direct bodily force, the actio must be brought in factum, that is on the particular circumstances of the case.

Si quis praecipe. Huschke suggests that praecipe has crept into the text from the gloss of a commentator who meant to suggest that the injury might be done with an instrument held in the hand, and so forming part of the body, of the wrongdoer.

The directa actio Aquilii could only be brought by the owner; the utilis might be brought by the possessor, usufructuary, and others having an interest less than that of ownership. (D. ix. 2. 11. 6, 10.)

As the action under the lex Aquilia was penal, if the damage was caused by more persons than one, the whole sum could be recovered separately against each offender. (D. ix. 2. 11. 2.)

If the defendant denied his liability, the penalty under the lex Aquilia was doubled, adversus inficiantem in duplum actio est. (D. ix. 2. 2. 1.)

It might very often happen that the person injured could also bring an action arising from a contract against the doer of the injury, as, for instance, an actio pro socio, mandati, depositi, if the person who did the injury was a partner, a mandatory, or depositary of the person to whom the injury was done. In such a case he could either bring an action on the contract, or proceed under the lex Aquilia. He could not do both; but if he brought the action on the contract, and then found that if he had proceeded under the lex Aquilia he would have recovered a larger sum, he was allowed to bring an action under the lex Aquilia to recover the surplus. (D. ix. 2. 7. 8; D. xlv. 7. 34. 2.)

The subject of damnnum is hardly noticed in the Institutes, except in connection with the lex Aquilia. (See Bk. iii. Tit. 18. 2.) By damnnum is meant the diminution or deterioration of a man's property, and it is treated of in the Digest according as it is factum, that is already done, or infectum, that is apprehended, as if an adjoining house seemed likely to fall. (D. xxxix. 2.) Damnnum factum, more usually termed simply damnnum, might arise from a mere accident, or from the free will of another. If it arose in the latter way, it might have arisen in the exercise of a right enjoyed by the person causing it, and then no reparation had to be made for
causing it, *non videtur vim facere qui jure suo utilitur* (D. I. 17. 155); or it might have been done wrongfully, *damnum injuria datum*, and then the person injured was entitled to compensation according to the rates provided by the *lex Aquilia*, if the damage came within the scope of the law; if it did not, then an *actio in factum* was given (D. ix. 2. 38. 1), and compensation was made at rates differing according to the degree of wrong. If there had been *dolus* or *culpa lata*, the compensation was regulated by the value peculiar to the person injured: if the degree of *culpa* had been less, the common value was the measure of the compensation. In cases of *damnum infectum*, the owner of the property threatened could call on the owner of the property from which danger was apprehended to give security against any loss which might thus arise. (D. xxxix. 2. 7. pr.)

TTr. IV. DE INJURIIS.

Generaliter *injuria* dicitur omne, quod non jure fit: specialiter alias contumelia, quae a contemnendo dicta est, quam Graeci ὁμονόμασιν appel- lant, alias culpa, quam Graeci ᾠδίμα μια dicunt, sicut in lege Aquilia damnum injuria accipitur, alias iniquitas et injuria, quam Graeci ἀμακρίς vocant. Cum enim prætor vel iudex non jure contra quem prænuntiat, injuriam accipisse dicitur.

*Injuria*, in its general sense, signifies every action contrary to law: in a special sense, it means, sometimes, the same as *contumelia* (insult), which is derived from *contemnere*, and is in Greek ὁμονόμασιν; sometimes the same as *culpa* (fault), in Greek ᾠδίμα, as in the *lex Aquilia*, which speaks of damage done *injuria*; sometimes it has the sense of iniquity, injustice, or in Greek ἀμακρίς; for a person against whom the prætor or judge pronounces an unjust sentence is said to have received an *injuria*.

D. xlvii. 10. 1. pr.

*Injuria*, then, is used in three special senses—1, a wrongful act, an *actum* done *nullum* judicem; 2, the fault committed by a judge who gives judgment not according to *juris*; 3, an outrage or affront. It is of *injuria* in this last sense that the present title treats.

1. *Injuria* autem committitur non solum, cum quis pugno putat aut fustibus essus et stiam verba- ratus erit, sed etiam si cui convicium factum fuerit, sive cujus bona quaesit debitoris possessa fuerint ab eo, qui intellegat nihil eum sibi debere, vel si quis ad infamiam alicujus libellum aut carmen scripsisset, composserit, ediderit dolove malo fecisset, quo quid eorum fieret, sive quis matremfamilias aut pretextatam pretextatamve aedectus fuerit, sive cujus pudicitia attinent esserit dicetur: et denique ailiis pluribus

1. An injury is committed not only when any one is wounded or beaten, as, for example, with the fist or a club, but also when public insult is offered to any one; as when possession is taken of the goods of any one on the pretense that he is a debtor to the wrongdoer, who knows he has no claim on him; or when any one has written, composed, and published a book or de- matory verses against another, or has maliciously contrived that any such thing should be done; or when any one has followed after an honest woman, or a young boy or girl, or has attempted
modis admitti injuriam manifestum est.

the chastity of any one; and, in short, it is manifest that in many other ways injury is committed.

Gal. iii. 220.

Convicium. Ulpian gives (D. xlvi. 10. 15. 4) the following derivation of the word: 'Convicium autem dicitur vel a concitazione vel a conventu, hoc est a collatione vocum; quum enim in unum complices voces conseruntur, convicium appellatur, quasi convocium,' any proceeding which publicly insults or annoys another, as gathering a crowd round a man's house, or shouting out scandal respecting another to a mob.

Matremfamilias, i.e. every married woman of honest character.

Prætextatum, -um, i.e. still wearing the prætexta, which was put off at the age of puberty.

Adsectatus fuit. Ulpian says (D. xlvi. 10. 15. 22), 'Adsectatur qui tacitus frequenter sequitur, assidua enim frequentia quasi præbet nonnullem infamiam.'

Pudicitia attentata. Paul says (D. xlvi. 10. 10), 'Attentari pudicitia dicitur cum id agitur, ut ex pudico impudicus fiat.'

2. Patitur autem quis injuriam non solum per semet ipsum, sed etiam per liberos suos, quos in potestate habet: item per uxorem suam, id enim magis prævaluit. Itaque si filie aliquis, quae Titio nupta est, injuriam feceris, non solum filia nomine tecum injuriarum agi potest, sed etiam patris quoque et mariti nomine. Contra autem, si viro injuria facta sit, uxor injuriarum agere non potest: defendi enim uxores a virus, non viros ab uxoribus sequum est. Sed et socer nurus nomine, cujus vir in potestate est, injuriarum agere potest.

2. A man may receive an injury, not only in his own person, but in that of his children in his power, and also in that of his wife, according to the opinion that has prevailed. If, therefore, you injure a daughter in the power of her father, and married to Titius, the action for the injury may be brought, not only in the name of the daughter herself, but also in that of the father and in that of the husband. But, if a husband has sustained an injury, the wife cannot bring the actio injuriarum, for the husband is rightly the protector of the wife, not the wife of the husband. But the father-in-law may also bring this action in the name of his daughter-in-law, if her husband is in his power.

Gal. iii. 221; D. xlvi. 10. 2; D. xlvi. 10. 1. 3.

Each person injured could bring an action. Take, for instance, the case of a married woman. She, her husband, her own father, and her husband's, have each an action, supposing both she and her husband are in potestate. But a person in potestate, though he had an action, could not bring it himself, except in certain cases, as in the absence of the paterfamilias. The paterfamilias would bring the action, and could sue either in his son's name or his own. The amount recovered in the respective actions differed according to the dignity of the person bringing it. It might happen, for instance, that the son was of higher rank than the father. Omnis utrique tam filio quam patri acquisita actio sit, non eadem utique facienda est: cum possit propter filii dignitatem major ipsi
quam patri injuria facta esse. (D. xlvii. 10. 30, 31.) Although the wife was in power of the father, yet her husband could always bring an action for injury done to her, grounded on his natural duty to protect her.

8. Servis autem ipsam quidem nulla injuria fieri intellegitur, sed domino per eos fieri videtur: non tamen isdem modis, quibus etiam per liberos et uxores, sed ita cum quid atrocissim commissum fuerit et quod aperte ad contumeliam domini respiicit: veluti si quis alienum servum verberaverit, et in hunc casum actio proponitur. At si quis servo convicium fecerit vel pugno eum percusserit, nulla in eum actio dominino competit.

8. An injury cannot, properly speaking, be done to a slave, but it is the master who, through the slave, is considered to be injured: not, however, in the same way as through a child or wife, but only when the act is of a character grave enough to make it a manifest insult to the master, as if a person has flogged the slave of another, in which case this action is given against him. But a master cannot bring an action against a person who has publicly insulted his slave, or struck him with his fist.

GAI. iii. 222.

Under the civil law the master could not bring an action for injury done to his slave, unless the injury was done with intent to hurt or annoy the master. But the praetor gave an action pleno jure, i.e. which could be brought as a matter of right, if the slave was beaten or tortured without the master's orders, and an action cognita causa, i.e. allowed if the circumstances of the case seemed, on inquiry, to furnish good ground for it, if the injury had been slighter. (D. xlvii. 10. 15. 34.) Regard was had, in making this inquiry, and in estimating the amount of damage, to the class of slaves to which the slave belonged. (See paragr. 7.) The slave himself could in no case bring an action for injury sustained by him.

4. Si communi servo injuria facta sit, sequum est, non pro ea parte, qua dominus quisque est, estimationem injuriae fieri, sed ex dominorum persona, quia ipsis sit injuria.

4. If an injury has been done to a slave held in common, equity demands that it shall be estimated not according to their respective shares in him, but according to their respective position, for it is the masters who are injured.

If the co-proprietors brought the action for injury done, or intended to be done, to them through their slave, then, as it is said in the text, it made no difference what was the amount of their interest in the slave. Each had equally had an insult offered him. But the co-proprietors might bring a praetorian action for harm done to the slave, when no insult or hurt was intended to them; but the only question was, how much was the slave damaged and made unfit for work, and then the amount recovered was divided between them, proportionately to their respective interests in the slave. (See note on last paragr., and D. xlvii. 10. 16.)

5. Quodsi ususfructus in servo Titii est, proprietas Mævii est, Mævius the property, in a slave, the
magis Mævio injuria fieri intellectur. injury is considered to be done rather to Mævius than to Titius.

D. xlvii. 10. 15. 47.

It might, however, happen that it could be shown that the intention was to injure and insult the usufructuary more than the proprietor. (D. xlvii. 10. 15. 48.)

6. Sed si libero, qui tibi bona fide servit, injuria facta sit, nulla tibi actio debitur, sed suo nomine is experiri poterit: nisi in contumeliam tuam pulsatus sit, tunc enim competet et tibi injuriarum actio. Idem ergo est et in servo alieno bona fide tibi serviente, ut totiens admiratus injuriarum actio, quotiens in tuam contumeliam injuria si facta sit.

6. If the injury has been done to a freeman, who serves you bona fide as a slave, you have no action, but he can bring an action in his own name, unless he has been injured merely to insult you, for, in that case, you also may bring the actio injuriarum. So, too, with regard to a slave of another who serves you bona fide, you may bring this action whenever the slave is injured for the purpose of insulting you.

D. xlvii. 10. 15. 48.


7. The penalty for injuries under the law of the Twelve Tables was a limb for a limb, but if only a bone was fractured, pecuniary compensation was exacted proportionate to the great poverty of the times. Afterwards the praetors permitted the injured parties themselves to estimate the injury, so that the judge should condemn the defendants to pay the sum estimated, or less, as he might think proper. The penalty for injury appointed by the Twelve Tables has fallen into desuetude, but that introduced by the praetors, and termed honorary, is adopted in the administration of justice. For according to the rank and character of the person injured, the estimate is greater or less; and a similar gradation is observed, not improperly, even with regard to a slave, one amount being payable in the case of a slave who is a steward, a second in that of a slave holding an office of an intermediate class, and a third in that of one of the lowest rank, or one condemned to wear fetters.

Gai. iii. 238, 224; D. xlvii. 10. 15. 44.

The greater part of the edict of the praetor on this subject is given by Ulpian in different parts of the extracts from his writings. (See D. xlvii. 10. 15.)

8. Sed et lex Cornelia de injuriis loquitur et injuriarum actionem introduxit. Quae competit ob eam rem, quod se pulsatum quis verberatumve domumve suam vi in-

8. The lex Cornelia also speaks of injuries, and introduced an actio injuriarum, which may be brought when any one alleges that he has been struck or beaten, or that his house has been
troitam esse diest. Domum autem accipimus, sive in propria domo quis habitat sive in conducta vel gratis sive hospitio receptus sit.

broken into. And the term ‘house’ applies whether a man lives in his own house or in a hired one, or in one he has without payment, or if he has been received as a guest.

D. xlvii. 10. 5. pr. and 2.

The lex Cornelia de sicariis (see Tit. 18. 5), though chiefly directed against murderers, also contained provisions against other deeds of violence. Lex itaque Cornelia ex tribus causis dedit actionem: quod quis pulsatus verberatusve domusve ejus vi introita sit. (D. xlvii. 10. 5. pr.) A civil, as well as a criminal, action could be brought under the lex Cornelia. (D. xlvii. 10. 37. 1.)

9. Atrox injuria aestimatur vel ex facto, veluti si quis ab aliquo vulneratus fuerit vel fistibus caesus: vel ex loco, veluti si cui in theatro vel in foro vel in conspectu pretorius injuria facta sit: vel ex persona, veluti si magistratus injuriam passus fuerit, vel si senatori ab humili injuria facta sit, aut parenti patronoque fiat a lberis vel libertis; aliter enim senatoris et parentis patronique, aliter extranei et humiles personae injuria aestimatur. Nonnumquam et locus vulneris atrocem injuriam facit, veluti si in oculo quis percussus sit. Parvi autem refert, utrum patrifamilias an filifamilias talis injuria facta sit: nam et hec atrox aestimabitur.

9. An injury is said to be of a grave character, either from the nature of the act, as if any one is wounded or beaten with clubs by another; or from the nature of the place, as when an injury is done in a theatre, a forum, or in the presence of the pretor; or from the quality of the person, as when it is a magistrate that has received the injury, or a senator has sustained it at the hands of a person of low condition, or an ancestor or patron at the hands of a child or freedman. For the injury done to a senator, an ancestor, or a patron is estimated differently from an injury done to a person of low condition or to a stranger. Sometimes it is the part of the body injured that gives the character of gravity to the injury, as if any one has been struck in the eye. Nor does it make any difference whether such an injury has been done to a patrifamilias or a filifamilias, for in the latter case also it is considered of a grave character.

Gal. iii. 226; D. xlvii. 10. 7. 8; D. xlvii. 10. 8, 9. 1, 2.

If the injury was atrox, a freedman might bring an action against his patron, and the emancipated son against his father, but not otherwise. (D. xlvii. 10. 7. 2, 3.) And the pretor himself, in cases of atrox injuria, when he gave the formula to the judge, fixed the maximum of the condemnation, and the judge would not, as a rule, condemn the defendant in a less sum. (Gal. iii. 224.)

10. In summa sciendum est, de omni injuria eum, qui passus est, posse vel criminaliter agere vel civiliter. Et si quidem civiliter agatur, estimatione facta secundum quod dictum est, pena imponitur.

10. Lastly, it must be observed, that in every case of injury he who has received it may bring either a criminal or a civil action. In the latter, it is a sum estimated as we have said that constitutes the penalty; in
Sin autem criminaliter, officio judicis extraordinaria poena reo irrogatur: hoc videlicet observando, quod Zenoniana constitutio introduxit, ut viri illustres quique supra eae sunt, et per procuratores possent actionem injuriarum criminaliter vel persequi vel suscipere secundum ejus tenorem, qui ex ipsa manifestius apparat. the former, the judge, in the exercise of his duty, inflicts on the offender an extraordinary punishment. We must, however, remark, that a constitution of Zeno permits men of the rank of illustrius, or of any higher rank, to bring or defend by a procurator the actio injuriarum if brought criminally, as may be seen more clearly by reading the constitution itself.

D. xlvi. 10. 6; C. ix. 85. 11.

It was only as a very peculiar exception that criminal actions could, like private actions, be brought or defended through a procurator.

The viri illustres constituted the highest rank of the imperial officials—such as the praetorian and urban prefects, the masters of the horse, and the seven ministers of the palace. (GIBBON, ch. 17.)

11. Non solum autem is injuriarum tenetur, qui fecit injuriam, hoc est qui percutit: verum ille quoque confinibitur, qui dolo fecit vel qui curavit, ut cui mala pugno percuteretur.

11. Not only is he liable to the actio injuriarum who has inflicted the injury, as, for instance, the person who has struck the blow; but he also who has maliciously caused or contrived that any one should be struck in the face with the fist.

D. xlvi. 10. 11. pr.

12. Hae actio dissimulatione aboletur: et ideo, si quis injuriarum dedi, hoc est statim passus ad animum suum non revocaverit, postea ex peinientia remissam injuriam non poterit recolere.

12. This action is extinguished by a person acting as if he had not received an injury; and, therefore, a person who has taken no account of the injury, that is, who immediately on receiving it has shown no resentment at it, cannot afterwards change his mind and resuscitate the injury he has allowed to rest.

D. xlvi. 10. 11. 1.

If the person injured, though expressing indignation at the time, did not take any steps towards enforcing reparation within a year, the action was extinct. (D. xlvi. 10. 17. 6; C. ix. 35. 5.) The action was personal to the person injured, and could not be transmitted to his heirs, unless before his death the action had already proceeded as far as the litis contestatio. (D. xlvi. 10. 13. pr.)

Trt. V. DE OBLIGATIONIBUS, QUÆ QUASI EX DELICTO NASCUNTUR.

Si iudex iurem suam fecerit, non proprie ex maleficio obligatus videtur. Sed quia neque ex contractu obligatus est et utique pecasse ali-

If a judge makes a cause his own, he does not, properly speaking, seem to be bound ex maleficio; but as he is not bound ex contractu, and as
The Roman law characterised rather arbitrarily certain wrongful acts as delicts, and then, as there were many other wrongful acts which bound the wrongdoer to make reparation, and as it could not be said that the wrongdoer was bound _ex delicto_, he was said to be bound _quasi ex delicto_, i.e. there was an evident analogy between the mode in which the obligation arose from other kinds of wrongdoing and that in which it arose from the kinds of wrongdoing technically called delicts. The principle was exactly the same, but the particular act did not happen to be among those technically termed delicts. The first instance given is that of a judge _qui iudem suam fecerit_, that is, who, through favour, corruption, or fear (D. v. 1. 15. 1), or even ignorance of law (_licet per imprudentiam_), gives a manifestly wrong sentence, and who thus makes the _lis_ or suit to be _sua_, that is, affect himself by rendering him responsible for the sentence. Gaius gives an example in the case of a judge condemning a defendant in a sum different from that fixed in the formula. (GAI. iv. 52.)

The defendant might, if he pleased, instead of bringing an action against the judge, appeal from his decision (see Tit. 17. pr. note); and in some cases, as when the judge had violated public law, or been corrupted, he might treat the decision as null, and commence the action afresh (D. xlix. 1. 19); but his adversary might be insolvent, or his indignation, or many other reasons, might make him prefer suing the judge.

Ducerrey points out that the distinction made between the seemingly parallel cases of an ignorant physician and an ignorant judge, the fault of the former being punished under the _lex Aquilia_, the latter being bound _quasi ex delicto_, arises from the injury of the physician being done to the body. The severity of the penalty against a judge who was merely ignorant of the law, is owing probably to the great checks against ignorance which the judge possessed, if he pleased to avail himself of them in the advice of the _prudentes_, whose business it was to assist him, and in the possibility of having recourse to the magistrate who had given the action to him.

1. Item is, _ex cujus cenaculo vel propio ipsius vel conducto vel in quo gratis habitabit, dejectum effutumve aliquid est, ut alii noceretur, quasi ex maleficio obligatus intellegitur_: ideo autem non proprie _ex maleficio obligatus intellegitur_, quia plerumque ob alterius

1. So, too, he who occupies, whether as proprietor, hirer, or gratuitously, an apartment, from which anything has been thrown or poured down, which has done damage to another, is said to be bound _quasi ex maleficio_, for he is not exactly bound _ex maleficio_, as it is generally by the fault of another, a slave,
culpam tenetur aut servi aut liber.
Cui similis est, qui ea parte, qua vulgo iter fieri solet, id posuit aut suspendit haebat, quod potest, si occiderit, aliqui nocere: quo casu poena decem aureorum constitueta est. De eo vero, quod dejectum effusumvix est, dupli quanti damnum dat um sit, constitueta est actio. Ob hominem vero liberum oecisum quinquaginta aureorum poena constiminur: si vero vivent necumunque ei esse diestur, quantum ob sem rem sequum judici videtur, actio datur: judex enim computare debet mercedes medicis praestitatis ceteraque impendia, quae in curacione facta sunt, praeterea operarum, quibus carnit aut cariturus est ob id, quod inutilis factus est.

D. xlv. 7. 5. 5; D. ix. 8. 5. 6; D. ix. 3. 1. pr.; D. ix. 8. 7.

The edict of the prætor, in the cases referred to in the text, is given, D. ix. 3. 1. pr.; and D. ix. 3. 5. 6.

The action given in each case was popularis (D. ix. 3. 5. 13), that is, any one might bring it, but in the case of a freeman being killed, his heirs or relations, if they brought an action, were preferred to strangers. (D. ix. 3. 5. 5.)

2. Si filiusfamilias soeorsum a patre habitaverit et quid ex caenaculo ejus dejectum effusumvix sit, sive quid posuit suspensumvix habuerit, cujus casus periculosus est: Juliano placuit, in patrem nullam esse actionem, sed cum ipeo filio agendum. Quod et in filiisfamilias judice observandum est, qui litem suam fecerit.

D. xlv. 7. 5. 5; D. v. 1. 15. pr.

The filiusfamilias could be sued himself for delicts, but the father was not obliged to repair the injury done even to the extent of the son's peculium, which was only made to meet the contracts or quasi-contracts of the son; but if a slave had done the injury the master was always bound to repair the damage, or to abandon the slave. (See Tit. 8. 7.)

8. Item exercitor navi aut cauponae aut stabili de damno, dolo aut furto, quod in nave aut in cauponae aut in stabulo factum erit, quasi ex maleficio teneri videtur, si modo ipsius nullum est maleficium, sed aliqua eorum, quorum opera navem aut cauponam aut stabulum exer-

3. The master of a ship, of an inn, or a stable, is liable quasi ex maleficio for any damage, through fraud or theft, occurring in the ship, inn, or stable, that is, if it is not he who has committed the wrongful deed, but some one employed in the service of the ship, inn, or stable. For as the ac-
The action was for double the value of the thing damaged or lost. (D. xlvii. 5. 2.) The person injured might also, at his option, have an action, or Aquilia, as the case might be, against the actual wrongdoer. (D. xlvii. 5.) This action was different from that given by the prætor against innkeepers and others for the restoration of things confided to them. (D. iv. 9.)

Superest, ut de actionibus loquamur. Actio autem nihil aliud est quam jus perseverandi judicio, quod sibi debetur. It now remains that we speak of actions. An action is nothing else than the right of suing before a judge for that which is due to us.

We now come to the last division of the Institutes, that which treats of actions and the subsidiary subjects of exceptions and interdicts. A sketch has been given in the Introduction (sec. 90–111) of the old legal actions, of the formulary system, and of the system of extraordinaia judicia, by which, long before the time of Justinian, the formulary system had been replaced. In treating of actions the Institutes make such constant reference to the formulary system, and generally to the prætorian law on the subject, that it is necessary, for the comprehension of this part of the Institutes, to set out with a knowledge of the law of actions while the formulary system prevailed. For a statement of the mode in which this system replaced the older actions, and of the scheme of the formule, the reader is referred to sections 98 to 106 of the Introduction. But it will be convenient to add here an outline of the principal divisions of actions under the prætorian system, and to connect these divisions with the corresponding paragraphs of this Sixth Title.

1. Actions in rem, in personam. A main division of actions is that into real actions and personal actions, a division based on the difference in the thing which the plaintiff claims to be due. In a real action, the plaintiff claims that, as against all the world, a thing corporeal or incorporeal is his. The intentio of such an action ran—Si paret hominem ex jure Quiritium Auli Agerii esse. But under the formulary system every condemnation was in
a sum of money. It was the value of the thing, not the thing, that was awarded; and so the *condemnation* in a real action ran—Quanti ea res erit, tantam pecuniam Numerium Negidium Aulo Agerio condemna; si non paret, absolve. Actions in rem were, however, as is explained below, arbitrarie, i.e. the judge ordered the unsuccessful defendant to restore the thing, and, if he failed to do so, condemned him in the sum of money. This was supposed to meet all the circumstances of the case. It seems, too, that, at any rate in the time of Ulpian, if the thing being in the possession of the defendant was not restored according to the order, force was employed under the direction of the judge to put the plaintiff in possession of it. (D. vi. 1. 68; see note on paragr. 31.) In all actions, when a defendant did not pay, he was liable, under the legislation of Antoninus Pius, to have sufficient of his goods to meet the liability seized and sold. (D. xliii. 1. 31.) (As to modes of execution see Introd. sec. 108, 111.)

A personal action was one in which the plaintiff claimed that the defendant should give, do, or make good something to or for him—Qua intendimus dare, facere, praestare oportere. For *praestare*, as in the action of theft (Gai. iv. 37), the words *damnnum decidere*, to make good the loss, were sometimes substituted. *Condictio*, used sometimes in the general sense of a personal action, had a special sense. Originally the *condictio* was the action by which the plaintiff demanded that the defendant should give, i.e. make over the full property in, something, and the thing to be given was something *certum*. It was therefore specially attached to unilateral contracts, i.e. to contracts made *re* (which, it will be remembered, are, with the exception of *mutuum*, bilateral only indirectly) or *verbis* or *litteris*, or to such obligations *quasi ex contractu* as that to restore money unduly paid. But the *condictio* was extended to things uncertain, to the giving or doing something which was not fixed; and the *condictio* in its primary application received the name of *condictio certi*, and in its extended application that of *condictio incerti*, and the *condictio certi*, or simply *condictio*, was limited by usage to actions brought on contracts *re*, *verbis*, or *litteris*, while *conditiones certi*, brought on other grounds, received special names, as the *condictio indebiti*, brought to enforce the repayment of money unduly paid. The *condictio incerti* always received a special name, according to the obligation it was brought to enforce, as *ex stipulatu*. (See Bk. iii. Tit. 15. pr.) Lastly, as the old *condictio certi* was, when first introduced by the *lex Silia* (510 A.U.C.), given to enforce the giving of a fixed sum of money, and only extended by the *lex Calpurnia* (520 A.U.C.) to enforce the giving of other fixed things, the *condictio*, when brought for anything else except a fixed sum of money, and whether *certi* or *incerti*, was spoken of as *triticaria* (D. xiii. 3. 1. pr.), from *triticum*, wheat, one of the objects comprised in the extension made by the *lex Calpurnia*. The *intentio* in the *condictio certi* ran—*Si paret oportere dare* (decem aureos);
and in the *condictio incerti*—*Quiquid paret dare, facereo portere*. Every action *facere* being necessarily uncertain, the *condemnatio* was necessarily uncertain, and so it was when *dare* even in *condictiones certi*, if the action was for anything but a fixed sum of money. If, for example, the action was to give a fixed amount of wheat, as every *condemnatio* was in a pecuniary shape, the defendant was condemned in the value, whatever it might be, of that amount of wheat—*Quanti ea res erit*.

2. *Actions in jus, in factum, directe, utiles, fictitiae, in factum prae scriptus verbis*. These terms applied to actions indicate the modes in which the praetor extended or modified the law by the shape he gave to the formula. In shaping actions the praetor introduced changes of two kinds. First, he gave actions for the enforcement of rights altogether outside the old civil law, but sanctioned by the edict; or, secondly, he extended existing actions (generally civil, but sometimes pretorian) to cases and persons outside the limits in which these actions could be brought.

The principal mode in which he effected the first object was to frame the action so as to be in *factum*. Probably the *actio in factum concep ta* shows the formula as framed in its earliest stage. The *demonstratio* and *intentio* were confounded or united in it. The praetor merely said, ‘If such a fact appears to be true, condemn the defendant.’ Such a formula would enable the praetor to give legal remedies to persons who, under the civil law, could not sue, as *peregrini* or *filii familiarum*, or to give a legal remedy where none previously existed. When, on the other hand, the formula was applied to actions properly within the sphere of the civil law, then the formula had reference to this law; and in the *intentio*, separated from the *demonstratio*, it was said, ‘If the plaintiff has such and such a legal right, or the defendant is legally bound (oportet) to give or do, then condemn.’ Reference being made to the law in this way, the formula was said to be in *jus concep ta*.

When there was an existing action and the praetor wished to extend it to persons or cases not within its sphere, the existing action was termed *directa*, and the extended action *utilis*. In framing *actiones utiles*, the praetor had two resources. He either gave an *actio in factum*, i.e. stated that if a fact was ascertained the defendant was to be condemned, so that *actiones in factum* were used both to give a new remedy and to enlarge an existing action, or he devised a fictitious action in *jus* (*actio fictitia*). He said, ‘If something was true which is not true, then what would the plaintiff’s legal rights be?’ For example, if a plaintiff claimed as if he had acquired by usucapion before the time of usucapion had run, the praetor said, *si anno posse diisset*, what would be the plaintiff’s rights? and the judge treated the plaintiff as if the year had run. (Gal iv. 30–38.)

Lastly, in such a case as that of an innominate contract executed on one side, the praetor gave an action in *jus* termed *actio*
in factum præscriptis verbis, which was exactly like an action in jus on a nominate contract, only that, as the contract did not fall under one of the recognised heads, the facts had to be stated in order to show how the legal obligation had arisen.

3. Actiones stricti juris, bona fidei, arbitrariae. This division depends on the varying amount of latitude given to the judge. The action might be one in jus concepta, and within the limits of the civil law; and then the judge had simply to decide the question submitted to him without taking into account any considerations of equity. But in some actions of this kind the prætor added the words ex fide bona, quod æquior, melius, or some equivalent expression; and then the judge imported equitable considerations, i.e. he took notice of dolus without an exceptio doli mali being inserted; he looked to customs and usages; he took cogniscance of set-off (compensatio), without the set-off being distinctly brought before him by the formula; he allowed interest from the time of default. The actions in which the judge had this latitude allowed him were termed bona fidei actiones, as opposed to those stricti juris, where he had no such latitude; and, speaking generally, unilateral obligations gave rise to actions stricti juris, and bilateral obligations gave rise to actions bona fidei. This division referred, however, to personal actions. In real actions the judge had a latitude by the actions being what was termed arbitrariae, i.e. an order to restore the thing was made, and if the thing was not restored (nisi restituit), then the defendant was condemned in a pecuniary equivalent fixed after taking all circumstances into account, and, as has been stated above, the defendant, if in possession, was forced to give up the thing. Some special personal actions, such as the actio ad eshibendum, were also made arbitrariae.

Actions in factum were not exactly stricti juris or bona fidei, terms only applied to actions in jus conceptæ, but practically they approached bona fidei actions, as the prætor directed a condemnation if the facts were found as he thought proper to state them; some of them were made arbitrariae; and all condicioes incerti were so far like actions bona fidei that the judge had to fix the pecuniary value, as he might think proper, of an uncertain thing.

4. Judicia legitima, imperio continentia.—There is one more division of actions to be noticed in connection with the formulæ system. We may ask as to actions (1) how long the right of bringing the action lasts after it has once arisen; (2) within what time the suit must be finished, so that, if the suit is not finished in the time, it must be recommenced; (3) whether the effect of the judgment is to bar fresh proceedings. Under the formulæ system the answer to these questions was determined by technical distinctions, depending partly on the nature of the action, and partly on the authority of the magistrate. To sum up the results briefly, we may say (1) that all actions could be
brought at any time after the cause of action had arisen, except pretorian actions for a penalty or in derogation of a statute (see note on Tit. 12. pr.); (2) that judicia legitima, i.e. the proceedings in actions in which the parties were Roman citizens, and there was only one judge, also a Roman citizen, and the cause was tried in Rome or within a mile of Rome, must, under the lex Julia judiciaria, be finished within eighteen months after the formula was given, and those in other actions were measured by the authority of the magistrate, judicia imperio continentia, and must be finished within the term of office of the magistrate who gave the formula (GAL. iv. 104, 105); and (3) that when judicia legitima were in personam, and there was an intention juris civilis, the judgment in them barred further proceedings, but that in all other actions, and in judicia legitima when the formula was in factum, fresh proceedings were not barred, but could be stopped by an exception. (GAL. iv. 106, 107; see note on Tit. 13. 5.) But this is a very subsidiary division of actions; the other three—viz. that according to the nature of the thing demanded, that according to the shape of the formula, and that according to the latitude given to the judge—are the principal divisions of actions. But, obviously, the same action may come under more than one division. Thus the actio Serviana (par. 7) was a real action in factum; the actio de constituta pecunia (par. 9) was a personal action in factum; the actio empti (par. 28) was a personal bonae fidei action in jus concepta.

The Institutes in this Title notice six divisions of actions: (1) that according to the nature of the thing demanded (in rem and in personam) (par. 1–11), and (2) that according to the latitude given to the judge (par. 28–31). As the formulary system had passed away, they do not ostensibly notice the division according to the shape of the formula, but they refer to one of its main features by noticing the distinction of actions (3) according as the action was a pretorian application of the civil law, or was a new creation of the pretor (par. 3–13). The other divisions noticed are subordinate, and refer (4) to the effect of the condemnatio, according as the action was penal or not (par. 16–20); (5) according as the condemnatio was for the simple value, or for the double, treble, or quadruple value (par. 21–27); and (6) according as the whole sum in which the defendant might have been condemned was recoverable or not (par. 36–40).

1. Omnia actionum, quibus inter aliquos apud judices arbitrosve de qua se queritur, summa divisione in duo genera deductur: aut enim in rem sunt aut in personam. Namque agit unusquisque aut cum eo, qui ei obligatus est vel ex contractu vel ex maleficio, quo casu prodita actiones in personam sunt, per quas intendit, adversarium ei dare facere

1. All actions whatever, by which any matter is submitted to the decision of judges or of arbitrators, may be divided into two classes; for actions are either real or personal. Either the plaintiff sues the defendant, because he is made answerable to him by contract, or by a delict, in which case the plaintiff brings a personal action, alleging that his adversary is bound
to give to, or to do something for, him, or making some other similar allegation. Or else the plaintiff brings an action against a person not made answerable to him by any obligation, but with whom he disputes the right to something, and for such cases real actions are given; as, for example, if a man is in possession of a corporeal thing, which Titius maintains to be his property, while the possessor says that he himself is the proprietor, here, if Titius asserts that the thing is his, the action is real.

Gal. iv. 1–3; D. xlv. 7. 25. pr.

2. Aequo si agat, jus sibi esse re, fundo forte vel sedibus utendi- fruendi vel per fundum vicini uendi, agendi vel ex fundo vicini aquam ducendi, in rem actio est. Eiusdem generis est actio de jure praediorum urbanorum, veluti si agat, jus sibi esse altius sedes suas tollendi prospiciendiive vel proiectiandi aliquid vel immittendi in vicini sedes. Contra quoque de usufructu et de servitutibus praediorum rusticorum, item praediorum urbanorum invicem quoque prodite sunt actiones, ut quis intendent, jus non esse adversario utendi fruendi, uendi, agendi aquam- ve ducendi, item altius tollendi, prospiciendi, proiectiandi, immittendi: iste quoque actiones in rem sunt, sed negative. Quod genus actionis in controversiis rerum corporalium proditum non est: nam in his sit agit, qui non possidet: si vero, qui possi- det, non est actio prodita, per quam neget, rem alterius esse. Sane uno caso qui possidet, nihil minus actoris partes obtinet, sicut in latioribus digestorum libris opportunius apperibit.

2. So, too, if any one alleges that he has a right to the usufruct, for instance, of land, or of a house, or that he has a right of going, or driving his cattle, or of conducting water, over the land of his neighbour, the action is real; as also are actions relating to servitudes of city estates, as when a man alleges a right to raise his house, a right to an uninterrupted view, a right to make part of his house project, or of inserting the beams of his building into his neighbour’s walls. On the other hand there are actions relating to usufructs, and the servitudes of country and city estates, which are the reverse of these; as when the complainant alleges that his adversary is not entitled to the usufruct, or has not the right to go, to drive, to conduct water, to raise his house, to have an uninterrupted view, to throw out projections, or to insert his beams. These actions are equally real, but are negative, and cannot therefore be used in disputes respecting things corporeal, for in these disputes it is the person out of possession who brings the action: for a possessor cannot bring an action to deny that the thing is the property of the other party. There is, however, one case, in which a possessor may act the part of plaintiff; which will be more fully seen if reference is made to the books of the Digest.

Gal. iv. 8; D. viii. 5. 2; D. xxxix. 1. 15.

Usufructs, uses, rural and urban servitudes, might be the objects of real actions. These actions were either confessediorum or negative; in the former the plaintiff claimed to exercise a servitude over the immovable of another, in the latter he maintained that a servitude which another attempted to exercise over an immovable belonging to the plaintiff was not due.
The actio confessoria might be brought either when a person claiming a servitute found this right contested, or when any obstacle, as if a tree overhung a way over which a servitude viv or actus was claimed, prevented the free enjoyment of the servitute. (D. viii. 5. 4. 5.)

The actio confessoria might be brought by the person claiming the servitute, whether he was or was not in possession, that is, in quasi-possession, of the servitute. For example, a man claims a servitute non altius tollendi—that his neighbour should not build his house higher than that of the claimant. Before the neighbour has built his house higher the claimant of the servitute is in possession of the servitute. He has his servitute and enjoys the advantages of it. After the neighbour has built his house higher, the claimant of the servitute has his servitute, but is no longer in possession of it. In either case the claimant of the servitute might bring his actio confessoria (D. viii. 5. 6. 1), although, if he was still in possession, he was further secured by being allowed to apply, if he pleased, for a prohibitory interdict (see Tit. 15) after interdicts were granted to protect servitudes.

The actio negativa was virtually an affirmative action brought by the owner of the immovable, claiming that the thing was his, freed from the servitute. Originally the possession of a servitute was not protected by interdicts, and the use of the actio negativa was to protect the enjoyment of the thing free from the servitute, or, in other words, to protect the enjoyment of that fragment of the dominium which constituted the servitute, as well as of all other fragments, while the possession of the thing itself was protected by the interdicts uti possidetis. (Tit. 15. 4.) Subsequently the possession of servitudes was protected by interdicts, but still the actio negativa remained as a concurrent remedy with the possessor interdict to protect the enjoyment of that fragment of the dominium which constituted the servitute, just as the actio confessoria remained as a concurrent remedy with the prohibitory interdict to prevent a servitute being infringed.

Sane uno cau. It is a subject of much dispute what is the one case in which the possessor could be plaintiff. Perhaps the words are but a summary of what has gone before. ‘There is, indeed, but one case of a person in possession being plaintiff, that, namely, of the possessor of an incorporeal thing.’ Perhaps they refer to a person repelling by an exceptio justi dominii the actio Publiciana noticed in par. 4, as such a person had to prove he was owner.

8. Sed iste quidem actiones, quarum mentionem habuimus, et si que sunt similes, ex legitimis et civilibus causis descendunt. Aliae autem sunt, quas preator ex sua jurisdictione comparatas habet tam in rem quam in personam, quas et ipsas necessarium est exemplis 8. The actions just mentioned, and those of a similar nature, are derived from particular laws and from the jus civil; but there are others, both real and personal, which the preator, by virtue of his jurisdiction, has introduced, and of which it is necessary to give some examples: thus the preator
often permits a real action to be brought, by which the plaintiff is allowed to allege that he has acquired, as it were by usucapio, something which he has not so acquired; or by which, on the contrary, he alleges that his adversary, the possessor, has not acquired something by usucapio, which, in reality, he has so acquired.

D. xlii. 7. 25. 2.

The second division of actions, given in this Title, is that of civil and pretorian. The two methods principally adopted by the pretor to give an action in cases not provided for by the civil law, were, as already stated (pr. note 2), either to construct a formula on a fictitious hypothesis, or make the action one in factum concepta. The three following paragraphs give examples of fictitious actions in rem.

Justinian notices five pretorian actions in rem, viz. the actio Publiciana, the actio in rem rescissoria, the actio Pauliana, the actio Serviana, and the actio quasi Serviana, and gives as instances of the numerous pretorian actions in personam, the actions de pecunia constituta, de peculio, &c. (See par. 8 et seq.)

4. Namque si cui ex justa causa res aliena tradita fuerit, veluti ex causa amptionis aut donationis aut dotis aut legatorum, necum ejus rei dominus effectus est, si ejus rei casu possessionem amiserit, nullam habet directam in rem actionem ad eam rem persequentiam: quippe ita proditas sunt jure civili actiones, ut quis dominium suum vindicet. Sed quia sane durum erat, eo casu deficere actionem, inventa est a pretore actio, in qua dicit is, qui possessionem amisit, eam rem se usucapisse et ita vindicat suam esse. Quae actio Publiciana appellatur, quoniam primum a Publicio pretore in edicto proposita est.

4. For instance, if anything belonging to another is delivered by a legal mode, as by purchase, gift, donation, or legacy, to a person who has not yet become proprietor of the thing delivered, if he chances to lose the possession, he has no direct real action for its recovery; inasmuch as the civil law only permits such actions to be brought by the proprietor. But, as it was very hard that there should be no action given in such a case, the pretor has introduced one, in which the person who has lost the possession alleges that he has acquired the thing in question by usucapio, although he has not really so acquired it, and he thus claims it as his own. This action is called the actio Publiciana, because it was first placed in the edict by the pretor Publicius.

GAL. iv. 86.

When any one except the real owner of the thing (dominus) delivered over a thing on a ground and in a mode which would have sufficed to pass the property, if he had had it to pass, or if an owner of a thing transferred a thing by a mode insufficient to pass the dominium, as if a res mancipi was delivered without mancipation, the person, in either of these cases, to whom the thing was delivered, being a bona fide possessor, could perfect his title to it by usucapion; but if he lost the thing out of his posses-
sion after it was delivered to him, but before the time necessary to complete the usucapion had expired, the civil law gave him no remedy, for he was not the dominus, and none but a dominus could claim a thing by \textit{vindicatio}. The \textit{actio Publiciana}, an \textit{actio fictitia in jus concepta}, was therefore given for his relief by the \textit{praetor Publicius}, perhaps the Publicius mentioned as \textit{praetor} by Cicero (\textit{Pro Cluent.} 45). In this action the plaintiff was allowed to state what was in fact not true, that the usucapion was complete, and thus to claim as if his ownership was absolute. If the thing had fallen into the hands of a person who himself claimed to be really the dominus, and to have a \textit{bona fide} ground of repelling the \textit{actio Publiciana}, it could be repelled by an exception termed the \textit{exceptio justi dominii}. (D. vi. 2. 16.)

If it had fallen into the hands of a person who did not claim to be the owner, but who had so acquired it as to be in a situation to perfect his title by usucapion, i.e. who was also a \textit{bona fide} possessor, and the plaintiff brought an \textit{actio Publiciana} for it before the time of the usucapion had expired, the title of the actual holder of the thing was considered the better; for in \textit{pari causa melior est conditio possidentis}. The formula of the action ran thus: \textit{Judex esto. Si quem hominem Aulus Agerius emit et est i traditus esset, anno posessisset, tum si eum hominem, de quo agitur, ejus ex jure Quiritium esse oporteret,} &c. (GAI iv. 36.)

The \textit{actio Publiciana} might also be useful to a person who was really the owner; for, while the distinction between \textit{res mancipi} and \textit{nec mancipi} was retained, the owner of a thing requiring to be passed by mancipation might have himself received it by mancipation, but be unable to show that the person who transferred it to him was really the dominus, and had in his turn received it by mancipation. If he lost the thing before he had perfected the title by usucapion, he could not bring a \textit{vindicatio}, but was obliged to have recourse to the \textit{actio Publiciana}; and before the legislation of Justinian this action was especially useful to persons who had received a transfer of things which, like provincial lands, could not be made the subject of a perfect \textit{dominium}, and the title to which could not be perfected by usucapion (see Bk. ii. Tit. 6. pr. note); for they were allowed to bring this fictitious action if they were deprived of the possession, at any rate after the time entitling them to use the \textit{praescriptio longi temporis} had elapsed. (C. vii. 39. 8.)

5. \textit{Bursus ex diverso si quia, cum rei publicae causa abesset vel in hostium potestate esset, rem ejus, qui in civitate esset, usceperit, permitteri domino, si possessor rei publicae causa abesse desierit, tum intra annum, rescissa uscapione, eam petere, id est ita petere, ut dicat, possessorum usu non cepisse et ob id suam esse rem. Quod}

5. Conversely, if any one, while abroad in the service of his country, or a prisoner in the hands of the enemy, has acquired by usucapion a thing which belongs to another person resident at home, then the proprietor is permitted, within a year after the return of the possessor, to sue for the thing by rescinding the uscapion; that is, he may allege that the posses-
This paragraph gives the converse case. Before, the usucapion was not complete, and the action supplied what was wanting to it. Here the usucapion is complete, and the action takes away its effect.

Such an action might be wanted in either of two cases. Either the proprietor of the thing might be absent, or deprived, on some legitimate ground, of the power of attending to his affairs, and during this time the usucapion might have been completed against him; or the possessor, the person in whose favour the time of usucapion was running, might have been absent, and the proprietor, not being able to sue him, might have been unable to stop the usucapion. In either of these cases this actio in rem, called rescissoria, because the usucapion was rescinded, came to the aid of the proprietor. It is to be remarked that Justinian notices only the latter of the two cases, and yet he had provided a much more simple remedy in behalf of proprietors, who were allowed to interrupt the usucapion of an absent possessor by a protestation made before a magistrate. (C. vii. 40. 2.)

This actio rescissoria, an actio fictitia in jus concepta, had to be brought within a year, commencing from the time when it first became possible to bring the action. Intra annum, quo primum de ea re experiundi potestas erit. (D. iv. 6. 1. 1.) The year was a utilis annum, and its length, therefore, varied in different cases, for which Justinian substituted the uniform term of four years. (C. v. 55. 7.)

Quibusdam et aliis. Such as the restitutio in integrum, by which the prætor protected a person under the age of twenty-five years. (See Bk. i. Tit. 23. pr. note.)

6. Item si quis in fraudem creditorum rem suam alicui tradiderit, bonis ejus a creditoribus ex sententia præsidii possidet, permititur ipsius creditoribus, rescissa traditione, eam rem petere, id est dicere, eam rem traditam non esse et ob id in bonis debitoris manisse.

6. Again, if a debtor delivers to a third person anything that is his property in order to defraud his creditors, who have been put in possession of his goods by order of the præses, the creditors are permitted to rescind the delivery, and bring an action for the thing delivered; that is, they may allege that the thing was not delivered, and that it therefore has continued to be a part of the debtor's goods.

Theophilus tells us that this action, an actio fictitia in jus concepta, was called the actio Pauliana. The lex Ælia Sentia (see Bk. i. Tit. 6) had made enfranchisements in fraud of creditors
void; but the law did not extend to alienations; and the praetor, therefore, when the creditors had taken possession of the effects of the debtor, permitted them to reclaim anything which had been alienated after insolvency and with intent to defraud.

This *actio Pauliana in rem* (says Ortolan) is not spoken of elsewhere in the whole *corpus juris* of Justinian. It must not be confounded with the *actio Pauliana in personam* treated of in the Digest (xxii. 1. 38. pr. and 4), which was given not only in case of alienation, but of every act whereby the debtor had fraudulently diminished his assets. The *intentio* of the *actio in personam* was directed not, as that of the *actio in rem*, which forms the subject of this paragraph, against any one who happened to be the person detaining the thing claimed, but against either (1) the debtor, or (2) persons who, having notice of the fraud, acquired any part of the assets, or (3) persons without notice, who profited by the fraudulent act, in this last case, however, the liability being limited to the extent to which they had profited. (D. xlii. 8. 6. 11; D. xlii. 8. 9.)

7. Item Serviana et quasi Serviana, quae etiam hypothecaria vocatur, ex ipsius pretoris jurisdicitione substantiam capit. Serviana autem expterit quis de rebus coloni, quae pignoria jure pro mercedibus fundi ei tenentur; quasi Serviana autem qua creditores pignora hypothecasse persequuntur. Inter pignus autem et hypothecam quantum ad actionem hypothecariam nihil interesse: nam de qua re inter creditorum et debitorum convenerit, ut sit pro debito obligata, utraque hae appellatione continentur. Sed in alia differentia est: nam pignoris appellatione eam proprii contineri dicimus, quae simul etiam traditur creditori, maxime si mobilis sit; et eam, quae sine traditione nuda conventione tenetur, proprio hypothecae appellatione contineri dicimus.

7. The *actio Serviana*, and the *actio quasi-Serviana* also called *hypothecaria*, equally take their rise from the pretor's jurisdiction. The *actio Serviana* is brought to get possession of the effects of a farmer which are held as a pledge to secure the rent of the land. The *actio quasi-Serviana* is that by which creditors sue for things pledged or mortgaged to them; and, as regards this action, there is no difference between a pledge and a *hypotheca*; for the two terms are indifferently applied to anything which the debtor and creditor agree shall be bound as security for the debt; but in other points there is a distinction between them. The term pledge is properly applied to a thing which has actually been delivered to a creditor, especially if the thing is a moveable; the term *hypotheca* to anything bound by simple agreement without delivery.

D. xx. 2. 4; D. xx. 1. 17; D. xx. 5. 1; D. xiii. 7. 9. 2.

We have already given a slight sketch of the *jus pignoris*, and the relative position of the creditor and debtor, at the end of the fifth Title of the Second Book. The interest of the creditor was not thought sufficient to support a *vindicatio* if he lost the thing pledged out of his possession, or wished to get the thing subjected to a *hypotheca* into his possession; but a pretorian action enabled him to effect this. The *actio Serviana* mentioned in this paragraph (to be distinguished from that mentioned in GAI. iv. 35) was given to enforce the claim of the landlord to the farming instruments, which, without any special agreement were considered, in
law, to he held as a pledge for the rent of the farm, and the actio quasi-Serviana was an extension of this, giving a means to every creditor of enforcing his right to anything pledged or mortgaged. Both actions were in factum.

Maxime si mobilis sit. An immovable might of course be given in pledge; but it would generally happen that things given in pledge were moveables.

A thing subjected to successive hypothecae belonged, as we have said in treating of the real right given by the jus pignoris (Bk. ii. Tit. 5), to the person in whose favour the first hypotheca was constituted. If, therefore, a creditor, whose hypotheca was subsequent, brought the actio quasi-Serviana against a creditor whose hypotheca was prior, he would be repelled by an exception. (C. viii. 18. 6.) Even a creditor having a pignus, i.e. having been put in possession, was postponed to a prior creditor who had only a hypotheca. (D. xx. 1. 10.)

8. In personam quoque actiones ex sua jurisdictione propositas habet pretor, velunti de pecunia constituta: cui similis videbatur receptitia; sed ex nostra constitutione, cum et, si quid plenius habebat, hoc in pecuniam constitutam transfusum est, ea quasi supervacua jussa est cum sua auctoritate a nostris legibus recedere. Item pretor propositum de peculio servorum filiorumque familias et ex qua queritur, an actor jurisverit, et alias complures.

8. There are also personal actions which the pretor has introduced in the exercise of his jurisdiction, as, for instance, the action de pecunia constituta, which that called receptitia much resembled. But by our constitution the actio receptitia has been rendered superfuous by all its advantages being transferred to the actio pecunia constituta, and has, therefore, lost its authority, and disappeared from our legislation. The pretor has likewise introduced an action concerning the peculium of slaves and of filii familias, and an action in which the question is tried, whether the plaintiff has made oath, and many others.

C. iv. 18. 2. pr. and 1.

9. De pecunia autem constituta cum omnibus agitur, quicumque vel pro se vel pro alio soluturos se constituerint, nullas scilicet stipulatione interposita. Nam aliquin si stipulant promiserint, jure civili tentur.

9. The actio de constituta pecunia may be brought against any person who has engaged to pay money, either for himself or another, that is, without having made a stipulation; for, if he has promised a stipulator, he is bound by the civil law.

D. xiii. 5. 2.

The actio de constituta pecunia was an action by which the pretor enforced a mere pact or agreement (not a stipulation, for then the action would have been ex stipulatu) by which a person promised again what he already owed, or promised what another owed, fixing the time for payment. This agreement (constitutum) did not operate as a novation, but was enforced as subsidiary to the main contract. Originally the actio de constituta pecunia only applied to things which could form the subject of a mutuum, i.e. things quae numero, ponderes, mensurave constant; and in
certain cases it could be brought only within a year. (C. iv. 18. 2. pr.) The pecunia was said to be constituta because it was agreed to be paid on a particular day. The actio receptitia was an action given against bankers (argentarii) who promised to satisfy the demands of a creditor of one of their customers. This creditor was said recipere diem, to have a day fixed by the banker for payment of his claim, and hence the action was called receptitia. The mere promise of the banker was considered enough to ground an action on, an exception to the ordinary rules of the civil law which must have grown out of the peculiar character of a banker's business. What the civil law confined to bankers only the pretor extended to every one alike; and whenever any one who owed a debt to another or had funds of another in his hand, promised to pay the money owed by or deposited with him on a particular day, the pretor gave the action de constituta pecunia to enforce the fulfilment of the promise.

Justinian abolished the actio receptitia, and invested the actio de constituta pecunia with privileges which had before belonged exclusively to the actio receptitia; for he made it in all cases perpetual, and he allowed it to be brought whatever was the nature of the thing promised. (C. iv. 18. 2.)

The pact to pay might be advantageous to the creditor, if it was the debt of another that was agreed to be paid, or if the antecedent obligation was only a natural one, or if the time in which the original debt could be sued on was on the point of expiring.

10. Actionem autem de peculio ideo adversus patrem dominumve comparavit pretor, quia licet ex contractu filiorum servorumve ipso jure non teneantur, sequam tamen esset, peculio tenus, quod veluti patrimonium est filiorum filiarumque, item servorum, condemnari eos.

D. xv. 1. 47. 6.

Actions de peculio are treated of in par. 4 of next Title.

11. Item si quis postulante adversario juraverit, debere sibi pecuniam, quam peteret, neque ei solvatur, justissime accommodat ei talem actionem, per quam non illud quaeritur, an ei pecunia debeatur, sed an juraverit.

D. xii. 2. 8; D. xii. 2. 5. 2.

Either party might challenge the other to swear to the truth of his statement. This might be done out of court, and if the party challenged took the oath, his statement could no longer be impugned by the person who had challenged him. For instance, if the creditor, being challenged, swore that the debt was due, the
debtor was obliged to pay. The only question, therefore, which could be subsequently referred to a court of justice was whether the oath had or had not been taken, inquiry into which circumstance was made under an actio in factum given by the prestor.

12. Penales quoque actiones prestor bene multas ex sua jurisdictione introducit: veluti adversus eum, qui quid ex albo ejus corruptisset: et in eum, qui patronum vel parentem in jus vocasset, cum id non impetrasset: item adversus eum, qui vi exemerit eum, qui in jus vocaretur, cujusque dolo alius exemerit: et aliae innumerabilea.

12. The prestor has also introduced very many penal actions by virtue of his jurisdiction. As, for instance, against a person who has tampered with the prestor's album; against those who summon patron or ascendant without obtaining previous permission; against those who carry away by force any one summoned to appear before a magistrate, or fraudulently induce a third person to carry him off; and very many other actions.

Gal. iv. 46.

The album was the tablet suspended in the forum, containing the ordinances of the prestor. Any attempt to injure or deface it was punished by an action de albo corrupto. (D. ii. 1. 7. pr.)

In eum, qui patronum, &c.; see Tit. 16. 3.

The actio de in jus vocato vi exempto was given against a person who rescued with violence any one who, after disobeying a notice to appear in jure, was being forcibly conveyed before the magistrate. The penalty was the amount at which the plaintiff estimated his claim in the action he had commenced against the person rescued, while this person rescued remained still liable to the action he had been summoned to answer. The actions under all the heads mentioned in this paragraph were in factum. (D. ii. 7. 5. 1.)

18. Prajudiciales actiones in rem esse videntur, quales sunt, per quas queritur, an aliquid liber vel an libertus sit, vel de partu agnoscendo. Ex quibus fere una illa legitimam causam habet, per quam queritur, an aliquid liber sit: etere ex ipsis prestoris jurisdictione substantiam capiunt.

18. Pre-judicial actions seem to be real actions; such are those by which it is inquired whether a man is born free, or has been made free, or whether he is the offspring of his reputed father. But of these, that alone by which it is inquired whether a man is free, belongs to the civil law. The others spring from the prestor's jurisdiction.

Gal. iv. 44; C. viii. 47. 9.

The object of a prejudicialis actio was to ascertain a fact, the establishing of which was a necessary preliminary to further judicial proceedings. (See Introd. sec. 104.) Such actions differ from actions in rem, because in an actio prejudicialis no one is condemned, only the fact is ascertained; but they are said in the text to resemble actions in rem, because they were not brought on any obligation, and because in the intentio, which indeed composed the whole formula in this case, no mention was made of any particular person against whom the action was directed.

Questions of status, such as those of paternity, filiation, pa-
tronage, and the like, were most commonly the subjects of actiones prejudiciales, but were by no means the only ones. We hear of others, such as *quanta dos sit* (Gai. iv. 44); *an ea res de qua agitur major sit centum sestertiis* (Paul. Sent. v. 9. 1); *an bona jure venierint* (D. xliii. 5. 30).

The *liberalis causa*, the suit in which the status of a supposed slave was ascertained, was originally nothing else but a *vindicatio*. The person called the *assertor libertatis* claimed him, and the master of the slave defended his possession. If the decision was in favour of the *assertor*, it was still open to another person to attempt to prove that the subject of the suit was really a slave; if the decision was in favour of the master, another *assertor* could bring a fresh suit; but there could only be three *assertores* in all. If the supposed slave was thrice adjudged a slave, his status could be no further questioned. Justinian entirely altered the action, by allowing the slave himself to claim his liberty, and making the first decision final. (C. vii. 17. 1.)

14. *Sic itaque discretis actionibus, certum est, non posse actorem rem suam ita ab aliquo petere 'si paret eum dare oportere': nec enim quod actoris est, id ei dari oportet, quia scilicet dari cuiquam id intellegitur, quod ita datur, ut ejus flat, nec res, quae jam actoris est, magis ejus fieri potest. Plane odio furum, quo magis pluribus actionibus teneantur, effectum est, ut extra penam dupli aut quadrupli rei recipienda nomine fures etiam habe actio in rem actio, per quam rem suam quis esse petit.*

14. Actions being thus divided, it is certain that a plaintiff cannot sue for his own property by such a formula as this, 'If it appears that the defendant ought to give.' For it is not a duty to give the plaintiff that which is his own. To give a thing is to transfer the property in it, and that which is already the property of the plaintiff cannot belong to him more than it does already. However, to show destestation for thieves, and to make them liable to a greater number of actions, it has been determined, that besides the penalty of double or quadruple the amount taken, they may, for the recovery of the thing taken, be subjected to the action, 'If it appear that they ought to give;' although the party injured may also bring the real action against them, by which the plaintiff demands the thing as proprietor.

**GAI. iv. 4.**

We have already seen (Tit. 1. 19) that the plaintiff might benefit by being allowed to bring a personal instead of a real action, as the things taken might have perished. But why should the *condictio* be so shaped as described in the text? The reason was this: the plaintiff, by being allowed to frame his action with the word *dare*, which was technically wrong, as this implied to transfer the full ownership, whereas the plaintiff remained the owner of the thing stolen, had the advantage, under the formulary system, of recovering the *sponio penalis* (Gai. iv. 171), or wager of one-third of the value of the thing, which was added to a *condictio certi*. (See Introduct. sec. 99.)
15. Appellamus antem in rem quidem actiones vindicationes: in personam vero actiones, quibus dare facere oportere intenditur, condiciones. Condicere enim est denuntiare prisa lingua; nunc vero abusive dicimus condicione actionem in personam, qua actor intendit, dari sibi oportere: nulla enim hoc tempore eo nomine denuntiatio fit.

Gal. iv. 5, 18.

Gaius says, 'actor adversario denuntiabat, ut ad judicem copiens-dum die xxx. aedesset' (iv. 18). Thus the proper meaning of condicetio is the appointing of a day.

16. Sequens illa division est, quod quaedam actiones rei persequendae gratia comparate sunt, quaedam poene persequendae, quaedam mixte sunt.

Gal. iv. 6.

We now come to the third division of actions, that, namely, according to the object for which they were brought; they were divided under this head into three classes—those in which it was sought to get a thing, rei persecutoriae, including all real actions and all personal actions, except those in which something beyond the simple value was recovered, those in which it was sought to enforce a penalty, and those (mixtae) in which both these objects were united.

17. Rei persequendae causa comparatae sunt omnes in rem actiones. Eum vero actionum, quae in personam sunt, ha quidem, quae ex contractu nascentur, fere omnes rei persequendae causa comparatae videntur: veluti quibus mutuum pecuniam vel in stipulatum deductam petit actor, item commodati, depositi, mandati, pro socio, ex empto, vendito, locato, conducto. Plane si depositi agatur eo nomine, quod tumultus, incendii, ruines, naufragii causa depositum sit, in duplum actionem pretor reddit, si modo cum ipso, apud quem depositum sit, aut cum herede ejus ex dolo ipius agitur: quo casu mixta est actio.

Gal. iv. 7; D. xvi. 8. 1–4; D. xvi. 8. 18.

The action against a fraudulent depositary was not in duplum, unless the depositor had been forced by fire, shipwreck, the fall of a building, or other sudden calamity, to make the deposit. If,
without being so forced, he had selected the depository, then the
action was only for the single value. It was his own fault not to
have chosen an honester man. (See Bk. iii. Tit. 14. 3.)

18. Ex maleficiis vero prodite
actiones alie tantum poene perse-
quendas causa comparatas sunt, alie
tam poene quam rei persequendas
et ob id mixtæ sunt. Pennam tan-
tum persequitur quis actione furti;
sive enim manifesti agatur quadru-
pli sive nec manifesti dupli, de sola
poena agitur: nam ipsam rem pro-
pria actione persequitur quis, id est
suum esse potens, sive fur ipse eam
rem possideat, sive alius quilibet:
eo amplius adversus furem etiam
condictio est rei.

18. Actions arising from a delict
are either for the penalty only, or both
for the thing and the penalty, which
makes them mixed. But, in an action
of theft, nothing more is sued for than
the penalty; whether, as in manifest
theft, the quadruple, or, in theft not
manifest, the double, is sued for. The
owner recovers the thing itself by a
separate action, by claiming it as pro-
prisor, whether it is in the possession
of a thief or of any one else. He may
also bring against the thief a condiction
for the thing.

Gal. iv. 8; D. xiii. 1. 7. 1.

Persons who suffered from crimes had a private action against
the wrongdoer for compensation, quite apart from, and indepen-
dent of, the prosecution of the offender for his outrage on the
laws of society. There was, indeed, something more than an
exact compensation enforced by the private actions; for, by way
of penalty, the defendant had often to pay two, three, or four
times the amount of loss actually sustained, and also to give back
the thing or its value; but still this penalty was given as a
punishment for the injury to the individual, and not as a punish-
ment for the infraction of public law.

19. Vi autem bonorum raptorum
actio mixta est, quia in quadruplo
rei persecutio contingetur, poena au-
tem tripli est. Sed et legis Aquilise
actio de damno mixta est, non solum
si adversus inquitianem in duplum
agatur, sed interdum et si in sim-
plum quisque agit. Veluti si quis
hominem claudum aut lusum occi-
derit, qui in eo anno integer et magni
pretii fuerit; tanti enim damnum,
quant quin homo in eo anno plurimi
fuerit, secundum jam traditam divi-
ensionem. Item mixia est actio contra
eos, qui relictà sacrosanctis ecclesiis
vel aliis venerabilibus locis legati
vel fideicommissi nomine dare dis-
tulenter usque adeo, ut etiam in
 judicium vocarentur: sune etenim
et ipsum rem vel pecuniam, quae
relictà est, dare compulsantur et
aliiud tantum pro poena, et ideo in
duplum ejus fit condemnatio.

19. An action for goods taken by
force is a mixed action, because the
thing taken is included under the
quadruple value to be recovered by
the action; and thus the penalty is
but triple. The action introduced by
the lex Aquilia, for wrongful damage,
is also a mixed action; not only when
brought for double value against a
man denying liability, but sometimes
when the action is only for the single
value; for instance, if a man has killed
a slave, who at the time of his death
was lame, or wanted an eye, but within
the year, previous to his decease, was
free from any defect, and of great
value, here, according to the distinc-
tion previously laid down, the wrong-
doer is condemned to pay an amount
representing the greatest value of the
slave within the year. The action is
also mixed which is brought against
those who have delayed the payment
of a legacy, or fideicommissum, left to
our holy churches, or other sacred
places, until at last they have been
summoned before a magistrate; for
then they are compelled to give the thing, or to pay the money left by the deceased, and in addition an equivalent thing or an equal sum, by way of penalty; and thus they are condemned in a double amount.

C. ix. 38. 1; D. ix. 2. 28. 8–6; C. i. 3. 46. pr. and 7.

Interdum et si in simpulum. An action could be brought in simpulum under the lex Aquilia, if the object of the action was not to determine whether the defendant had done the injury, but to fix the sum which would be the proper compensation for it. It could not be brought in simpulum to determine the fact of the defendant having done the injury: for if he denied it, the action was in duplum; if he confessed it, there was no need of an action to prove what he confessed.

Sacrosanctis ecclesiis. The punishment had formerly been enforced in case of all legacies in which specific things had been given per damnationem. (See Bk. iii. Tit. 27. 7.)

Dare distulerint. Formerly the punishment had only been inflicted in case of an absolute refusal of the legacy. (C. i. 3. 46. 7.)

The use in this paragraph of the word mixtæ in the sense of 'brought at once to recover a thing and to enforce a penalty,' seems to have suggested the reference in the next paragraph to actions which were mixtæ in a very different sense, viz., 'both real and personal.'

20. Quaedam actiones mixtæ causam optimae videntur tam in rem quam in personam. Qualis est familiae eriscundae actio, quæ com p e tit coheredibus de dividenda hereditate: item communi dividundo, quæ inter eos redditor, inter quos aliquid commune ex quacumque causa est, ut id dividatur: item finium regundorum, quæ inter eos agitur, qui confines agros habent. In quibus tribus judicis permittitur judicij rem aliquii ex litigatioribus ex bono et seco adjudicare et, si unus pars praevarari videbitur, sum invicem certa pecunia alteri condemnare.

D. x. 1. 2. 1; D. x. 1. 8; D. x. 2. 55.

These actions, though entirely personal, as being founded on obligations and brought against particular persons, are here said to seem in one aspect like real actions, because they involved an adjudicatio. Particular things were adjudged and given over to the parties. Even here, however, the analogy to real actions was not very complete, as real actions were always brought for some definite thing, ascertainable before the action was brought; but,
except in the case of an indivisible thing or one which it was not expedient to divide (the case referred to in the last clause of the paragraph), the thing to be adjudged was only ascertained by the action.

As to the formula in these actions, see Introd. sec. 103. In these actions no distinction can properly be made of plaintiff and defendant. Ulpian says, 'Muitae sunt actiones, in quibus uterque actor est.' (D. xliv. 7. 37. 1.) The judge discharged the function assigned him equally for the benefit of all persons interested in the subject-matter of the action. (See Tit. 17. 4–7.)


21. All actions are for the single, double, triple, or quadruple value; beyond that no action extends.

D. ii. 8. 8.

We have now the fourth division of actions, that, namely, according to the amount of the condemnation.

In actions which were in duplum, in triplum, or in quadruplum conceptae, the intentio only contained an estimate of the single value, the amount of actual loss, and then in the condemnatio this was doubled, tripled, or quadrupled, as the case might be; the word concepta, therefore, which properly refers to the intentio, is not very strictly used.

22. In simplicem agitur veluti ex stipulatione, ex mutui datione, ex empto, vendito, locato, conducto, mandato et denique ex aliciis compluribus causis.

22. The simple value is sued for; as, for example, in case of a stipulation, a contract of mutuum, a sale, a letting on hire, a mandate, and in numberless other cases.

If a person stipulated that in a certain case his debtor should give him double or triple of the value of the sum owed, the action brought to enforce the stipulation would still be in simplicem concepta. It would be the agreement, and not the action, which would double or triple the sum to be paid.

23. In duplum agimus veluti furti nec manifesti, damni injuriæ ex lege Aquilia, depositi ex quibusdam casibus: item servi corrupti, quae competit in eum, cujus hortatu consiliove servus alienus fugerit aut contumax adversus dominum factus est aut luxuriosus vivere ceperit aut denique quodlibet modo deterior factus sit (in qua actione etiam earum rerum, quas fugiendo servus abstulit, estimatio deductur): item ex legato, quod venerabilibus locis relictum est, secundum ea, quae supra diximus.

23. The double value is sued for; as, for example, in an action of theft not manifest, of wrongful injury under the lex Aquilia, and, in certain cases, in an action of deposit. Also in an action on account of the corruption of a slave brought against him by whose advice or instigation the slave has fled from his master, has grown disobedient towards him, become dissolute in his habits, or been made in any manner worse; and, in this action, an estimate is also to be made of whatever things the slave has stolen from his master at his flight. An action also for the detention of a legacy, left to a sacred
place, is brought for double value, as we have before stated.

*Gal* iii. 190; *Gal* iv. 9, 171; *D* xvi. 8. 1. 1; *D* xi. 8. 1. pr.; *C* i. 8. 46. 7.

*Depositum ex quibusdam casibus*, i.e. when made under the pressure of a sudden calamity. (See note on par. 17.)

24. *Tripla vero, cum quidam majorem verum estimationis quantitatem in libello conventionis inseruit, ut ex hac causa viatores, id est executores litium, ampliorem summam portularum nomine exigere tunc enim quod propter eorum causam damnum passum fuerit reus, id tripulum ab actore consequeatur, ut in hoc triplo et simplum, in quo damnum passus est, connumersetur. Quod nostra constitutio induxit, quae in nostro codice fulget, ex qua dubio procul est ex lege condiciensionis emanare.*

24. The triple value is sued for when any person inserts in his statement of demand a greater sum than is due to him, so that the *viatores*, that is, the officers of suits, exact a larger sum as their fee. In this case the defendant may obtain from the plaintiff the triple value of the loss he has sustained by giving the fee, but the amount which, by being overcharged, he disbursed is counted as one of the three sums in the triple value. This a constitution inserted in our code has established, on which constitution, without doubt, a statutory condition may be grounded.

*C* iii. 10. 2.

In the old law there had been other actions in *tripulum*, as those *furti concepti* and *furti oblati*. (*Gal* iii. 191; see *Tit* 1. 4 of this Book.) The action, of which Justinian speaks in this paragraph, had been substituted by him for the penalty of entirely losing all right of action, to which a plaintiff who sued for more than was due to him had been liable. (*Gal* iv. 53.)

The *libellus conventionis*, in the system of civil process obtaining in the Lower Empire, was the notification of an action and its grounds delivered by a bailiff of the court (viator, executor) to a defendant, who, on the receipt of it, had to give security for his appearance before the *judec*. It thus, in the *extraordinaria judicia*, replaced the old *vocatio in jus*. *Condictio ex lege* is literally a ‘condition under a statute.’ (See Introd. sec 111.)

25. *Quadrupli veluti furti manifesti, item de eo, quod metus causa factum sit, deque ea pecunia, quae in hoc data sit, ut si, cui datur, calumniese causa negoli um aliqui faceret vel non faceret: item ex lege condiciencia a nostra constitutiione oritur, in quadrupli condemnationem imponeos his exsequitoribus litium, qui contra nostra constitutio normam a reis quidquid exegerint.*

25. The quadruple value is sued for; as, for example, in an action for manifest theft, in an action *quod metus causae*, and an action relating to money given to any one to set on foot, or to desist from, a vexatious suit. The statutory condition is also for the quadruple value, which is established in our constitution against those officers of suits who demand anything from the defendant, contrary to the regulations of the constitution.

*Gal* iii. 189; *D* iv. 2. 14. 1; *D* iii. 6. 1. pr.; *C* iii. 2. 4.

*De ea pecunia quae datur.* Titius is bribed by some one to institute a vexatious suit, or he threatens to bring a vexatious suit,
and the person he threatens pays him not to bring it. In either case an action in quadruplum lies against him.

26. Sed furti quidem nec manifesti actio et servi corrupti a ceteris, de quibus simul locuti sumus, eo differt, quod hae actiones omnimodo duplum sunt: at illae, id est damni in jure ex lege Aquilia et interdum depositi, in initiatione duplicatur, in confinentem autem in simplum dantur: sed illa, qua de his competit, qua relieta venerabilibus locis sunt, non solum ininitione duplicatur, sed et si distuliter relieti solutionem, usque quo jussu magistratuum nostrorum conveniatur; in confinentem vero et antequam jussu magistratuum conveniatur solventem simpli redditur.

26. But an action of theft not manifest, and an action on account of a slave corrupted, differ from the others, which we have placed under the same head, in that they are always brought for double the value; but the others, that is, the action given by the lex Aquilia for a wrongful injury, and the action of deposit under pressure, are brought for the double value in case of denial; but if the defendant confesses, the single value only can be recovered. In actions brought for things given to sacred places, double is recovered, not only on the denial of the defendant, but also on payment being delayed until a magistrate orders an action to be brought; but it is the single value only that can be recovered, if the debt is acknowledged, and paid before such an order is given.

GAI. iv. 9, 171, 173; C. i. 8. 46. 7.

27. Item actio de eo, quod metus causa factum sit, a ceteris, de quibus simul locuti sumus, eo differt, quod ejus natura tacite contingitur, ut, qui judicis jussu ipsam rem actori restituat, absolvatur. Quod in ceteris casibus non ilia, sed omnimodo quisque in quadruplum condemnatur, quod est et in furti manifesti actione.

27. The action quod metus causa differs also from the other actions included under the same head, because it is tacitly implied in the nature of this action, that a defendant, who, in obedience to the command of the judge, restores the things taken, ought to be acquitted; in all the other actions, on the contrary, the defendant is always condemned to pay the fourfold value, as, for instance, in the action of manifest theft.


The actio quod metus causa was given to a person who had, while under constraint from the fear of actual or threatened violence, alienated anything, created real rights, or entered into an obligation. It could be brought against any one who profited by what had been done. (D. iv. 2. 14. 3.) The action was, as the text informs us, arbitraria. (See Introd. sec. 106.)

28. Actionum autem quedam bona fidei sunt, quedam stricti juris. Bona fidei sunt ha: ex empto, vendito, locato, conducto, negotiorum gestorum, mandato, deposito, pro socio, tutela, commodati, pigneratoria, familiae erosisundae, communis dividundo, scriptoribus verbis, quae de estimato proponitur, et ea, que ex permutatione competit, et hereditatis petito. Quamvis enim usque adhuc incertum erat, sive inter

28. Again, some actions are bona fidei, some are stricti juris. Of those bona fidei there are the following:— the actions empti and venditi, locati and conducti, negotiorum gestorum: those brought on a mandate, deposit, partnership, tutelage, loan, or pledge: the action familiae erosisundae; that communis dividundo; the action scriptoribus verbis, arising from a commission to sell at a fixed price, or an exchange; and the demand of an in-
bonae fidei judicia communes et numerosa sit sive non, nostra tamen constitutione aperte eam esse bonae fidei disquisit. heritatione, For although it was, till recently, doubtful whether this last action should be included among those bonae fidei, our constitution has clearly decided that it is to be included among them.

GAL. iv. 62; C. iii. 81. 12. 3.

We here enter on the fifth division of actions, that, namely, according to the powers given to the judge, and according to which they are divided into actiones bonae fidei, actiones stricti juris, and actiones arbitrariae.

In actions bonae fidei, the words ex bona fide, or some equivalent expression, were permitted to be added to the formula, so that the intentio, which was always incerta, ran, quicquid dare, or facere, or praestare oportet ex bona fide. The actions in which this was permitted were all praeatorian. Justinian here gives a list of them; and probably, though not quite certainly, the list is meant to be a complete one. The principal effects of this addition to the formula were:—(1) That all circumstances tending to show dolus malus were taken into consideration, without an exception dolii malii being inserted. (D. xxx. 84. 5.) (2) Every assistance which the consideration of customs and common use could give to the determination of the particular question was permitted to affect the decision of the judge. (D. xxi. 1. 31. 20.) (3) The judge would notice any counter claims which the defendant might have arising out of the same set of circumstances which gave rise to the action of the plaintiff (GAL. iv. 63), and would provide for future contingencies, as, e.g., in an action pro socio, he met the case of one partner having taken on himself liabilities not as yet enforceable. (D. xvii. 2. 38. pr.) (4) And, lastly, interest was due on the thing withheld from the time it ought to have been given. (D. xxii. 1. 32. 2.)

In the actions stricti juris, the judge was obliged to adhere strictly to the principles of the civil law. Dolus malus, or counter claims, could not be taken into consideration unless exceptions were inserted bringing them before the notice of the judge. And interest could not generally be claimed from before the time of the litis contestatio, except by special stipulation. (D. xii. 1. 31.) It was the actions derived from the jus civile, i.e. real actions and conditions, that were stricti juris. That a real action should, as in the case of the petitio hereditatis, be bonae fidei, was quite an exception. But the petitio hereditatis had characteristics which allied it with personal actions, habet praestationes quasdam personales. (D. v. 3. 25. 18.) It could only be brought against those who possessed an inheritance (1) pro herede, i.e. as heir or bonorum possessor, or (2) pro possessor. Pro possessor possidet praedae qui interrogatus cur possidet, responsurus sit quia possideo, i.e. a possessor who does not pretend to justify his possession by any legal title. (D. v. 3. 11 and 12.) And not only was the
petitio hereditatis thus personal in the sense of being limited to two classes of persons, but it had some of the consequences of a personal action. By it the plaintiff could recover from the possessor moneys he had derived from the inheritance, and it could be brought against debtors of the deceased to make them pay what they owed to the inheritance in case these debtors claimed to retain their debts as being the right heirs. (D. v. 3. 13. 15; D. v. 3. 42.) The jurists had been divided on the point whether in a petitio hereditatis cogniscance could be taken of dolus matus without an exceptio. Justinian decided that it could, the action being treated as one bona fidei.

Actiones arbitrariae are treated of in paragr. 31.

An action praescriptis verbis, otherwise in factum praescriptis verbis, or civilis in factum, was, as we have elsewhere said, an action in which at the head of the formula were placed words stating the facts giving rise to a contract which did not come under any of the heads of contracts bearing a particular name. Of these actions, which were always bona fidei and in jus concepsae, the two mentioned in the text are only examples. In the contract permutatio, each party made a contract re, i.e. by depositing the thing bartered with the other; but the thing given was not given as a mutum, a commodatum, a depositum, or a pignus, and therefore the circumstances had to be stated specially. The action de estimato was given when a thing was entrusted to another to sell for a certain sum; the agent being permitted to retain all he received above that given, and to give back the thing if he could not obtain the price fixed. This was not precisely a locatio, a societas, or a mandatum, and therefore the action was given in the form of one praescriptis verbis. (See Bk. iii. Tit. 13. 2. note 4.)

29. Fuerat antea et rei uxoriei actio ex bona fidei judiciis: sed cum, pleniorem esse ex stipulatu actioinem invenientes, omne jus, quod res uxoriei ante habebat, cum multis divisionibus in ex stipulatu actionem, quae de dotibus exigendi proponitur, transtulimus, merito rei uxoriei actio sublatas, ex stipulatu, qua pra ea introducta est, naturam bona fidei judicii tantum in exactione dotis meruit, ut bona fidei sit. Sed et tacitam ei dedimus hypothecam: preferri aemt antii aliis creditoribus in hypothecis tunc censimus, cum ipsa mulier de dote sua experiatur, cujus solius providentia hoc induximus.

29. Formerly, there was the action rei uxoriae, which was included among the actions bona fidei; but finding the action ex stipulatu to be more advantageous, we have transferred, but with many distinctions, to the action ex stipulatu, when given for the recovery of marriage portions, all the effects before attaching to the action rei uxoriae; the actio rei uxoriae being then reasonably done away with, the action ex stipulatu, by which it is replaced, naturally assumed the character of an action bona fidei, but assumed it only when brought for the recovery of a marriage portion. We have also given the wife an implied mortgage, but when we prefer her to mortgagees, we do so only whenever she herself sues for her marriage portion. For it is to her personally that we grant the privilege.

D. iv. 8. 8; C. v. 18; C. viii. 18. 12. 1.
In order to enforce the restitution of a marriage portion after
the dissolution of the marriage, the actio rei uxorii was given;
but sometimes the wife or other person entitled (Bk. ii. Tit. 7. 3.
ote), not content with the remedy, stipulated with the husband
for the restitution, and thus secured the power of bringing an
action ex stipulatu.

In the actio rei uxorii, which was an action bonae fidei, the
husband could, for different reasons, make certain deductions in
his restitution of the dos. He had three years in which to make
restitution by thirds of all things quae numero, pondera, men-
surave constant; he could oppose to the action the beneficium
competentiae, that is, he was only condemned to pay quantum
facere potest; and he could deduct the useful as well as the
necessary expenses he had incurred in managing the dotal pro-
erty. (See paragr. 37.) The wife could not transmit the action
to her heirs, and if her husband was deceased, and she had
benefited by his testament, she could not both accept the gift
under the testament, and also ask for the restitution of her portion,
but was obliged to abandon either the one advantage or the other.
(Ulp. Reg. 6. 6. et seq.)

None of these drawbacks attended the action ex stipulatu.
There could be no deductions, no delay in payment, no regard to
the husband’s power to pay. The action passed to the heirs of the
wife, and she could take, in addition, anything given her by her
husband’s testament.

Justinian united the two actions into one. However the dos
might have been given, and whether there had really been any
stipulation to restore it, a tacita stipulatio was, in every case, to
be supposed. The actio rei uxorii was to be abolished, and all
actions for the restitution of a marriage portion to be brought ex
stipulatu. But then, this action was treated as one bonae fidei,
and produced most of the advantages which the husband had
enjoyed under the actio rei uxorii. He had a year in which to
restore all moveables; he could claim the beneficium competentiae,
and might deduct the necessary expenses he had been put to.
(See paragr. 37.) Lastly, in order to make the position of the
wife more secure, Justinian gave her an implied mortgage on the
effects of her husband, taking priority over all other incumbrances
—a privilege, however, personal to herself. (C. v. 13. 1.)

80. In bonae fidei antem judiciis
libera potestas permitti videtur judici ex bono et uqno estimandi,
quas actiones restitutus debat. In
quo et illud continetur, ut, si quid
invicem actorem prestare oporteat,
co compensato, in reliquum is, cum
quo actum est, condemnari debet.
Sed et in strictis judiciis ex reposito
divi Marci opposita doli mali excepto
compensatio inducebatur. Sed
nostra constitutio eas compensa-

80. In all actions bonae fidei full
power is given to the judge to deter-
mine, according to the rules of equity,
how much ought to be restored to the
plaintiff; whence it follows that when
the plaintiff also is found to be indebted
to the defendant, the debtor ought to
be allowed to set off the sum due to
him, and to be condemned only to pay
the difference. Even in actions stricti
juris, a rescript of the Emperor Marcus
permitted a set-off to be claimed, by

G G
The subject of compensatio will be treated of more fully under paragr. 39.

81. Some actions, again, are called arbitrary, as depending upon the arbitrium of the judge. In these, if the defendant does not, on the order of the judge, give the satisfaction awarded by the judge, and either restore, exhibit, or pay the thing, or give up a slave that has committed an injury, he ought to be condemned. Of these arbitrary actions some are real and some personal: real, as the actions Publiciana, Serviana as to the property of a farmer, and quasi Serviana, also called hypothecaria; personal, as those by which a suit is commenced on account of something done through fear or fraud, and that by which something is sought which was promised to be paid at a particular place. The action ad exhibendum also depends on the arbitrium of the judge. In these actions, and others of a like nature, the judge may determine, according to the principles of equity and the circumstances of the particular case, the satisfaction which the plaintiff ought to receive.

In the actiones arbitrariae the judge was instructed only to condemn the defendant in a sum of money, if he did not satisfy the demand of the plaintiff, supposing that demand was well founded. When, therefore, the judge had ascertained the validity of the plaintiff's claim, he issued an order (arbitrium) to the defendant, and at the same time condemned him to pay, in case of his refusal, a sum proportionate to the value of what was claimed. quanti ea res erit. This was fixed, if the defendant, when ordered to restore a thing, had fraudulently put it out of his power to restore it, by the plaintiff himself, who stated on his oath (D. xii. 3. 5) the amount he considered fairly due to him as compen-
sation; otherwise the *judex* fixed the amount according to the circumstances of the case; and, at any rate in the time of Ulpian, the *manus militaris* was employed, by the direction of the judge, to put the plaintiff in possession, when the defendant had the thing in his possession and would not give it up. (D. vi. 1. 68.)

Actions in *rem* were enforced by being made *arbitrariae*, and all actions in *rem* were so enforced. (See Tit. 17. 2.) In real actions the satisfaction ordered by the judge was to restore the thing. In the *actio Serviana* and the *actio quasi-Serviana*, the *arbitrium* was alternative, and the defendant was ordered either to pay the debt or to give up the thing pledged, and in default was condemned to the amount of the value of the thing pledged. (D. xx. 1. 16. 3.) It is to this case that the words *'vel solvat'* in the text refer. When the thing claimed was restored, the *condemnation* might still be made available for the *fructus*. (D. vi. 1. 68.) Among personal actions, those *quod metus causa*, *de dolo male*, and *ad exhibendum* were *arbitrariae*, because they were brought virtually to have something restored or exhibited. The action *de eo quod certo loco promissum est* was made *arbitraria*, for the peculiar reason mentioned below.

With respect to the *actio quod metus causa*, see paragr. 25 and 27. The *actio de dolo male* was given to avoid the consequences of a *dolus malus*, but only when there was no other means of avoiding them (D. iv. 3. 1. 1); it was *in simpium*; it subjected the defendant, if condemned, to infamy, and had to be brought within a year. (D. iv. 3. 29.)

As will be found from Tit. 12. 2, in every action the defendant was to be absolved if, before sentence was given, he satisfied the demands of the plaintiff.

*Qua id, quod certo loco promissum est, petitur.* When a contract was made in which it was agreed that payment should be made at a particular place, the creditor could not demand payment anywhere else. If he did, he asked for more than was his due, and was subject to the consequences of a *plus-petitio*. (See paragr. 33.) Supposing, indeed, the action brought on the obligation was one *bonas fidei*, or had an *intentio incerta*, as being for an undetermined object, then, as the judge would take into account all the circumstances of the case, and allow the defendant the benefit of whatever difference being sued in a wrong place could be supposed to make to him, the consequence of this *plus-petitio* would be immaterial. But if the action was *stricti juris* and for a thing certain, the plaintiff could not have brought it elsewhere than in the place named without incurring the consequences of a *plus-petitio*, had not the praetor come to his relief and given him the *actio arbitraria* mentioned in the text. By this action the creditor was allowed to sue in a place other than that agreed upon, but the praetor compensated the debtor by giving him an advantage. The action was made *arbitraria*, and the debtor was ordered to pay what the creditor claimed, or to give security that
it would be paid in the place where due. If he did not do this, then in the *condemnation* the *judex* fixed an amount in which the advantage it might have been to the debtor to have paid in the particular place was taken into consideration. (See paragr. 33.) The *praetor*, however, perhaps only allowed the creditor to take advantage of this action if the defendant abstained himself from the place where the payment ought to have been made (D. xiii. 4. 1), and then the creditor could bring this action either at Rome or in any place where the defendant had a domicile, or in any place where the defendant consented to appear. (D. v. 1. 19. 4.)

82. *Curare autem debet judex, ut omnimodo, quantum possible si sit, certe pecunia vel rei sententiam ferat, etiam si de incerta quantitate apud eum actum est.*

82. A judge ought, as much as possible, to take care that his sentence awards a thing or sum certain, even though the claim submitted to him may have been for an uncertain quantity.

GAI. iv. 48, 52; C. vii. 4. 17.

*Certa pecunia vel rei.* Before the formulary system the judgment might be either to give a thing or to pay a sum of money. Under the formulary system the *condemnation* was always to pay a sum of money. (GAI. iv. 48.) Under the system of *judicia extraordinaria* a return was made to the old law, and the *condemnation* might be not only for a certain sum of money, but also for any other definite thing, that thus the object of the demand might be directly obtained.

83. *Si quis agens in intentione sua plus complexus fuerit, quam ad eum pertinet, causa cadebat, id est rem amittebat, nec facile in integrum a praetore restituebatur, nisi minor erat viginti quinque annis. Huic enim sicut in allis causis causa cognita succurrebatur, si lapsus juventutem fuerat, icta et in hac causa succurriri solitum erat. Sane si tam magna causa justi erroris interveniebat, ut etiam constantissimus quisque labi posset, etiam majori viginti quinque annis succurrebatur: veluti si quis totum legatum petierit, post deinde prolati fuerint codicilli, quibus aut pars legati adempta sit aut quibusdam alios legatos data sunt, quae efficiebant, ut plus petisse videretur petitor quam dodrantem, ad quem ideo leges Falcidiæ legatos minuebantur. Plus autem quattuor modis petitur: re, tempore, loco, causa. Re: veluti si quis pro decem aureis, qui ei debebantur, viginti petierit, aut si is, cujus ex parte res est, totam eam vel majore ex parte suam esse intenderit. Tempore: veluti si quis ante diem vel ante conditionem pe-

83. Formerly, if a plaintiff claimed in his *intention* more than his due, he failed in his action, that is, he lost the thing owing to him, nor was it easy for him to get reinstated by the *praetor* unless he was under the age of twenty-five years; for in this, as well as in other cases, in which aid was given on good ground for it being proved, it was usual to aid the plaintiff if it appeared that he had made an error owing to his youth. If, however, the reasons which betrayed him into the mistake were such as might have misled the most careful man, relief was given even to persons of full age. For example, if a legatee had demanded his whole legacy, and codicils were afterwards produced by which a part of it was taken away, or new legacies given to other persons, so that the plaintiff appeared to have demanded more than the three-fourths to which the legacies were reduced by the *lex Falcidiæ*. A man may demand more than what is due to him in four ways—in respect to the thing, to the time, to the place, and to the circumstances. In respect to the thing, as when the plaintiff, instead of ten *aurei,*
tierit. Qua ratione enim qui tardius solvit, quam solvere debet, minus solvere intellegitur, eadem ratione, qui prematur petit, plus petere videtur. Loco plus petitur, veluti cum quis id, quod certo loco sibi stipulatus est, ali o loco petit sine commensurato aliquo loci, in quo sibi dari stipulatum fuerit: verbi gratia si quis, qui ita stipulatum fuerit 'Ephesi dare sponde?' Rome pure intendent dari sibi oportere. Ideo autem plus petere intellegitur, quis utilitatem, quam habuit promissor, si Ephesi solveret, admittit ei pura intentione: propter quam causam aliquo loco petendi arbitraria actio posse potuit, in qua scilicet ratio habetur utilitatis, quae promissor competitura fuisse, si illo loco solveret. Quae utilitas plerumque in mercibus maxima inventur, veluti vino, oleo, frumento, quae per singulas regiones diversas habent pretia: sed et pecuniae numeratae non in omnibus regionibus sub idem usus ferebantur. Si quis tamen Ephesi petat, id est eo loco petat, quo, ut sibi detur, stipulatus est, pura actione recte agit: idque etiam pretor monstrat, scilicet quia utilitas solvendi salva est promissori. Huic autem, qui loco plus petere intellegitur, proximus est, qui causae plus petit: ut ece si quis sit a te stipulatum sit 'hominem Stichum aut decem aureos dare sponde?' deinde alterutrum petat, vel uti hominem tantum aut decem aureos tantum. Ideo autem plus petere intellegitur, quia in eo genere stipulationis promissoris est electio, utrum pecuniam an hominem solvere malit: qui igitur pecuniam tantum vel hominem tantum sibi dari oportere intendit, eripit electionem adversario et eo modo suam quidem meliorem condicionem facit, adversarii vero sui deterioriorem. Qua de causa talis in ea re prodata est actio, ut quis intendat, hominem Stichum aut aureos decem sibi dari oportere, id est ut eodem modo peteret, quo stipulatus est. Preterea si quis generaliter hominem stipulatum sit et specialiter Stichum petat, aut generaliter vinum stipulatum, specialiter Campanum petat, aut generaliter purpuram stipulatum sit, deinde specialiter Tyriam petat: plus petere intellegitur, quia electionem which are due to him, demands twenty; or if, although owner of but part of some particular thing, he claims the whole, or a greater share than he is entitled to. In respect to time, as when the plaintiff makes his demand before the day of payment, or before the performance of a condition; for just as he who does not pay so soon as he ought is held to pay less than he ought, so whoever makes his demand prematurely, demands more than his due. In respect to place, as when any person sues in another place for something stipulated to be delivered at a particular place, without mentioning the place fixed by the stipulation; for example, if, having stipulated in these words, 'Do you promise to give at Ephesus?' any one should afterwards bring an action at Rome, merely stating that the defendant ought to demand. In this case the plaintiff would demand more than his due, as he would, by his intentio thus conceived simply, deprive the promissor of the advantage he might have in paying at Ephesus. And it is thus that a plaintiff, suing in a place different from that agreed on, has provided for him an arbitrary action in which allowance is made for the advantage which the debtor might have reaped from paying his debt in the place agreed on. This advantage is generally found to be most considerable in different kinds of merchandise, as in wine, oil, corn, of which the price differs in different places. Money itself, again, is not lent everywhere at the same interest. But if a man brings his action at Ephesus, that is, at the place fixed by the stipulation, he may validly bring an action without mention of the place agreed on for payment: and this the pretor, too, points out, because all the advantage the debtor will have in paying at the particular place is secured to him. In respect to the circumstances, he who demands more than his due in this way approaches very nearly to him who demands more than his due in respect of place; as, for instance, if any one stipulates thus with you, 'Do you promise to give either your slave Stichus or ten aurei?' and then demands either the slave only, or the money only. He would in this case be held to have demanded more than his due, because in such a stipulation the promissor has the right to choose whether he will give the slave or the
adversario tollit, cui stipulatiónis jure libérum fuit uid solvere, quam quod peteretur. Quin etiam licet vilissimum sit, quod quis petat, nihil minus plus petere intellegitur, quia sepe accidit, ut promissori faciulus sit ilud solvere, quod majoris pretii est. Sed hae quidem ante in usu fuerant. Postea autem lex Zenoniana et nostra rem coar-tavit, et si quidem tempore plus fuerit petitum, qui statui oportet, Zenonis dixit memoriae loquitur constituü: sin autem quantitate vel alio modo plus fuerit petitum, omne, si quid forte damnum ut in sportulis ex hae causa acciderit ei, contra quem plus petitum fuerit, commissa tripli condemnatiónes, sicut supra diximus, puniatur.

money. He, therefore, who claims either the money only, or the slave only, takes away his adversary’s power of choice, and thus makes his own condition better, and that of his adversary worse; and accordingly an action has been provided by which in such a case the plaintiff maintains that either the slave Stichus ought to be given him, or the money, and thus makes a demand in conformity with the stipula-tion. So, too, if a man stipulates generally that a slave, or wine, or purple be given him, and afterwards sues for the slave Stichus, the wine of Campania, the purple of Tyre, he is held to demand more than his due, for he thus takes the power of election from his adversary, to whom it was open by the terms of the stipulation to pay something different from what is de-manded. Nay, even if the thing actually sued for is the least valuable of its kind, yet the plaintiff is held to claim more than his due, because it is often easier for the debtor to pay a thing of greater value. Such was the law formerly in use. But considerable limitations have been imposed on its operation by the constitution of the Emperor Zeno, and by our own. If more than is due is demanded in re-spect of time, the constitution of Zeno of glorious memory decides what must be done; if in respect of quantity, or in any other way, then the plaintiff is to be punished, as we have said above, by having to pay a sum triple the amount of any loss sustained by the defendant, for example, by increased court fees.

Gal. iv. 53; D. iv. 4. 1. 1; D. iv. 6. 1. 1; D. xiii. 4; C. iii. 10. 1, 2.

Under the system of formulæ, a plus-petitio or pluris-petitio had the effect of making the plaintiff fail entirely in an actio stricti juris, when the error was in the intentio, and the intentio was for a thing certain. Supposing this were the case, as the formula would run si paret decem nummos &c., condemna, si non abvolve, then, if the defendant owed only nine nummi, he did not owe ten, and so the judex could not condemn him. The plain-tiff failed, and having once come in judicio, the litis contestatio operated as a novation of the cause of action (see Bk. iii. Tit. 29. 3 note), and, his original claim being thus cut away, he was left entirely without remedy, and could take no further proceedings to enforce his demand.

Of course, if the demand was for a thing uncertain, there could be no plus-petitio in this sense. If there was an error in
the *demonstratio*, the plaintiff was not at all prejudiced. If there was a mistake in the *condemnatio*, making it more unfavourable to the defendant than it ought to have been, it was the defendant who would be prejudiced; but the praetor would grant a new formula, and so rectify the mistake. (See Gal. iv. 58–60, reading in 57, *sed* (reus cum) iniquam formulam acceperit.)

Under the system of the *judicia extraordinaria* a *plus-petitio* would mean any claim in excess contained in the *libellus conventionis*. The text informs us of the mode in which such a mistake or misstatement was punished when the *plus-petitio* was not one *tempore*. If the *plus-petitio* was *tempore*, i.e. if the plaintiff sued before the proper time, he was condemned by the constitution of Zeno (C. iii. 10. 1) to wait double the time he ought originally to have waited, and, on renewing the action, to reimburse the defendant all expenses he might have been put to by the action improperly brought.

*Siue supra diximus* refers to the case of the *damnum* being the exaction of a larger fee by the officers of the court, as mentioned in paragr. 24.

84. *Si minus in intentione complexus fuerit actor, quam ad eum pertinuerat, veluti si, cum ei decem deberentur, quinque sibi dari oporteret. Sed quia totus fundus ejus esset, partem dimidiam suam esse petierit, sine periculo agit:* in reliquam enim nihil minus iudex adversarium in eodem judicio condemnat ex constitutione divae memoris Zеноnis.

84. *If a plaintiff includes less in his intention than he has a claim to, demanding, for instance, only five aurei when ten are due, or the half of an estate when the whole belongs to him, he runs no risk; for the judge may, by the constitution of Zeno of glorious memory, condemn in the same action the defendant to pay the remainder of what is due to the plaintiff.*

Gal. iv. 56; C. iii. 10. 1. 8.

Under the pretorian system, a plaintiff who claimed a less amount than was really due to him, could bring another action for the surplus if he waited until another praetor came into office. (Gal. iv. 56.) Zeno allowed the *iudex* to add the surplus in condemning the defendant.

85. *Si quis aliud pro alio intenderit, nihil eum periclitari placet, sed in eodem judicio cognita veritate errorem suum corrigeret si permittimus, veluti si, qui hominem Stichum petere debet, Erotem petierit, aut si quis ex testamento sibi dari oportere intenderit, quod ex stipulatu debetur.*

85. *When a plaintiff demands one thing instead of another, he incurs no risk. For if he discovers the truth, he is allowed to correct his mistake in the same action; as if he should demand the slave Eros instead of Stichus, or should claim as due by virtue of a testament what is really due upon a stipulation.*

Gal. iii. 55.

In the time of Gaius, a plaintiff who demanded one thing instead of another, lost the action, but could recover the thing really due in a subsequent action. Justinian permitted the mistake to be retrieved in the same action, as the text informs us.
36. There are, again, certain actions by which we do not always sue for the whole of what is due to us, but sometimes for the whole, sometimes for less. For example, when a suit is brought so as to form a claim against the peculium of a son or a slave, then, if the peculium is sufficient to answer the demand, the father or master is condemned to pay the whole debt; but if the peculium is not sufficient, he is condemned to pay only to the extent of the peculium. We will hereafter explain, in its proper place, how the peculium is to be estimated.


We here enter on another division of actions, according to which actions, by which the whole of what was due was obtained, are distinguished from those by which sometimes the whole, sometimes less than the whole, of what was due was obtained.

Suo ordine; see next Title.

37. Item si de dote judicio mulier agat, placet, etenus maritum condemnari debere, quatenus facere possit, id est quatenus facultates ejus patriuntur. Itaque si dotis quantitati concurrent facultates ejus, in solidum damnatur: si minus, in tantum, quantum facere potest. Propter retentionem quoque dotis repetitio minuitur: nam ob impensa in res dotales factas marito retentio concessa est, quia ipso jure necessariis sumptibus dos minuitur, sicut ex latioribus digestorum libris cognoscere licet.

38. Thus, too, if a wife brings an action for the restitution of her dos, the husband must be condemned to pay only as far as he is able, i.e. as far as his means permit. Therefore, if his means admit of his paying the whole amount of the dos, he is condemned to pay the whole; if not, he must pay as much as it is in his power to pay. The claim of a wife for the restitution of her dos may also be lessened by the husband having a right to retain something; for the husband is permitted to retain a sum equivalent to the expenses he has incurred upon the things given, since the marriage portion is by law diminished by the amount of all necessary expenses, as may be seen in fuller detail in the Digest.

D. xxiv. 8. 12, 14; D. xxv. 1. 5.

The privilege of having the condemnatio reduced, duntaxat in id quatenus facere potest, i.e. of being condemned only in an amount which he could pay without being reduced to a state of destitution (D. l. 17. 173. pr.), a privilege called by the commentators the beneficium competentiae, was accorded to the defendant in several other cases besides those mentioned in the text and in the next paragraph and in paragr. 40. We may instance the case of one brother sued by another, and every case arising between man and wife, except claims grounded on delicts. (D. xlii. 1. 20.) This privilege was always personal, and did not avail either heirs or sureties.

If the debtor subsequently had funds, he had to pay what
under the beneficium competentiae he left unpaid. (C. v. 18. 8.)
In calculating how much the debtor could pay, account was
only taken of what he possessed, without deduction for what he
owed, except in the one case of the donor, who might deduct his
debts. (D. xlii. 1. 19.)

Prop iter retentionem dotis. The husband might deduct the
amount of all necessary expenses incurred in the management
of the property constituting the marriage portion. If the ex-
enses had been only profitably and not necessarily incurred,
that is, were utiles, and not necessaria, Justinian only allowed the
husband to bring an actio mandati, or an actio negotiorum gesto-
rum, to reimburse himself; whereas, previously, he had been able to
deduct such expenses as well as those that were necessaria.
(D. l. 16. 79; C. v. 13. 1. 5.)

88. Sed et si quis cum parente suo
patronove agat, item si socius cum
socio judicio societatis agat, non plus
actor consequitur, quam adversarius
ejus facere potest. Ideem est, si
quis ex donatione sua conveniatur.

88. If any person sues his ascendant
or patron, or one partner sues another
in an action of partnership, he cannot
obtain a greater sum than his adver-
sary is able to pay. It is the same
when a donor is sued for his gift.

D. xlii. 1. 16, 19.

89. Compensations quoque op-
opposite plerumque efficiunt, ut minus
quisque consequatur, quam ei debe-
atur: namque ex bono et sequo,
habitata ratione ejus, quod invicem
actorem ex eadem causa præstare
oporeret, in reliquum sum, cum quo
actum est, condemnare licet, sicut
jam dictum est.

89. Sets-off too, opposed by one
party to the claims of the other, often
bring about the result that the plaintiff
recovers less than is due to him; for the
judge, proceeding on equitable prin-
ciples, may take account of whatever
the plaintiff ought to make good in
reference to the same set of circum-
stances, and may condemn the de-
fendant to pay the balance only, as has
already been observed.

GAI. iv. 61.

If the defendant was not only a debtor but a creditor of the
plaintiff, if he had something owing to him from the plaintiff as
well as owed something to him, it was evidently the most conve-
nient way that he should be allowed to balance one debt against
the other (compensatio, pendere cum), and only account for the
surplus, supposing a surplus was still due from him.

Under the prætorian system, in all actions bonæ fidei, the judge,
who could take all the circumstances of the case into his consi-
deration, set off, as a matter of course, any debt due to the defen-
dant from the plaintiff in consequence of the same set of circum-
stances (ex eadem causa) by which the debt on which the action
was brought became due. (GAI. iv. 61.) In one case, however, viz.
that of a banker (argentarius), a much stricter system prevailed.
The argentarius could only sue a customer for the sum due to
him after allowing for what he owed to the customer. If he sued
for more, it was a plus-petitio. (GAI. iv. 64.) The bonorum
emptor, or purchaser of an insolvent’s estate, had also to make a
deduction of what was due to the defendant from the insolvent when he sued a debtor of the insolvent. (Gai. iv. 65.) Between this deductio and the compensatio required from the argentarius there were some differences: compensatio was only of things of the same kind, only of debts due, and had to be inserted in the intentio; whereas the deductio was of things of different kinds, of debts not yet due as well as debts due, and being inserted in the condemnatio did not expose the plaintiff to the risk of plus-petition. (Gai. iv. 66–68.) In the actions stricti juris, which arose from unilateral, not bilateral contracts, there could be no reciprocal rights, as in a bilateral contract, giving the defendant a claim ex eadem causa. But the rule grew up and was confirmed by a rescript of Marcus Aurelius (see par. 30), dolo facit qui petit quod redditurus est. (D. xliv. 4. 8. pr.) If the plaintiff claimed a sum which directly he had obtained it he would have to pay back to the defendant, he was guilty of a dolus; he had acted as if he had a right to the money, whereas he had not. Accordingly the defendant could avail himself of the exception of dolus. What the effect of this exception was is not certain. Some think that if the plaintiff was found to owe the defendant anything of a similar kind, although ex dispari causa, which he had not allowed for in stating the amount of his claim, he entirely failed in his action. He did not recover any surplus which might be really due to him. The exception stopped the action altogether. The formula ran: Si in ea re nihil dolo malo Auli Agerii factum sit neque fiat... condemna; si non paret, absolve. Dolus major did appear, and all the iudex could do was to absolve the defendant. (Paul. Sent. ii. 5. 3.) Others suppose that the defendant had to pay any balance found to be due by him. (See Demangeat, ii. 629.)

But we must not suppose that compensatio was originally looked on as a means of extinguishing an obligation. In theory of law, each debt subsisted separately. Certainly in the case of the argentarius it is hard to draw a line between an extinction of obligation and the way in which debts due to customers were necessarily deducted; but it was necessary that the debts due to and from the argentarius, although ex dispari causa, should be in eadem re, that is, should both consist, for instance, of money or wine. This was an exceptional case, and, generally speaking, the two debts clearly subsisted together, although, when, by submitting the facts to the knowledge of the iudex in the case of actions bona fidei, and by the exceptio doli in the action of law, the set-off was claimed, its effects were retroactive, and may be said to have commenced from the moment when the two debts first began to exist together. (C. iv. 31. 4.)

Under Justinian the debts were held to operate as mutually extinguishing each other ipso jure. When the parties came before the iudex, he ascertained their respective claims on each other, and if there was, on the whole, a balance in favour of the plaintiff, awarded the amount to him. All the old distinctions were done
away, and it no longer made any difference whether the two debts arose from the same transaction, or whether things of the same kind were payable (the words ex eadem causa in the text are, therefore, under Justinian’s legislation, inaccurate). But Justinian made it requisite that the defendant’s claim should be clearly well founded, and that the amount should be at once ascertainable, and not need further inquiry to determine it (causa liquida) (see C. iv. 31. 14. 1), and he would not allow any set-off to an actio de-
position.
(See paragr. 30.)

40. Eum quoque, qui creditoribus suis bonis cessit, si postea aliquid adquisierit, quod idoneum emolumentum habeat, ex integro in id, quod facere potest, creditoribus cum eo experituntur: inhumanum enim erat spoliatum fortunis suis in solidum damnari.

40. So, when a debtor who has made a cession of his goods to his creditors subsequently acquires something of an advantageous character, the creditors may compel him by a fresh action to pay as much as he is able, but not more; for it would be inhuman to condemn a man to pay the full amount who has already been deprived of all his property.

D. xiii. 8. 4, 6.

Trt. VII. QUOD CUM EO, QUI IN ALIENA POTESTATE EST, NEGOTIUM GESTUM ESSE DICTUR.

Quia tamen superius mentionem habuimus de actione, que in peculium filiorumfamilias servorumque agitur: opus est, ut de hac actione et de ceteris, que sororum nomine in parentes dominosve dari solent, diligentius admoreamus. Et quia, sive cum servis negotium gestum sit sive cum his, qui in potestate parentis sunt, fere eadem jura servavantur, ne verbosa fiat disputatio, dirigamus sermonem in personam servi dominique, idem intellecturii de libris quoque et parentibus, quorum in potestate sunt. Nam si quid in his propriis observetur, separatim ostendemus.

We have already spoken of the action which may be brought relative to the peculium of filiofamilias or of slaves. And we must now speak of it more fully, and also of all other actions which may be brought against ascendants and masters as representing children and slaves. But, as the law is almost the same, whether the dealing is with a slave, or with one under the power of an ascendant, to avoid pro-
firixity, we will treat only of slaves and their masters, leaving what we say of them to be understood as applicable also to children and the ascendants, under whose power they are. For any-
thing which is peculiar to children and ascendants we will point out separately.

GAI. iv. 69.

By the strict rule of the civil law, the parent or master could not be bound or prejudiced by any act of a child or slave. But a sense of equity gradually broke in upon this rule, and, in certain cases, the contracts and delicts of persons alieni juris came to affect those in whose power these persons were.

This Title treats of the contracts of persons alieni juris, which were considered to concern the master or parent (1) whenever they were made by his order, whether expressly or by implication, and (2) whenever he had profited by them.
1. Si igitur iussu domini cum servo negotium gestum erit, in solidum pretor adversus dominum actionem pollicetur, sicelcit quia qui ita contrahit, fidel domini sequi videtur.

2. Eadem ratione pretor duas alias in solidum actiones pollicetur, quarum altera exercitatoria, altera institoris appellatur. Exercitória tunc locum habet, cum quis servum suum magistrum navis præposuerit et quid cum eo ejus rei gratis, cui præpositus erit, contractum fuerit. Ideo autem exercitória vocatur, quia exercitior appellatur is, ad quem cotidianus navis questus pertinet. Institoris tunc locum habet, cum quis tabernae forte aut calliæ negotiationi servum præposuerit et quid cum eo ejus rei causa, cui præpositus erit, contractum fuerit. Ideo autem institoris appellatur, quia qui negotiationibus præponitur, institores vocantur. Istas tamen duas actiones pretor reddit et si liberum quis hominem aut alienum servum navi aut tabernæ aut calliæ negotiationi præposuerit, sicelcit quia eadem equitatis ratio etiam eo casu intervenièbat.

1. Thus, then, if any one deals with a slave acting under the command of his master, the pretor will give an action against the master for the whole of what is due under the contract; inasmuch as, in this case, the person who contracts does so as relying on the faith of the master.

GAL. iv. 70.

Jussu domini; this extended to cases where the master subsequently ratified the contract, the ratification being equivalent to a mandate. (D. xvi. 4. 1. 6.)

If the slave had been merely the instrument of his master, if, for instance, the master arranged that money borrowed for himself should be told out to his slave, the pretor would give a conductio, not an action quod iussu. (D. xv. 4. 5. pr.)

2. For the same reason the pretor also gives two other actions for the whole due, the one called the actio exercitatoria, the other the actio institoris. The action exercitatoria may be brought when a master has made his slave commander of a vessel, and a contract has been entered into with the slave relating to the business he has been appointed to manage. This action is named exercitatoria, because he, to whom the daily profits of a ship belong, is said to be an exercitior. The action institoris may be brought when a master has entrusted his slave with the management of a shop or any particular business, and a contract has been made with the slave relating to the business he has been appointed to manage. This action is called institoris, because persons to whom the management of a business is entrusted are called institores. The pretor likewise permits these two actions to be brought if any one commits to a free person, or to the slave of another, the management of a ship, a warehouse, or any particular affair, as the principle of equity is the same.

GAL. iv. 71.

Liberum hominem. We have seen at how late a period of Roman law it was that one freeman could act for another. (See Bk. iii. Tit. 26. pr. note.) It was, in fact, by extending these actions institoris and exercitatoria, so as to embrace the case of a mandatory, that the pretor made the principal directly responsible, and thus enabled him to be really represented by the agent.

3. Introduxit et aliam actionem 3. The pretor has also introduced
prætor, quæ tributoria vocatur. Namque si servus in peculiari merce, sciente domino, negotiatur et quid cum eo ejus rei causa contractum erit, ita prætor jus dicit, ut, quidquid in his mercibus erit quodque inde receptum erit, id inter dominum, si quid ei debiatur, et ceteros creditorum pro rata portione distribuat. Et quia ipsi domino distributionem permittit, si quis ex creditoribus queratur, quasi minus ei tributum sit, quam oportuerit, hanc ei actionem accommodat, quæ tributoria appellatur.

GAI. iv. 72; D. xiv. 4. 1; D. xiv. 4. 5. 11; D. xiv. 4. 7. 1, 2.

The action called tributoria was only given against the master when there was fraud (dolus) in the distribution; but there would be dolus directly the master had notice that a creditor had received nothing, or less than his share. (D. xiv. 4. 7. 2, 3.)

4. Præterea introducta est action de peculio deque eo, quod in rem domini versum sit, ut, quamvis sine voluntate domini negotium gestum erit, tamen sive quid in rem ejus versum fuerit, id totum præstare debeat, sive quid non sit in rem ejus versum, id eatus præstare debeat, quatenus peculium petitur. In rem autem domini versum intellectualiter, quidquid necessario in rem ejus impenderitur servus, veluti si mutuatque pecuniam creditoribus ejus solventur, aut sedifica ruentia fulserit, aut familiæ frumentum emerit, vel etiam fundum aut quamlibet aliæm rem necessarin merces erit. Itaque si ex decem utpota aureis, quos servus tuus a Titio mutuos accepit, creditorij tuo quoque aureos solventur, reliquis vero quinque quolibet modo consumpersit, pro quinque quidam in solidum damnari debes, pro ceteris vero quinque eatus, quatenus in peculio sit: ex quo scilicet apparat, si tot decem aurei in rem tuam versi furenter, totos decem aureos Titium consequi posse. Licet enim una est action, qua de peculio deque eo, quod in rem domini versum sit, agitur, tamen duas habet condemnationes. Itaque judex apud quem ea actione agitur, ante dispiceræ solet, an in rem domini versum sit, nec aliter ad peculii estimationem transit, quam si aut nihil in rem domini another action called tributoria; for, if a slave with the knowledge of his master trades with his peculium, and contracts are made with him in the course of business, the prætor ordinates that all the merchandise or money arising from his traffic shall be distributed between the master, if anything is due to him, and the rest of the creditors of the slave in proportion to their claims. And as the master himself is permitted to make the distribution, if any creditor complains that he has received too small a share, the prætor will permit him to bring the action tributoria.

4. The prætor has also introduced an action relating at once to a peculium, and to whatever has been applied to the profit of the master, for although the slave contracts without the consent of his master, yet the master ought, if he has profited by anything, to pay all up to the amount of his profit; if he has not received any profit, he ought to pay up to the amount of the slave's peculium. Everything is understood as profiting the master which is laid out in his necessary expenses by the slave; as, for instance, if the slave borrows money with which he pays the debts of his master, repairs his buildings in danger of falling; purchases wheat for the establishment, or land for his master, or any other necessary thing. Thus if your slave borrows ten aurei of Titius, pays five to one of your creditors, and spends five, you ought to be condemned to pay the whole of the first five, and so much of the other five as the slave's peculium would cover; whence it will appear, that if all the ten aurei had been spent to your profit, Titius might have recovered the whole from you; for although it is the same action in which the plaintiff seeks to obtain the peculium, and the amount by which the master has profited, yet this action contains two condemnations. The judge before whom the action is brought, first inquires whether the master has received any profit; and then, when he has ascertained that no
versum intellegatur aut non totum. Cum autem queritur, quantum in peculio sit, ante deductur, quidquid servus domino quive in potestate ejus sit, debet, et quod superest, id solum peculium intellegitur. Aliquando tamen id, quod ei debet servus, qui in potestate domini sit, non deductur ex peculio, veluti si is in hujus ipsius peculio sit. Quod eo pertinent, ut, si quid vicario suo servus debeat, id ex peculio ejus non deductur.

GAL. iv. 78; D. xiv. 5. 1; D. xv. 8. 3. 1; D. xv. 1. 17.

This action is generally called de peculio et in rem verso, because, in most cases, the judge had to take notice of both the profit derived by the master and of the amount of the slave's peculium. But in some cases, as, for instance, where the slave had no peculium, the action could be brought de in rem verso only, and so it would naturally be if it could be shown that the master had reaped all the benefit of the contract. (See end of next paragraph.)

Si quid vicario. The vicarii formed part of the peculium of the ordinary slave; anything, therefore, deducted from the peculium, as owed to the vicarii, would, if paid, again enter into the peculium as the property of the ordinary slave. It was, therefore, useless to pay it.

5. Ceterum dubium non est, quin quaque, qui jussu domini contraxerit cuique insitioria vel exercitatoria actio competit, de peculio deque eo, quod in rem domini versum est, agere possit: sed erit multissimus, si omissa actione, qua facillime solidum ex contractu consequit, se ad difficultatem perducat probandi, in rem domini versum esse, vel habere servum peculiu et tantum habere, ut solidum sibi solvi possit. Is quoque, cui tributoria actio competit, aequo de peculio et in rem verso agere potest: sed sane huic modo tributoria expediat agere, modo de peculio et in rem verso. Tributoria ideo expediat agere, quia in ea domini condicio precipua non est, id est, quod domino debitur, non deductur, sed ejusdem juris est dominus, cujus et ceteri creditores: at in actione de peculio ante deductur, quod domino part or not the whole of the sum due from the slave has been expended to the profit of the master, he proceeds to estimate the value of the peculium, in estimating which a deduction is first made of what the slave owes his master, or any one under the power of his master, and the remainder only is considered as the peculium. But it sometimes happens that what a slave owes to a person in the power of his master is not deducted, as when he owes something to a slave who forms part of his own peculium: that is to say, if a slave is indebted to his vicarius, the sum due cannot be deducted from the peculium.

5. It need hardly be said that a person who has contracted with a slave acting by his master's command, and who may bring either the action insitioria or exercitatoria, may also bring the action de peculio et in rem verso. But it would be the height of folly in any one to give up an action by which he might easily recover his whole demand, and have recourse to another by which he would be reduced to the difficulty of proving that the money he lent to the slave was employed to the profit of the master, or that the slave is possessed of a peculium, and that sufficient to answer the whole debt. Any one, again, in whose power it is to bring the actio tributoria, may equally bring the action de peculio et in rem verso; and it is expedient, in some cases, to employ the former, and in some cases the latter. On the one hand, the actio tributoria is preferable, because in this no privilege is accorded.
debetur et in id, quod reliquum est, creditori dominus condemnatur. Rursus de peculio ideo expedit agere, quod in hac actione totius pecullii ratio habetur, et in tributoria ejus tantum, quod negotiatur, et potest quisque tertia forte parte pecullii aut quarta vel etiam minima negotiari, majorem autem partem in prædictis et mancipiis aut fenebri pecunia habere. Prout ergo expedit, ita quisque vel hanc actionem vel illum eligere debet: certe qui potest probare, in rem domini versum esse, de in rem verso agere debet.

to the master, i.e. there is no previous deduction made in his favour of what is due to him, but he stands in the same position as the rest of the creditors; whereas in the action de peculio, there is first deducted the debt due to the master, who is only condemned to distribute the remainder among the creditors. On the other hand, in some cases, it may be more convenient to bring the action de peculio, because it affects the whole peculium, whereas the action tributoria affects only so much of it as has been employed in trade; and it is possible that a slave may have traded only with a third, a fourth, or some very small part of it, and that the rest may consist in lands, slaves, or money lent at interest. Every one ought, therefore, to select the one or the other action as may seem most advantageous to him. If, however, a creditor can prove that anything has been employed to the profit of the master, he ought to bring the action de in rem verso.

GAL iv. 74; D. xiv. 4. 11.

Any one who could bring an actio quod jussu, exercitoria, or institoria, could also, at option, bring an actio de peculio et in rem verso, but not at all necessarily vice versa.

6. Que diximus de servo et domino, eadem intellegimus et de filio et filia aut nepote et nepete, et patre avove, cujus in potestate sunt.

6. What we have said in relation to a slave and his master, is equally applicable to children and grandchildren, and to their ascendants, in whose power they are.

D. xiv. 4. 1. 4.

It may be observed, however, that (1) the master was never bound, if the slave engaged himself by mandate, or fidejussio, for a third person, but the father was bound to the extent of a son’s peculium by the son’s intercessio (D. xv. 1. 3. 9), and (2) the son was bound civilly, the slave only naturally. If the son was sued and condemned to pay, an action judicati de peculio could be brought against the father to the extent of the son’s peculium. (D. xv. 1. 3. 11.)

7. Illud proprie servetur in eorum persona, quod senatusconsultum Macedoniam probuit, multis pecunias dari eis, qui in parentis erunt potestate: et ei, qui crediderit, denegatur actio tam adversus ipsum filium filiamve, nepotem neptenve, sive adhuc in potestate sunt, sive morte parentis vel emancipatone sue potestatis esse coeperint, quam

7. A peculiar provision has, however, been made in their favour by the senatusconsultum Macedoniam, which prohibits money to be lent to children under power of their parents, and refuses any action to the creditor, either against the descendants, whether still under power, or become sui juris by the death of the parent or by emancipation, or against the parent, whether
he still retains them under his power, or has emancipated them. This provision was adopted by the senate, because they thought that persons under power, when loaded with debts contracted by borrowing sums to be wasted in debauchery, often attempted the lives of their parents.

D. xiv. 6. 1. pr.; D. xiv. 6. 8. 8; D. xiv. 6. 7. 10.

The senatusconsultum Macedonianum was made, according to Tacitus, in the reign of Claudius (Ann. xi. 13); according to Suetonius, in that of Vespasian (Vesp. 11.) Perhaps it was only renewed in the latter reign. Theophilus informs us that it was made to meet the case of a young prodigal named Macedo, who attempted the life of his father. The terms of the senatusconsultum (D. xiv. 6. 1. pr.) would rather lead us to suppose Macedo was the name of a usurer. The text says denegatur actio; but if there was any doubt as to the facts, the action was brought, and the senatusconsultum Macedonianum made the ground of an exception. (D. xiv. 6. 11.)

8. Illud in summa admonendi
sumus, id, quod jussu patris domini
tive contractum fuerit quoque in
rem ejus versum fuerit, directo quoque
posse a patre dominove condici,
tamquam si principaler cum iapeo
negotium gestum esset. Ei quoque,
qui vel exercitoria vel institoria
actione tenetur, directo posse condici
placeat, quia hujus quoque jussu con-
tractum intellegitur.

8. Lastly, we may observe, that
whenever any contract has been made
by command of a father or master, or
anything employed to their profit, a
condictio may be brought directly
against the father or master, exactly
as if the contract had been originally
made with them. So when any one is
liable to the action exercitoria or insti-
toria, a condictio may also be brought
directly against him, as in this case
also it is by his order that the contract
is understood to have been made.

D. xvii. 2. 84; D. xiv. 8. 17. 5; D. xii. 1. 29.

Posse condici. If a condiction could be brought, of what use
were the peculiar pretorian actions of which, as the text informs
us, the plaintiff could avail himself? Probably the institution of
these actions was long antecedent to the time when the condiction
was admitted as an appropriate form of action in cases where a
paterfamilias was to be made responsible for the acts of his son or
slave. It was only by a great extension of the scope of the con-
diction that it was given, first, when one man profited in any way
by the property of another (D. xii. 1. 23, 32); and, secondly,
against a person by whose order another person had contracted,
or whose manager (institor) the person contracting was (D. xii.
1. 9. 2.) After it had received this extension, the condictio would
be a concurrent remedy with the pretorian actions. But there
would still be cases, namely, bilateral contracts, giving rise to
pretorian actions, such as those empti or venditi, pro socio, locati
or conducti, or contracts giving rise to actions in factum, in which
the condiction would not be given against the paterfamilias, and
in which recourse must be had to the prætorian actions proper to
the kind of contract. These prætorian actions would, in the par-
ticular case of the paterfamilias, receive a slight modification of
form and a new name, and be termed quod jussu, de in rem
vero, de peculio, &c., though remaining substantially empti,
locati, pro socio, &c., according to the character of the trans-
action.

TIT. VIII. DE NOXALIBUS ACTIONIBUS.

Ex maleficiis servorum, veluti si
furtum fecerint aut bona rapuerint
aut damnum dederint aut injuriam
commiserint, noales actiones pro-
dite sunt, quibus domino dannato
permittitur, ant litis estimationem
suffere aut hominem noxe dedere.

The wrongful acts of a slave, wheth-
er he commits a theft or robbery, or
does any damage or injury, give rise
to noxal actions in which the master of
the slave, if judgment is against him,
may either pay the estimated amount
of damage done, or deliver up his
slave as a noxa.

GAL. iv. 75; D. ix. 4. 1.

We now pass to actions given to enforce obligations arising
from the delicts of persons alieni juris. These actions, which
were given against the master of the slave, and, in ancient times,
against the parent of the filiusfamilias, were termed noxales be-
cause the master or parent could rid himself of all liability by
abandoning the slave or child committing the delict to the person
injured. There was, however, no distinct actio novalis. The
action brought on the delict was one furti, vi honorum raptorum,
&c., as the case might be, the difference being that the conden-
natio was alternative, either to pay so much or to abandon the
slave, instead of simply to pay so much.

If at any time, either before or after the litis contestatio, the
master abandoned the slave, all right of action for damages against
him became immediately extinct. The actio novalis had thus a
kind of resemblance to the actiones arbitrarie, in which the judex
first ordered the defendant to make satisfaction, and then, if he
did not comply, proceeded to condemn him. In two cases the
master could not escape liability by giving up the slave: (1) if he
falsely denied that the slave was in his power (D. ii. 9. 2. 1);
(2) if the master could have prevented the delict (D. ix. 4. 2. 1).

1. Noxa autem est corpus, quod
necuit, id est servus: noxa ipsum
maleficium, veluti furtum, damnum,
rapina, injuria.

1. Noxa is the body that has done
the wrongful act, i.e., the slave. Noxia
is the wrongful act itself, that is, the
theft, the damage, the robbery with
violence, or injury.

D. ix. 1. 1. 1.

2. Summa autem ratione permis-
sum est noxa deditione defungi:
namque erat iniquum, nequitiam

2. It is with great reason that the
master is permitted to deliver up the
offending slave; for it would be very

HH
3. Dominius noxali judicio servi sui nomine conventus, servum actorinoxse dedendo liberatur. Nec minus perpetuum ejus dominium a domino transfertur: si autem damnum si, cui deditus est, resarcierit quiesita pecunia, auxilio pretorii, invito domino, manumittitur.


5. Omnis autem noxalis actio caput sequitur. Nam si servus tuusnoxiam commiserit, quamdui in tuapotestate sit, tecum est actio: si inalterius potestatem pervenerit, cumillo incipit actio esse, aut si manu-missus fuerit, directo ipse tenetur etextinguitur noxes deditio. Exdiverso quoque directa actio noxalisesse incipit: nam si liber homo-noxiam commiserit et is servus tuusesse coeperit (quod casibus quibus-dam effici primo libro tradidimus),incipit tecum esse noxalis actio, quese ante directa fuisset.

5. Every noxal action follows the delinquent. The delicts committed by your slave are a ground of action against you, while the slave belongs to you; if the slave becomes subject to another, the action must be brought against the new master; but if the slave is manumitted, the action is brought directly against him, and there cannot then be any giving up of the slave in satisfaction. Conversely, an action, which was at first direct, may afterwards become noxal; for if a free-man commits a wrongful act, and thenbecomes your slave, which may happen in some cases, of which we have spoken in our First Book, then the direct ac-tion against the slave is changed intoa noxal action against you.

6. Si servus domino noxiam commi-serit, actio nulla nascitur: namque inter dominum et eum, qui in ejuspotestate est, nulla obligatio nasci potest. Ideo et si in alienam

6. If a slave commits a wrongfulact against his master, no action canbe brought; for no obligation can arisebetween a master and one in his power;and if the slave passes under the power
potestatem servus pervenerit aut manumissae fuerit, neque cum ipso neque cum eo, currius nunc in potestate sit, agi potest. Unde si alienus servus noxiam tibi commiserit et is possea in potestate tua esse coeperit, intercedit actio, quia in eum casum deducta sit, in quo consistere non potuit: ideoque licet exercer de tua potestate, agere non potes, quemadmodum si dominus in servum suum aliquid commiserit, nec si manumissus vel alienatus fuerit servus, ullam actionem contra dominum habere potest.

of another master, or is manumitted, no action can be brought either against him or his new master; whence it follows, that, if the slave of another should commit a wrongful act against you, and become your slave, the action is extinguished, as it has become impossible in the actual position of the parties. And although he subsequently passes out of your power, yet you cannot bring an action. Neither, if a master injures his slave in any way, can the slave, after having been alienated or manumitted, bring any action against his master.

Gal. iv. 78.

The Proculians had thought that a master could, after a slave had passed out of his power, bring an action against the slave for anything done by him before he became his slave. (Gal. iv. 78.)

7. Sed veteres quidem haec et in filiusfamilias masculis et feminis admiserunt. Nova autem hominum conversatio hujusmodi aspersitatem recte respondet: esse existimavit et ab usu communis haec penitus recessit: quis enim patitur filium suum et maxime filiam in noxam alii dare, ut pene per corpus filii pater magis, quam filius periclitetur, cum in filibus etiam pudicitiae favor hoc bene excludit? Et ideo placuit, in servos tantummodo noxales actiones esse proponendas, cum apud veteres legum commentatores invenimus sepsius dictum, ipsos filiusfamilias pro suis delictis posse conveniri.

Gal. iv. 75, 77-79; D. ix. 4. 38-35.

A filiusfamilias could be sued for delicts, and then the plaintiff could by an actio judicati recover from the father up to the amount of the peculium. (Tit. 7. 6, note.)

Trr. IX. SI QUADRUPES PAUPERIEM FECISSE DICETUR.

Animalium nomine, quæ ratione carent, si quidem lascivia aut fervore aut feritate pauperiæm fecerint, noxalis actio lege duodecim tabularum prodita est (quæ animalia si nōxæ dedantur, proficiunt reo ad liberationem, quia īa lex duodecim tabularum scripta est); puta si

A noxal action is given by the law of the Twelve Tables, when irrational animals, through wantonness, rage, or ferocity, have done any damage; as, for example, if a kicking horse should kick, or an ox, apt to gore, should inflict an injury with his horns. If the animals are delivered up in satis-
equus calcitrosus calce percusserit aut bos cornu petere solitus petierit. Hae autem action in his, quae contra naturam moventur, locum habet: ceterum si genitalis sit feritas, cessat. Denique si ursus fugit a domino et sic nocuit, non potest quoniam dominus conveniri, quia desit dominus esse, ubi fera evasit. Pauperis autem est damnum sine iuris facientis datum: nec enim potest animal iuriam fecisse dici, quod sensu caret. Hae quod ad noxalem actionem pertinent.

Although in the Twelve Tables the word quadrupes was used, all animals were held to be included under it.

The distinction noticed in the text is that between an animal with an inborn fierceness (genitalis feritas) and one with a confirmed vicious habit (calcitrosus, petere solitus). The owner of the latter only was liable to the actio noxalis given by the Twelve Tables.

If an animal fierce by nature did any damage while in the keeping of any one, his keeper would be liable to an actio utilis, though not to the direct actio noxalis given by the law of the Twelve Tables. (See next paragraph.)

1. Ceterum scendendum est, sedilitio edicto prohiberi nos canem, verrem, aprum, ursum, leonem ibi habere, qua vulgo iter fit: et si adversus ea factum erit et nocitum homini libero esse dicetur, quod bonum et sequum judicium videtur, tanti dominus condemnetur, ceterarum rerum, quanti damnum datum sit, dupli. Prater has autem sedilitias actiones et de pauperie locum habebit: numquam enim actiones presentim penales de eadem re concurrentes alia a liam consumit.

1. It must be observed, that the edict of the sedile forbids any man to keep a dog, a boar, a wild boar, a bear, or a lion, where there is a public road: and, if this prohibition is disobeyed, and thus any freeman receives hurt, the master of the beast may be condemned at the discretion of the judge; and, in case of damage to anything else, the condemnation must be in double the amount of damage done. Besides the sedilian action, the action de pauperie may also be brought against the same person; for when different actions, especially penal actions, may be each brought on account of the same thing, the employment of one does not prevent the employment of another.

The same delict might be resolvable into two distinct offences. A slave is corrupted, and then made to commit a theft. A separate action lay for each offence. Or the same delict, though consisting of one offence, might come under two heads of delict. A slave is injured by being beaten, and an action would lie injuria-
rum, or under the *lex Aquilia*. The master might bring both actions in succession, but he would only recover in the second any special advantages which that action might give him beyond what the first had given. (D. xliv. 7. 34. pr.)

**Trt. X. DE HIS, PER QUOS AGERE POSSUMUS.**

Nunc admonendi sumus, agere posse quemlibet aut suo nomine aut alieno. Alieno velutis procuratorio, tutorio, curatorio, cum olim in usu fuisse, alterius nomine agere non posse nisi pro populo, pro libertate, pro tutela. Preterea lege Hostilia permissum est ferti agere scorum nomine, qui apud hostes essent aut rei publicae causa abessent quive in scorum cujus tutela essent. Et quia hoc non minimam incommode natum habebat, quod alieno nomine neque agere neque excipere actionem licebat, cepurent homines per procuratores litigare: nam et morbus et setas et necessaria peregrinatio itemque alia multa causa sepe impedimento sunt, quo minus rem suam ipse exsequi possint.

We must now remark, that a person may conduct an action either in his own name, or in that of another, as, for instance, if he is a procurator, a tutor, or a curator; but anciently, custom forbade one person conducting an action in the name of another, unless for the people, for freedom, or for a pupil. The *lex Hostilia* afterwards permitted an *actio furti* to be brought in the names of those who were prisoners in the hands of an enemy, of persons absent in the service of the state, or of those under the tutorship of such persons. But, as it was found to be exceedingly inconvenient, that one man should be prohibited from bringing or defending an action in the name of another, it by degrees became a practice to sue by procurators. For ill-health, old age, unavoidable journeys, and many other causes, continually prevent men from being able to attend personally to their own affairs.

GAL. iv. 82; D. l. 17. 128. pr.; D. iii. 8. 1. 2.

The old principle of Roman law was, that no one could represent another, and, with the exceptions noticed in the text, this principle was rigorously observed during the period of the actions of law.

By *agere pro populo* was meant bringing an *actio popularis* (eam popularem actionem dicimus que suum jus populo tuestur, D. xlvi. 23. 1); by *agere pro libertate* was meant becoming *asser- tor libertatis* for a slave (see Introdom. sec. 96); and by *agere pro tutela*, bringing an action on behalf of a pupil.

Under the system of *formulae*, the first step towards breaking through the old rule was the permitting a *cognitor* to be appointed. A *cognitor* was a person who was appointed by one of the parties to a suit to conduct it for him. The *cognitor* himself was not necessarily present when he was appointed, but it was necessary that the appointment should be made before the magistrate, in presence of the adversary, and by a certain form of words. For instance, a plaintiff speaking generally of his action would say, "Quod ego tecum agere volo, in eam rem Lucium Titium cognito- rem do." Other forms, adapted to other cases, are given in Gaius.
(iv. 83). The name of the principal was inserted in the intentio, that of the representative in the condemnatio. (Gal. iv. 86.) In the case of a cognitor, the actio judicati was for or against the party to the suit.

The next step was to permit a procurator appointed by a mandate to conduct a suit, but at first he did so in his own name, for it was not till a later period of Roman law that a procurator could expressly represent his principal. He had accordingly, before Justinian, if plaintiff, to give security ratam rem dominum habiturum, and, if defendant, to give security judicatum solvi, as explained in the next Title. If a person offered to conduct a suit for another as procurator voluntarius, and could not produce an authorisation, he was allowed to act, not as mandatory, but as negotiorum gestor, if he acted in good faith, and gave security for ratification. (Gal. iv. 84.) The actio judicati lay for or against the procurator, and not the party. Subsequently, when the mandate was clear, or if the mandator was present and gave it, the procurator was considered as only representing the party, and the actio judicati was given to or against the party, not the procurator (Vat. Frag. 331), and this was extended to the case of the negotiorum gestor, who, although at first acting without a mandate, afterwards showed that the party approved what he did. (D. v. 1. 56.) Thus the procurator had taken the place of the cognitor, and it is only of the former that Justinian speaks.

1. Procurator neque certis verbis neque presentes adversario, immo plerumque ignorantia eo constituitur: cuiqueque enim permiseris rem tuam agere aut defendere, is procurator intellegitur.

1. A procurator is appointed without any particular form of words, nor is the presence of the adverse party required; indeed, it is generally done without his knowledge. For any one is considered to be your procurator whom you have allowed to bring or to defend an action for you.

Gal. iv. 84.

2. Tutore et curatore quemadmodum constituuntur, primo libro expositum est.

2. How tutors and curators are appointed has been already explained in the First Book.

Gal. iv. 85.

If the tutor, in appearing for the pupil, had merely discharged a duty forced upon him, the actio judicati (i.e. the action brought to enforce the sentence) was given to or against the pupil. If the tutor chose to appear for the pupil when he need have done nothing more than authorise the pupil to appear himself (si se liti obtulit), the actio judicati was given to or against the tutor. The case was the same as regards the curators of persons under the age of twenty-five. (D. xxvi. 7. 2. pr.; D. xxvi. 9. 5. pr.)
Trt. XI. DE SATISDATIONIBUS.

Satisdationum modus alius antiquitati placuit, alium novitas per usum amplexa est. Olim enim si in rem agebatur, satisdare possessor compellebatur, ut, si victus nec rem ipsum restituetet nec litis estimacionem, potestas esset petitori aut cum eo agendi aut cum fidejusoribus ejus. Quae satisdatione appellabatur judicatum solvi: unde autem sic appelabatur, facile est intellegere. Namque stipulabatur quia, ut svolveretur sibi, quod fuerit judicatum. Multo magis, qui in rem actione conveniebatur, satisdare cogebatur, si alieno nomine judgmentum accipiebat. Ipsa autem, qui in rem agebat, si suo nomine petebat, satisdare non cogebatur. Procurator vero si in rem agebat, satisdare jubebatur ratam rem dominum habiturum: periculum enim erat, ne iterum dominus de eadem ex peoriatur. Tutores et curatores eodem modo, quo et procuratores, satisdare debere, verba dicti faciebant. Sed aliquando agentibus satisdatio remittebat. Hec ita erant, si in rem agebatur.

One system of taking securities prevailed in ancient times; custom has introduced another in modern times. Formerly, in a real action the possessor was compelled to give security, so that if he lost his cause, and did not either restore the thing itself, or pay the estimated value of it, the plaintiff might either sue him or his sureties: this species of security was termed judicatum solvi, nor is it difficult to understand why it was so called. For the plaintiff used to stipulate that what was adjudged to him should be paid. And with still greater reason was a person sued in a real action obliged to give security if he was defendant in the name of another. A plaintiff in a real action suing in his own name, was not obliged to give security; but a procurator bringing a real action had to give security that his acts would be ratified by the person for whom he acted; for there was a danger lest the person should bring a fresh action for the same thing. By the words of the edict, tutors and curators were bound to give security, as well as procurators, but it was sometimes dispensed with when they were the plaintiffs. Such was the practice with regard to real actions.

Gal. iv. 89, 90, 96, 98–100.

Judicatum solvi stipulatio tres clausulas in unum collatas habet: de re judicata, de re defendenda, de dolo malo. (D. xlii. 7. 6.) There were three objects secured by the cautio judicatum solvi. It was promised (1) that the litis aestimatio, the amount of what was adjudged by the sentence, should be paid if the defendant should be condemned and should not give back the thing; (2) that the defendant should take all the proper steps in defending the action, and appear to receive the sentence of the judge; (3) that the defendant should use no dolus malus, should not, for instance, give back the thing, but give it in a state deteriorated by his fault. The object of the defendant, as well as the sureties, binding himself for the litis aestimatio (aut cum eo agendi, says the text, aut cum fidejusoribus), was to give the plaintiff his choice between an action ex stipulatu, which was often preferred, or one ex judicato, i.e. upon, or to enforce, the sentence. The object of making the defendant directly liable, by a stipulation, if he did not appear to defend the action, was to avoid having recourse to the less direct
mode in which the disobedience of the defendant to obey the
magistrate’s summons was made to benefit the plaintiff.

_Satis dare possessor compellebatur._ If the possessor would not
give the _cautio judicatum solvi_, the possession, by means of an in-
terdict (see Tit. 15. 3), was transferred to the plaintiff, if he was
willing to give the security which his adversary refused to give.

_Litis aestimatio_. _Lis_ here signifies the subject of the suit.

_Multo magis si alieno nomine._ This applied to the procurator
in the days when he did not really represent the principal. The
_cognitor_ never gave security. The person really interested in the
action was called _dominus litis_; when the procurator did not re-
present him, but came forward as if he was the _dominus litis_, it
was necessary to guard against the real _dominus litis_ bringing
another action.

Tutors had probably to give security in all cases where they
were the party defendant.

1. Sin vero in personam, ab ac-
toris quidem parte sedem obteinant,
quae diximus in actione, qua in rem
agitur. Ab ejus vero parte, cum
quod agitur, si quidem alieno nomine
aliquis interveniret, omnimodo satis-
debat, quia nemo defensor in aliena
re sine satisfactione idoneus esse
creditur. Quod si proprio nomine
aliquis judicium accipiebat in per-
sonam, judicatum solvi satis dare non
cogebarit.

1. In personal actions, on the part
of the plaintiff, the same rules as to
giving security were observed as in
real actions. As to the defendant, if
he appeared in the name of another,
he was obliged to give security, for no
one was considered a competent defen-
dant in behalf of another unless he
gave security; but any one who de-
fended a personal action in his own
name was not compelled to give the
security _judicatum solvi_.

_Gal_ iv. 100–102.

If the defendant was a _cognitor_, the _dominus litis_ gave security
for him. (_Vat. Fragm._ 317.)

_Gaius notices_ (iv. 102) that in some few exceptional instances,
as if the action was one _judicati_, or if there was anything to make
the credit of the defendant suspected, the defendant was obliged
in personal actions to give security _judicatum solvi_.

2. Sed _haec_ _hodie_ alter obser-
vantur. Sive enim quis in rem ac-
tione convenit _sive_ _personali suo
nomine_, _nullam_ satisfactionem _pro-
ter_ _litis_ _estimationem_ dare _com-
pellitur_, sed _pro_ _sua_ _tanto_ _persona_
quo _in_ _judicio_ _permaneat_ _usque ad
terminum litis_, _vel_ _committitur_ _sue
promissioni cum_ _jurejurando_, _quam
juratoriam _cautio_ _nem_ _vocant_, _vel
nudam promissionem_ _vel_ _satisfactione_
_nem_ _pro_ _qualitate_ _personae_ _sue_ _dare
compellitur_.

2. At present a different practice
prevails. A defendant who is sued
in his own name, either in a real or
personal action, is not forced to give
security for the payment of the esti-
lated value of the thing sued for, but
only for his own person, that is, that
he will remain and abide the judgment
until the end of the suit. For this
security recourse may be had to the
promise on oath of the party, when the
security is called a _cautio juratoris_, or
to his simple promise without oath, or
to a _satisfaction_, according to the quality
of the person.

_C. xii. 1. 17_.

_In judicio permaneat_. An earlier writer would probably have
pointed out that the cautio was given, when the parties were before the pretor, that the defendant would go before the judex. But in Justinian's time the distinction of in jure and in judicio was done away.

We gather from the text, that whereas under the old law the defendant would have had to give security both for the payment of the amount at which the subject-matter of the action was valued, and that he would appear to defend himself (pro re defendenda, or, as here, in judicio permaneat), under Justinian's legislation he did not engage at all for the former, and for the latter he did not necessarily give the security of a fidejussor, but, if a vir illustrius (see Tit. 4. 10 note), only pledged himself by oath, or even by a simple promise. (C. xii. 1. 17.)

8. Sin autem per procuratorem lis vel infertur vel suscipitur, in actoris quidem personas, si non mandatum actis insinuatum est vel praesens dominus litis in judicio procuratoris sui personam confirmavit, ratam rem dominum habeturum satisfactionem procurator dare compellitur, eodem observando et si tutor vel curator vel alis tales persone, quae alienarum rerum gubernationem reciperunt, litem qui busdam per alium inferunt.

4. Sin vero aliquis convenitur, si quidem praesens procuratorem dare paratus est, potest vel ipse in judicium venire et sui procuratoris personam per judicatum solvi satisfactionis sollemnes stipulationes firmare vel extra judicium satisfactionem exponere, per quam ipse sui procuratoris fidejussor existit pro omnibus judicatum solvi satisfactionis clausulis. Ubi et de hypothesca suarum rerum convenire compellitur, aive in judicio promiserit aive extra judicium caverit, ut tam ipse quam heredes ejus obligentur: alia insuper cautela vel satisfactione propter personam ipsius exponenda, quod tem pore sententiæ recitandæ in judicio inveniatur, vel si non venerit, omnia dabit fidejussor, quæ condemnatione continentur, nisi fuerit provocatum.

8. But, where a suit is commenced or taken up by a procurator as plaintiff, if a mandate of appointment is not registered, or if the person who really brings the action does not himself appear before the judge to confirm the appointment of the procurator, then the procurator himself is obliged to give security that the person for whom he acts will ratify his proceedings. The same rule applies also if a tutor, curator, or any other person, who has undertaken to manage the affairs of another, brings an action through a third party.

4. As to the defendant, if he appears and wishes to appoint a procurator, he may either himself come before the judge, and there confirm the authority of the procurator, by giving with a solemn stipulation the caution called judicatum solvi, or he may give such a security elsewhere, and become himself the fidejussor of his own procurator, as to each clause of the caution judicatum solvi; and he is compelled to subject all his property to a hypothesca, whether he promises before the judge or not, and this obligation binds not only himself but his heirs. He must also give further security as to his own person, that he will himself appear at the time when judgment is given, or that, if he fails to do so, his fidejussor will pay all that is fixed to be paid by the sentence, unless the decision is appealed against.

For the clausula of the cautio judicatum solvi, see note on the introductory paragraph.

Alia insuper cautela. This was to insure that the actio judicati should be given against the real dominus litis.
5. Si vero reus praesto ex qua-
cumque causa non fuerit et alius
velit defensionem subire, nulla di-
ferentia inter actiones in rem vel
personales introducendas, potest hoc
facere, ita tamen ut satisfactionem
judicatam solvi pro litis præstet
restitutions. Nemo enim secundum
veterem regulam, ut jam dictum est,
aliens rei sine satisfactione defensor
idoneus intellegitur.

6. Quæ omnia apertius et per-
fecstissime e coddianio judicorum
usu in ipsi rerum documentis ap-
parent.

7. Quam formam non solum in
hac regia urbe, set et in omnibus
nostris provinciis, etiæ propter im-
peritiam aliter forte celebrantur,
opinere censemus, cum necessæ est
omnes provincias caput omnium
nostrarum civitatum, id est hanc
regiam urbem, ejusque observantiam
sequit.

TIT. XII.

DE PERPETUIS ET TEMPORALIBUS ACTIO-
NIBUS, ET QUÆ AD HERedes VEl IN HERedes
TRANSEUNT.

Hoc loco admonendi sumus, eaq
quidem actiones, que ex lege sena-
tusve consulo sive ex sacris con-
stitutionibus proficiscuntur, perpe-
tuo solere antiquitus competere,
donec sacra constitutiones tam in
rem quam personalibus actionibus
certos fines dederunt: eæ vero, que
ex propria pretoris jurisdictione
pendent, plerumque intra annum
vivere (nam et ipsius pretoris intra
annum erat imperium). Aliquando
tamen et in perpetuum extenduntur,
id est usque ad finem constitutionibus
introductum, quales sunt he, quas
bonorum possessori ceterisque, qui
heredis loco sunt, accommodat.
Furti quoque manifesti actio, quam-
vis ex ipsius pretoris jurisdictione
proficiscatur, tamen perpetuo datur:
absurdum enim esse existimavit,
anno eam terminari.

We ought here to observe that the
actions derived from a law, from a
senatusconsulatum, or from imperial con-
stitutions, could formerly be exercised
at any length of time, however great;
until imperial constitutions assigned
fixed limits both to real and to personal
actions. Of the actions derived from
the jurisdiction of the pretor, the
greater part last only during one year,
for this was the limit of the pretor's
authority. Sometimes, however, these
actions are perpetual, that is, last until
the time introduced by the constitu-
tions; such are those given to the
bonus possessori and to others stand-
ing in the place of the heir. The ac-
tion furti manifesti, also, though pro-
ceeding from the jurisdiction of the
pretor, is yet perpetual, for it seemed
absurd to limit its duration to a year.

GAL. iv. 110, 111.

In the introductory note to Title 6, it has been said that we
may ask as to actions, within what time they may be brought,
within what delay the proceedings must be finished, and what is
the effect of a judgment in case of fresh proceedings being insti-
tuted. The second of these points is not noticed in the Institutes,
the rules as to the period of finishing the suit having become
obsolete. The third is treated of in the next Title, par. 5. We
have now to consider the first, namely, how long the right of
action lasted from its inception, i.e. from the time when the
plaintiff could have brought an action.

Under the formulary system, the general rule was that actions
arising from the law, a senatusconsultum, or constitutions, in-
cluding an action arising out of the old civil law, were perpetual;
that is, there was no limit to the time in which they could be
brought. On the other hand, praetorian actions were annual, i.e.
must be brought within an annus utilis, or year made up of days
in which there was no obstacle to the plaintiff appearing in court,
so that more than twelve months might be included. This time
of a year was probably suggested by the duration of the praetor's
office, but it had nothing to do with any one praetor being in office.
It was merely a limited time during which the praetor, in creating
an action, fixed that it must be brought.

To the rule that praetorian actions were annual, there were,
however, exceptions of a very wide kind. The text mentions the
actions given to a honorum possessor, and to every one placed in
loco heredes, and also the praetorian action for furtum manifes-
tum, which was perpetual because it was a commutation of capital
punishment. (Gal. iv. 111.) Further, all praetorian actions rei
persecutoriae, for the sake of the thing, including all actions on
contracts for the simple value, were perpetual, unless the action
was one not extending, but directly contradicting, the civil law,
when it was annual. An example will show what was meant by
this distinction. The actio Publiciana (Tit. 6. 4), given to ex-
tend the operation of usucapion, was perpetual, but the actio
rescissoria, given to rescind usucapion (Tit. 6. 5), was annual.
(D. xlv. 7. 35. pr.) We may, therefore, almost reverse the de-
scription of praetorian actions, and say that they were perpetual
except when they were (1) penal (the actio furti manifesti being,
however, perpetual), or (2) rei persecutoriae, and in direct opposition
to the civil law.

Saecae constitutiones certos fines dederunt. In a.d. 424, Theo-
dosius II. enacted that, as a general rule, actions, real or personal,
should not be brought after a lapse of thirty years. (C. vii. 39.
3.) Subsequently the time was, in the case of some actions, as
in that of an actio hypothecaria, when the thing hypothecated
remained in the hands of the debtor, extended to forty years.
(C. vii. 39. 7. 1.) The term perpetua, however, still continued
to be applied to these actions, though, properly speaking, in the
time of Justinian it meant nothing more than an action which
could be brought within thirty or forty years, as opposed to those
which could only be brought within a shorter period.
1. Non omnes autem actiones, qua in aliquem aut ipso jure competunt aut a prectore dantur, et in heredem aequo competunt aut dari solent. Est enim certissima juris regula, ex maleficis poenales actiones in heredem non competere, veluti furto, vi bonorum raptorum, injuriarum, damni injuriis. Sed heredibus hujusmodi actiones competunt nec denegantur, excepta injuriarum actione et si quas alia similis inveniatur. Aliquando tamen etiam ex contractu actio contra heredem non competit, cum testator dolose versatus sit et ad heredem ejus nihil ex eo dolo pervenerit. Poenales autem actiones, quas supra diximus, si ab ipsis principalibus personis fuerint contestata, et heredibus dantur et contra heredes transseunt.

GAI. iv. 112, 118; D. iv. 8. 17. 1; D. xli. 7. 26, 59.

Although penal actions could not be brought against the heir of the wrongdoer in order to enforce the liability to a penalty, as the liability was personal to the wrongdoer, yet they could be brought against the heirs for the purpose of getting back from them anything by which they had received an advantage from the delict. (D. xli. 7. 35. pr.)

Aliquando ex contractu actio contrah. non competit. This is taken from Gaius, who means it to apply to the heirs of adstipulatores, sponsores, and iudicatores, for their heirs were not bound; but it is difficult to say to what it could apply in the time of Justinian. It would also be supposed, from the text, that an action making a testator responsible for dolus malus did not ordinarily pass against his heirs, if his heirs were not benefited by the wrong he had committed; but there was only one case in which the action did not pass against his heirs, whether they had benefited by the dolus malus or not, namely, the action in duplum against a person who had been guilty of dolus malus with regard to a deposit placed in his custody under the pressure of an accidental misfortune (see Tit. 6. 23); and even in this case an actio in simplicium passed against the heirs. (D. xvi. 3. 18.)

2. Superest, ut admoneamus, quod si ante rem judicatam est, cum quo actum est, satisfaciat actori, officio judicis convenit eum absolvere, iudicet juriici accipiendi tempore in ea causa fuisse, ut damnum debeat: et hoc est, quod ante vulgo dicebatur, omnia judicia absolvitoria esse.

2. It remains that we should remark, that if, before the sentence, the defendant satisfies the plaintiff, the judge ought to absolve the defendant, although, from the time of the action being commenced before the magistrate, it was evident the defendant would be condemned. It is in this sense that in former times it was com-
monly said that in all actions the defendant might be absolved.

Gal. iv. 114.

If, after the formula was delivered, but before judgment was given, the defendant satisfied the plaintiff, a question had arisen, as we learn from Gaius (iv. 114), whether in all cases the judge was to absolve the defendant, or whether in actions *stricti juris* the judge was technically bound to go on and pronounce judgment. The Proculians thought that the condemnation was still to be made in actions *stricti juris*, though not in *bonae fidei* actions or actions *in rem*. The Sabinians held that the defendant should be absolved in all actions, and it is the opinion of the Sabinians that Justinian confirms.

Trt. XIII. DE EXCEPTIONIBUS.

Sequitur, ut de exceptionibus dispiciamus. Compare sunt autem exceptiones defendendorum eorum gratia, cum quibus agitur: sepe enim accidit, ut, licet ipsa actio, qua actor expetitur, justa sit, tamen iniqua sit adversus eum, cum quo agitur.

It now follows that we should speak of exceptions. They have been introduced as a means of defence for those against whom an action is brought. For it often happens that the action of the plaintiff, although in itself well founded, is yet unjust as regards the person against whom it is brought.


Exceptions belonged properly to the system of formulæ only. Under that system the praetor or other magistrate who pronounced on the right, *qui jus dicebat*, decided whether, on the statement of facts, the plaintiff had a right to an action. If he had, the parties were sent to the judge. But though the plaintiff might have a right to an action, the defendant might have some ground to urge why, in the particular instance, the action should be defeated; and if the action *in factum* was not *bonae fidei*, i.e. if it was *stricti juris*, *arbitraria*, or penal, it was necessary that this ground should be distinctly stated by the defendant to the praetor. Thus the statement was incorporated in the formula sent to the judge, and was called the *exceptio*; it excepted, or took away from the power of the action. (See Introd. sec. 104.) The judge was bound by the instructions he received in the *intentio*. He could take notice of no reason urged by the defendant why the action should fail, if the only question submitted to him by the praetor was whether the plaintiff had a good ground of action. It was necessary that the praetor should also expressly instruct him to inquire whether the action, however well grounded, ought not to be defeated.

For instance, supposing an action was brought on a stipulation, the formula would run *Si paret Numerium Negidium Aulo Agerio sestertiium X milia dare oportere*. The only question which the *judex* could have to decide would be, was the stipulation made or not? If it was, the right of the plaintiff to have a
sentence in his favour was indisputable. But supposing the prætor went on to add an exception, which was always negative, and say, *Si in ea re nihil dolo malo Auli Agerii factum sit neque fiat*, then a further inquiry would have to be made: was there any fraud on the part of the creditor which made it unjust that he should recover in the action?

The defendant, in making an exception, was not supposed to admit the truth of the plaintiff’s statement. (D. xlv. 1. 9.) The plaintiff had first to prove his *intentio*, and unless he did so the action failed. Supposing he proved it to the satisfaction of the *judez*, it was then for the defendant to prove his exception. He affirmed the facts on which the exception rested, and he must prove them; he was in his turn the attacking party. *Reus in exceptione actor est.* (D. xlv. 1. 1.)

In actions *bonæ fidei*, as we have already said (see Tit. 6. 28), exceptions were never used; for here the judge was bound by the character of the action to examine into all the circumstances, and only to condemn the defendant if justice demanded he should do so. The action itself was said to imply any exception that could be set up. (D. xxx. 84. 5.)

In the time of Justinian there were, properly speaking, no such things as exceptions. The word came to mean any defence other than a denial of the subsistence of the right of action, which was urged before the magistrate by the defendant.

1. *Verbi gratia si metu coactus aut dolo inductus aut errore lapsus stipulandi Titio promissisti, quod non debueras promittere, palam est, jure civilii te obligatum esse, et actio, qua intenditurus dare te oportere, efficax est: sed iniquum est, te condemnari, ideoque datur tibi exceptio metus causa aut doli mali aut in factum composita ad impugnandam actionem.*

1. For instance, if forced by fear, inveigled by fraud, or fallen into a mistake, you promise Titius in a stipulation that which you did not owe him, it is evident that, according to the civil law, you are bound, and the action, in which it is maintained that you ought to give, is validly brought. Yet it is unjust that you should be condemned; and, therefore, to repel the action, you have given you the exception *metus causa*, or *doli mali*, or one made to suit the circumstances.

D. xlv. 4. 16. 88.

*Errore lapsus*, i.e. not a mistake as to the thing forming the subject of the stipulation, for such a mistake would make the stipulation void; but a mistake in the apprehension of some fact which if the defendant had known rightly, he would not have entered into the stipulation. (See Bk. iii. Tit. 19. 23.)

The exceptio *metus causa* ran thus: *Si in ea re nihil metus causa factum est* (D. xlv. 4. 43). The exceptio *doli mali* thus: *Si in ea re nihil dolo malo Auli Agerii factum sit neque fiat* (D. xlv. 4. 2. 1; GAL. iv. 119). We may remark that the former is general (fear inspired by any one whomsoever), the latter personal (the fraud of *Aulus Agerius*), and that the exceptio *doli mali* relates not only to the character of the action at the particular time when the obligation was formed, but also to its
subsequent character, neque factum sit neque fiat. A claim might be perfectly fair in the first instance, and afterwards become only partially so, or even wholly unfair. For instance, the real owner of an estate might claim it, and then find that the possessor, having improved it during the time he held it, is entitled to compensation. If the owner refuses the compensation, his claim, in itself fair, becomes, in the way he urges it, unfair.

In factum composita, i.e. shaped so as to raise the question whether a statement of a particular fact was or was not true. Some particular fact is submitted by the pretor to the judez, instead of such a general inquiry as whether the plaintiff has been guilty of fraud. For instance, to use the example given in the Digest (xlv. 1. 22), the inquiry directed to be made might be whether the plaintiff has not made the defendant believe that the subject of stipulation, which is made of brass, was made of gold.

The exceptio in factum composita was thus, like the actio in factum concepita, opposed to one in jus concepita. For instance, the exceptio doli mali, which was in jus concepita, not only raised a question of fact, but made it requisite that the judez should affix a certain character to the acts of the parties. It may be observed that this general exception doli mali would always answer every purpose which could be gained by using an exception in factum composita; for any particular fact which, if stated as an exception and proved, would furnish a bar to the action, would be taken notice of under the exception doli mali. But the magistrate would not always allow an exception doli mali to be inserted when he would give permission to employ one in factum composita; for infamy was attached to a plaintiff against whom an exception doli mali was proved; and when the plaintiff stood to the defendant in any such near relation as that of patron or ascendant, the magistrate would not allow an exception to be used which would have any further consequence than to protect the defendant. (D. xlv. 4. 4. 16.) The instances of exceptions in the following paragraphs are all instances of exceptions in factum.

2. Idem juris est, si quis quasi credendi causa pecuniam stipulatus fuerit neque numeravit. Nam eam pecuniam a te petere posse eum certum est: dare enim te oportet, cum ex stipulatu tenearis: sed quis iniquum est eo nomine te condemnari, placet, exceptione pecuniae non numerate te defendi debere, cujus tempora nos, secundum quod jam superioribus libris scriptum est, constitutio nostra coartavimus.

2. It is the same, if any one should stipulate with you for the repayment of money he is to lend you, and then does not pay to you the sum borrowed; in such a case he could certainly demand from you the amount you have engaged to repay him, and you are bound to give it, for you are tied by the stipulation. But as it would be unjust that you should be condemned in such an action, it has been thought right you should have the defence of the exception pecuniae non numerate. The time within which this exception can be used, has, as we have said in a former Book, been shortened by our constitution.

Quasi credendi causa, i.e. had made the defendant promise to pay a sum, as if he, the plaintiff, were going to lend the sum to the defendant.

It will be remembered that, in this exception, the burden of proof was on the plaintiff, instead of, as in other exceptions, on the defendant, and then it must be pleaded within originally one year and then five years, a term reduced by Justinian to two years. (See Bk. iii. Tit. 21.)

3. Praeterea debitor si pactus fuerit cum creditore, ne a se peteretur, nihil minus obligatus manet, quia pacto convento obligationes non omnimodo dissolvuntur: qua de causa efficax est adversus eum actio, qua actor intendit si pariet eum dare oportere. Sed quia iniquum est contra pactionem eum damnari, defenditur per exceptionem pacti conventi.

8. Again, the debtor who has agreed with his creditor that payment shall not be demanded from him, still remains bound. For an agreement is not a mode by which obligations are always dissolved. This action, therefore, in which the intentio runs, 'If it appears that he ought to give,' may be validly brought against him; but as it would be unjust that he should be condemned in contravention of the agreement, he may use in his defence the exception pacti conventi.


Obligations formed re or verbis could not be dissolved by a simple pact. As the contract was a subsisting one, an exception was necessary. The exception pacti conventi ran thus: Si inter Aulum Agerium et Numerium Negidium non conventit, ne ea pecunia peteretur. (Gal. iv. 119.)

4. æque si debitor deferente creditore juraverit, nihil se dare oportere, adhuc obligatus permanet; sed quia iniquum est, de perjurio queri, defenditur per exceptionem jurisjurandi. In his quoque actionibus, quibus in rem agitur, æque necessarie sunt exceptiones: veluti si petitore deferente possessor juraverit, eam rem suam esse, et nihil minus eandem rem petitor vindicet: licet enim verum sit, quod intendit, id est rem ejus esse, iniquum est tamen, possessorem condemnari.

4. So, too, if the debtor, when the creditor challenges him to swear, affirms on oath that he ought not to give anything, he still remains bound. But as it would be unjust to examine whether he has perjured himself, he is allowed to defend himself with the exception jurisjurandi. In actions in rem, these exceptions are equally necessary: for instance, if the possessor, on being challenged by the claimant, swears that the property is his, and yet the plaintiff still persists in his real action. For the claim of the plaintiff might be well founded, and yet it would be unjust to condemn the possessor.

D. xii. 2. 9. pr. and 1; D. xii. 2. 8. 1; D. xii. 2. 11. 1.

The exceptio jurisjurandi was only necessary when the question whether the defendant had accepted the oath when offered him was disputed. If it was acknowledged, the pretor would not give an action at all. (D. xii. 2. 3. pr.) The oath terminated the right of the plaintiff to an action, being looked on as a sort of compromise by which the action was settled; jurisjurandum speciem
5. Item si judicio tecum actum fuerit sive in rem sive in personam, nihilominus ob id actio durat et ideo ipso jure postea de eadem re adversus te agi potest; sed debes per exceptionem rei judicatae adjuvari.

5. Again, if an action real or personal has been brought against you, not the less because it has been so brought does the action endure, and, in strict law, an action might still be brought against you for the same object, but you are to be protected by the exception rei judicatae.


Under the system of the actions of law, if a cause had once been decided, no further action could again be brought on the same grounds (Gal. iv. 108); but this was not the case under the prestation system. To understand the effect of a previous action having been brought under the prestation system, we must notice the distinction drawn by Gaius in his Fourth Book between judicia legitima and judicia imperio continentia (iv. 103–109). Judicia legitima, i.e. proceedings founded on the old jus civile, were those in an action given in the city of Rome, or within the first milestone round the city, between Roman citizens, and tried by a single judge. Judicia imperio continentia, i.e. proceedings measured by the authority of the prector, were those in an action given out of Rome, or tried by recuperatores, or by a single judge, if the judge or one or both parties was a peregrinus, or were peregrini. Judicia imperio continentia were only in full force during the time of office of the magistrate who gave the formula, and therefore the plaintiff who subsequently brought an action for the second time had to be met with an exception. With respect to judicia legitima, a further distinction is to be made. If they were in rem or in factum, the nature of these actions prevented the litis contestatio in their case operating in the way of a novation (see Book iii. Tit. 29. 3, note); and therefore, if a fresh action was brought, the defendant had to repel it by the exception rei judicatae. Accordingly we may say, in brief, that under the prestation system none but judicia legitima in personam, having an intentio juris civilis, extinguished the right of action, and therefore in all other cases an exception was necessary.

In the time of Justinian these distinctions had disappeared, and therefore he says generally that the res judicata produces an exception. It was to have the same force as it had formerly had in the case of judicia imperio continentia, and not that it had received in judicia legitima. Whether the action was real or personal, as the text informs us, the action still subsisted, and, no novation having taken place, a second action could only be repelled by an exception. But, practically speaking, under the system of judicia extraordinaria, as the judge did not receive instructions from a magistrate, and was not bound within the limits of a for-
mula, the distinction between the \textit{res judicata} operating as a bar or as an exception was a very immaterial one.

In order that a \textit{res judicata} should be available either as a bar or an exception, it was necessary that there should have been, in the former action, the same thing as the subject-matter of the litigation, the same quantity, the same right, the same ground of action, the same parties. \textit{Cum queritur hae exceptio noceat necne, inspiciendum est an idem corpus sit,quantitas eadem, idem jus: et an eadem causa petendi, et eadem conditio persomarum—que nisi omnia concurrunt, alia res est.} (D. xliiv. 2. 12–14.)

Gaius also mentions the \textit{exceptio rei in judicium deducra}, i.e. that the case was already before the tribunal, as where one of two promissors (\textit{duo rei promittendi}) having been sued, the other if sued could say that the case was already in the way of adjudication, having reached the stage of the \textit{litis contestatio}, and might be ended within the appointed time, i.e. within eighteen months if it was a \textit{judicium legitimum}, or within the duration of the power of the magistrate if it was \textit{imperio continens}. See introductory note to Tit. 6. (Gai. iv. 106, 107.)

\textit{Litis contestatio}. It may be convenient here to notice what was meant by the \textit{litis contestatio} in the time of Justinian. Under the system of extraordinary procedure there was no longer that distinction of the proceedings which had obtained under the formulary system according as they were \textit{in jure} (before the magistrate) or \textit{in judicio} (before the judge). The \textit{litis contestatio} was, in the formulary system, the last step in the proceedings before the magistrate. When he appointed the judge, the rights of the parties were fixed as they were at that epoch. Under the system of extraordinary procedure the same magistrate heard the case throughout. (See Introd. sec. 105, 111.) The epoch, so precise under the formulary system, for fixing the rights had now no place. For many purposes, however, it was necessary that some epoch should be fixed; and the epoch chosen was when the magistrate began to take cognisance of the cause by having the case for the plaintiff stated before him (C. iii. 9); and the expression \textit{litis contestatio} was borrowed to denote the consequences of this epoch having arrived. For example, if the action was for a farm, the condition of the farm \textit{(cause)} was taken to be that in which the farm was at the moment when the judge began to take cognisance of the action. But in many respects the whole effects of the \textit{litis contestatio} were prevented from operating. We have already had three examples: 1. In Bk. ii. Tit. 6. 13 (note) we have seen that \textit{usucapio} was interrupted by an action, and that this interruption took place, in the time of Justinian, not when the stage of the judge taking cognisance of the cause was reached, but by the plaintiff commencing proceedings. 2. In Bk. iii. 26. 6 (note) we have seen that Justinian prevented the \textit{litis contestatio} operating so as to place the \textit{fidejussor} in a different position from that of the \textit{mandator}. 3. In Bk. iii. Tit. 29. 3 (note) we have seen that the
litis contestatio had, under the formulary system, the effect of ex-
tinguishing obligations giving rise to judicia legitima in personam;
but this was not the case under Justinian, and therefore, in dis-
cussing novation (Bk. iii. Tit. 29. 3), all reference to the extinction
of obligations is omitted, and in the text we have the general rule
laid down that the action endures, and must be repelled by an
exception if again brought.

6. Hær exempli causa rettulisse
sufficiet. Aliquin quam ex multis
varisque causis exceptiones neces-
sarìe sint, ex iustioribus digestorum
seu pandectarum libris intelligi po-
test.

7. Quam quaedam ex legisbus
vel ex his, quæ legis vicem obtinent,
vel ex ipsius prorsis jurisdictione
substantiam cæpiunt.

6. The above examples of excep-
tions may suffice. It may be seen in
the larger work of the Digest or Pan-
dects how numerous and how different
are the causes which make exceptions
necessary.

7. Some of these exceptions are
derived from laws, and from other
enactments having the force of law, or
from the jurisdiction of the praedor.

Gal. iv. 118.

Ex legisbus; such as the exception nisi bonis cesserit (see Tit.
14. 4), relative to the cession of the debtor’s goods, under the lex
Julia.

Ex his quæ legis vicem obtinent, i.e. senatusconsulta and con-
stitutions. The exception under the rescript of Hadrian, per-
mitting the employment of an exception doli mali when a plaintiff
neglected to notice a counter-claim (see Tit. 6. 39), may serve as
an example.

8. Appellantur autem exceptiones
8. Exceptions, again, may be
alæ perpetuae et peremptoriae, alæ
classed as either perpetual and per-
temporales et dilatoriae.

D. xiv. 1. 8; Gal. iv. 120.

The duration according to which exceptions are said to be per-
petuae or temporales, is the length of time in which they can be
used by the defendant if he has occasion, not the length of time
during which their effect continues if they are employed.

All exceptiones perpetuae were necessarily peremptoriae; if found
to be justified by the facts, they set the matter in litigation at rest
for ever. All exceptiones temporales were necessarily dilatoriae;
they did but defer the decision of the matter in question till the
expiration of a certain time.

9. Perpetuae et peremptoriae sunt,
que semper agentibus obstant et
semper rem, de qua agitur, perem-
munt: quæs est exceptio doli mali
et quod metus causa factum est et
pacti conventi, cum ita convenerit,
ne omnino pecunia pateretur.

9. Those are perpetual and peremp-
tory which always present an obstacle
to the demand, and cut away for ever
the ground on which it is brought;
as, for instance, the exception doli
mali, that metus causa, and that pacti
conventi, when it has been agreed that
no demand for the money shall ever
be made.

D. xlv. 1. 8; Gal. iv. 121.
An act might be used for ever as an exception; and yet if an action was brought grounded on it, that action might possibly have to be brought within a certain time. For instance, if fraud or violence had been used in the making of a contract, the exception would be good whenever an action was brought on the contract: but the person injured could only bring an actio doli or metus causa within a limited time. Hence it came to be said that such things were temporalia ad agendum, perpetua ad excipiendum. (See D. xlv. 4. 5. 6.)

10. Temporales atque dilatoriae sunt, quae ad tempus nocent et temporis dilationem tribuunt: quae est pacti conventi, cum convenverit, ne intra certum tempus ageretur, veluti intra quinquennium. Nam finito eo tempore non impeditur actor rem exsequi. Ergo hi, quibus intra tempus agere volentibus objectur exceptio aut pacti conventi aut alia simulis, differre debent actionem et post tempus agere: ideo enim et dilatoriae istae exceptiones appellantur. Alioquin, si intra tempus egerint objectaque sit exceptio, neque eo judicio quidquam consequentur propter exceptionem nec post tempus olim agere poterant, cum temere rem in judicium deducerant et consumebant, qua ratione rem amitterant. Hodie autem non ita stricte haec procedere volumus, sed eum, qui ante tempus pactonis vel obligationis litem inferre ausus est, Zenonianse constitutioni subjacere censemos, quam sacratissimus legislator de his, qui tempore plus petierunt, protulit, ut et inducas, quas, sive ipse actor sponte indulserit vel natura actionis contineat, contemperat, in duplum habeant hi, qui talem injuriam passi sunt, et post eae finitas non aliter litem suspiciant, nisi omnes expenses litis antea acciperint, ut actores, tali pena perterrisi, tempora litium doceantur observare.

10. Those are temporary and dilatory which present an obstacle for a certain time and procure delay. Such is the exception pacti conventi, when it has been agreed that no action shall be brought for a certain time, as, for instance, for five years; when once this period has elapsed, the plaintiff is not prevented from demanding the thing. Those, therefore, who seek to bring the action before the expiration of the time, and are repelled by the exception pacti conventi, or any similar one, ought to put it off and to bring it after the time has elapsed; hence these exceptions are termed dilatory. If plaintiffs have brought the action before the expiration of the time, and been repelled by the exception, they will not gain anything by the action they bring, because of the exception; and, formerly, they would not have been able again to bring an action on the expiration of the time, because they had rashly brought their claim before a judge, and so used up their right to bring an action, and lost all they could claim. But at the present day we do not wish to proceed so rigorously; any one who shall venture to bring an action before the time fixed by the agreement or obligation shall be subject to the dispositions of the constitution of Zeno, published by that legislator of most pious memory with respect to those who, in regard to time, ask more than is due to them. Consequently, the delay which the plaintiff has disregarded, whether he himself has voluntarily accorded it, or whether it results from the nature of the action, shall be doubled for the benefit of those who have sustained such a wrong; and, even after the expiration of the time, these persons shall not be obliged to defend the action unless they have been first reimbursed for all the expenses of the former action, that a penalty so heavy may teach plaintiffs
to have due regard to the delays that are to elapse before actions are brought.

Gal. iv. 122, 128; C. iii. 10. 1.

Alia similis. Gaius gives, as an instance, the exceptio litis dividuae, given to repel a plaintiff who broke up into two actions his remedy for a single thing, and sued within the same praetorship for the part he did not include in his first action. Gaius, in the Digest, defines dilatory exceptions as those quae non semper locum habent, sed evitari possunt. (D. xliv. 1. 3.)

Zenonianæ constitutionis. See Tit. 6. 33.

11. Præterea etiam ex persona dilatoris sunt exceptiones: quales sunt procuratoris, veluti si per militem ant mulierem agere quis velit: nam militibus nec pro patre vel matre vel uxore nec ex sacro rescripto procuratorio nomine experiri conceditur: suis vero negotiis superasse sine offensa discipline possunt. Eas vero exceptiones, quæ olim procuratoribus propter infamiam vel daníis vel ipsius procuratoris opponebantur, cum in iudiciis frequentari nullo repercussumus modo, conquiescere sancímus, ne, dum de his altercatur, ipsius negotii disceptatio proteletur.

11. There are also dilatory exceptions by reason of the person; such are those objecting to a procurator; as, for instance, if a plaintiff wishes to have his cause conducted by a soldier or woman, for soldiers cannot be procurators even for their father, or mother, or wife, not even by virtue of an imperial rescript; but they may conduct their own affairs without any breach of discipline. As to the exceptions formerly opposed to procurators on account of the infamy either of the person appointing the procurator, or of the procurator himself, since we found that they were no longer used in practice, we have enacted that they shall be abolished, that no discussion as to their effect may prolong the course of the action itself.

D. xliv. 1. 3; C. ii. 18. 7, 9.

The exception to the procurator as an improper person only produced a delay; directly the plaintiff appointed a proper person as procurator, the action proceeded.

The infamia was that produced by being condemned in certain actions, as in the actio tutela, depositi, pro socio, &c.

After noticing exceptions, Gaius notices prescriptions, which originally had been limitations of the action inserted on behalf of the plaintiff or defendant. (Introd. sec. 104.) We have had an instance of the one inserted for the protection of the defendant in the praescriptio longi temporis (Bk. ii. Tit. 6. pr. note); but by the time of Gaius all prescriptions on behalf of the defendant were ranked among exceptions. Prescriptions on behalf of the plaintiff still remained where it was to the interest of the plaintiff that not all his right, but only so much of it as had given rise to an existing liability, should be sued on, so that he might not be barred from suing when other liabilities came into existence. (Gai. iv. 130–137).
Trt. XIV. DE REPLICATIONIBUS.

Interdum eventit, ut exceptio, qua prima facie justa videatur, inique noceat. Quod cum accidit, alia allegatione opus est adjuvandi actoris gratia, qua replicatio vocatur, quia per eam replicatur atque resolvitur vis exceptionis. Veluti cum pactus est aliquis cum debitore suo, ne ab eo pecuniam petat, deinde postea in contrarium pacti sunt, id est ut petere creditori liceat: si agat creditor et excipiat debitor, ut ita demum condemnetur, si non conveniet, ne eam pecuniam creditor petat, nocet ei exceptio; convenit enim ita, etiamque nihil minus hoc verum manet, licet postea in contrarium pacti sunt. Sed quia iniquum est, creditorisem excludi, replicatio ei debitor ex posteriori pacto convenit.

Sometimes an exception which at first sight seems just, is really unjust. In this case, to place the plaintiff in a right position, it is necessary there should be another allegation, termed a replication, because it unfolds and resolves the right given by the exception. For example, supposing a creditor has agreed with a debtor not to demand payment, and then makes an agreement to the contrary; that is, that he may demand payment; if, when the creditor brings his action, the debtor uses the exception, alleging that he ought only to be condemned if his creditor is not under an agreement not to demand payment, this exception presents an obstacle to the creditor. For so it was agreed, and it still remains true that this agreement was made, although a contrary agreement was afterwards made. But as it would be unjust to deprive the creditor of his remedy, he will be permitted to use a replication founded on the subsequent agreement.

GAL. iv. 126.

All that has been said on the use and nature of exceptions is applicable to replications, which are but exceptions to an exception. (D. xlii. 1. 22. 1.)

It is to be remarked that there could not be an exceptio doli mali to an exceptio doli mali. If the plaintiff had been guilty of fraud, it could not strengthen his right of action that the defendant had also been guilty. (D. xliii. 4. 4. 13.)

1. Rursus interdum eventit, ut replicatio, qua prima facie justa sit, inique noceat. Quod cum acciderit, alia allegatione opus est adjuvandi rei gratia, qua duplicatio vocatur.

1. The replication, in its turn, may, at first sight, seem just, and yet be really unjust. In this case, to aid the defendant, it is necessary there should be a further allegation, termed a duplicatio.

GAL. iv. 127.

2. Et si rursus ea prima facie justa videatur, sed propter aliquam causam iniquum actori noceat, rursus allegatione alia opus est, qua actori adjuvetur, qua dicitur triplicatio.

2. And if, again, the duplicatio may seem just, but is for some reason really unjust to the plaintiff, there is wanted, to aid the plaintiff, a still further allegation, termed a triplicatio.

GAL. iv. 128.

3. Quarum omnium exceptio- num usum interdum ulterius quam diximus, varietas negotiorum intro-

3. The great diversity of affairs has made it requisite to carry still further than we have mentioned the use of
4. Exceptiones autem, quibus de- 
bitor defenditur, plurumque accom-
modari solent stiam fideiussoribus 
ejus : et recte, quia, quod ab his pe-
titur, id ab ipso debitore peti vide-
tur, quia mandati judicio redditurus 
est eis, quod hi pro eo solverint. 
Qua ratione et si de non petenda 
pecunia pactus quis cum reo fuerit, 
placuit, proinde succurrerendum esse 
per exceptionem pacti conventi illis 
quoque, qui pro eo obligatui essent, 
as et cum ipsis pactus esset, ne ab 
eis ea pecunia peteretur. Sane que-
dam exceptiones non solent his ac-
accommodari. Ecce enim debitor si 
bonis suis cesserit et cum eo creditor 
experimentur, defenditur per exception-
em ' nisi bonis cesserit ': sed hic ex-
ceptio fideussoribus non datur, sci-
licit ideo quia, qui alios pro debitore 
obligat, hoc maxime prospicit, ut, 
cum facultatibus lapsus fuerit de-
bitor, possit ab his, quos pro eo 
obligavit, suum consequi.

4. The exceptions given for the 
protection of the debtor are also for 
the most part given in behalf of his 
Fideussoros, and rightly so; for what 
is demanded from them is really de-
demanded from the debtor, because by 
the actio mandati he will be forced to 
repay them what they have paid for 
him. Hence, if a creditor agrees with 
his debtor not to demand payment, the 
exception pacti conventi may be em-
ployed by those who are bound for 
him, exactly as if the agreement not 
to demand payment had been made 
with them personally. There are, 
however, some exceptions not allowed 
them; for instance, if the debtor has 
made a cession of his property, and 
the creditor sues him, he may protect 
himself by the exception nisi bonis ces-
serit; but this exception is not allowed 
to fideussores. For in taking sureties 
for the payment of a debt, what the 
creditor principally looks to is re-
covering what is owed him from the 
sureties, in case of the insolvency of 
the principal.

D. xlv. 1. 19; D. ii. 14. 82.

Exceptions were divided into rei coherentes, which affected the 
right to claim, and personae coherentes, which only protected the 
debtor himself. As an instance of an exceptio coherens rei may 
be given an exceptio doli mali, or a general pact not to sue. As 
an instance of an exceptio coherens personae may be given that 
mentioned in the text, where the debtor was protected by having 
given up all his property, or a particular pact not to sue the debtor 
personally. Generally the fideussors of the defendant could use 
the exceptions which he could have used; but this was not always, 
as the text points out, true of those personae coherentes, as in the 
case of the exception nisi bonis cesserit.

Tr. XV. DE INTERDICTIS.

Sequitur, ut dispiciamus de inter-
dictis seu actionibus, quae pro his 
exercentur. Erant autem interdicta 
formae atque conceptiones verborum, 
quibus praeutor aut judexbat aliquid 
 fieri aut fieri prohibebat. Quod tum 
these exceptions. A clearer knowledge of 
them all may be obtained by reading 
the fuller work of the Digest.

Gal. iv. 129.
maxime faciebat, cum de possessione to possession or quasi-possession.
ant quasi possessione inter aliquos contenebatur.

Gal. iv. 188, 189.

An interdict was a decree or edict of the prætor made in a special case. The prætor published a general edict stating the leading principles on which he would act. But in certain cases he would make an edict applicable only to particular persons and particular things. Instead, for instance, of referring the party applying to him for relief to the general rule of law that one man should not be allowed to interfere with the watercourses of another, he made an edict that A should not interfere with the watercourses of B. According to the circumstances of the case such a command might be either positive or negative; and though, as is remarked in paragr. 1, the word interdictum was considered to apply more properly to a negative command only, it was, as a matter of usage, applied to all such special edicts indifferently; and Justinian seems to suppose that interdicere does not mean, as Gaius assumes, to forbid, but inter duos dicere, to decide between two parties. (See paragr. 1.)

If the person to whom the special edict was addressed obeyed its directions, no further proceedings were necessary; if he asserted that he had not done wrong, the prætor allowed an action to be brought grounded on the interdict. A sketch of the mode in which the proceedings grounded on an interdict were conducted will be found in the notes to paragr. 8.

There was always something of a public character in the reasons which induced the prætor to grant an interdict. He adopted it as a speedy and sure remedy in cases where danger was threatened to objects which public policy is especially interested to preserve uninjured, such as public roads and waters, burial-grounds, or sacred places; and though interdicts were granted where the quarrel was entirely between private parties, it was originally, perhaps, only when the subject of dispute was such as to render a breach of the public peace the probable result, unless the matter was set at rest by the summary interposition of legal authority. If, for instance, it was a possession or quasi-possession that was disputed, it might be feared that the claimant would adopt force to eject the actual occupier, that force would be met by force, and the public peace be broken; and the limitation of the time—one year—within which, as we shall see (paragr. 6, note), interdicts had in many cases to be applied for, seems to connect the acts giving rise to them with delicts. (Poste, Gai. pp. 650, 651.) This public character attaching to interdicts may suggest that they were originally given to protect public, not private, interests. Niebuhr (Hist. Rom. vol. ii. 149, Eng. Trans.) and Savigny (Possess. Bk. iv. 44) think that in the private occupancy of the ager publicus may be seen an interest so little protected otherwise, and calling so precisely for some such aid as the interdict, that it can hardly be doubted that the early use of
interdicts was directed to meet the exigencies of this particular case. Anyhow, as the civil law did not deal with possession apart from ownership, a remedy became necessary when the praetors recognised possession, and, after the praetorian system was fully established, a character of settled law was imposed upon the mode of giving interdicts by the praetor announcing in his edict that he would grant a particular interdict under particular circumstances. Interdicts were given, as the text informs us, to protect not only the possession of corporeal things, but the quasi-possession of servitudes. (See Bk. ii. Tit. 3. 4 note.)

When the system of granting interdicts was fully formed, an interdict was ordinarily the mere prelude to an action, which was tried like any other action, and the process was not more summary than in other actions (see note on parag. 8); and even before the introduction of the system of extraordinaria judicia, interdicts had become, probably, less frequently used, there being a tendency to go direct to the action grounded on them, and to do away with the interdict as a preliminary step. In the time of Justinian persons who under the praetorian system would have applied for an interdict, brought an action. (See parag. 8.) In conducting this action, the magistrate would be greatly guided by the old law relating to interdicts; but otherwise the subject of interdicts was one with which the law of the Lower Empire had very little to do.

1. Summa autem divisio interdictorum hae est, quod aut prohibitoria sunt aut restitutoria aut exhorbitatoria. Prohibitoria sunt, quibus vetat aliquid fieri, veluti vim sine vitio possidenti vel mortuum inferenti, quo ei jus erit inferendori, vel in loco sacro sedicari, vel in flumine publico ripave ejus aliquid fieri, quo pejus navigetur. Restitutoria sunt, quibus restituit aliquid jubet, veluti honorum possessori possessionem eorum, quae quis pro herede aut pro possessor e possidet ex ea hereditate, aut cum jubet ei, qui vi possessione fundi dejectus sit, restitui possessionem. Exhibitoria sunt, per quae jubet exhiberi, veluti eum, cujus de libertate agitur, aut libertum, cui patronus operas indicere velit, aut parenti liberos, qui in potestate ejus sunt. Sunt tamen qui putant, pro priie interdicta ea vocari, quae prohibitoria sunt, quia interdicere est denuntiare et prohibere: restitutoria autem et exhibitoria proprie decreta vocari: sed tamen optimum, omnia interdicta appellari, quia inter duos dicuntur.

1. The principal division of interdicts is, that they are prohibitory, restitutory, or exhibitory. Prohibitory interdicts are those by which the praetor forbids something to be done, as, for example, to use force against a person in lawful possession, or against one who carries a dead body to a spot where he has a right to carry it, or to build on a sacred place, or to do anything in a public river, or on its bank, which may impede the navigation. Restitutory interdicts are those by which the praetor orders something to be restored, as, for instance, when he orders to be restored to the honorum possessor the possession of the goods of an inheritance possessed by another as heir or as possessor, or when he orders the possession of land to be restored to the person who has been violently expelled from the possession of it. Exhibitory interdicts are those by which the praetor orders to exhibit; for instance, to exhibit the person whose freedom is being questioned, or the freedman to whom his patron wishes to notify the services due from him, or to exhibit to the father the children in his power. Some, how-
ever, think that the term interdict ought, strictly speaking, to be applied to those which are prohibitory, because interdicere means 'to denounce, to prohibit,' while those that are restitutory or exhibitory ought to be called decreta. But usage has applied the word interdict to all alike, as they are all given between two parties.

Gal. iv. 189, 140, 142; D. xliii. 1. 1.

The formula of many of the interdicts most ordinarily in use is preserved to us in the Digest. It would take up too much space to give many of these at length. One or two examples of each kind must suffice.

The formula of the prohibitory interdict generally ended with the words veto or vim fieri veto. That forbidding nuisances in public ways ran thus:—

In via publica itinereve publico facere, immittere quid, quo ea via idve iter deterius sit, fiat, veto. (D. xliii. 8. 2. 20.)

That forbidding interruption in the use of a burial-ground ran thus:—

Quo quave illi (the person protected) inferre invito te (the person against whom the interdict was granted) jus est, quominus illi eo cave mortuum inferre et ibi sepelire licet, vim fieri veto. (D. xi. 8. 1. pr.) Other prohibitory interdicts may be found relating to sacred places (D. xliii. 6. 1. pr.), tombs (D. xi. 8. 1. 5), navigation (D. xliii. 12. 1. pr.).

Restitutory interdicts ran, for example, thus:—

Quod in flumine publico ripave ejus factum, sive quid in flumen ripamve ejus immission habes, si ob id aliter aqua fluit atque uti priorie aestate fluxit, restitueas. (D. xliii. 13. 11.)

Restituire is used in a very wide sense, as it includes not only, as in this example, putting back things into the state they were before, and giving back possession, but giving possession to a person who had not had possession.

Of exhibitory interdicts, which were ordinarily used as the preliminary of a vindication, we may take as a specimen that de libero homine exhibendo, granted to make any one who had a freeman in his custody produce him, and thus render it impossible that he should be illegally retained in his custody. It ran thus:—

Quem liberum dolo malo retines, exhibeas. (D. xliii. 29. 1. pr.)

2. Sequens divisio interdictorum hae est, quod quaedam adipiscendae possessionis causa comparata sunt, quaedam retinende, quaedam recipierandae.

Gal. iv. 148; D. xliii. 1. 2. 8.

As interdicts were mainly applied to questions of the possessory rights of private persons, those interdicts which distinctly
referred to such possession are here classed together. But they fall under the heads of the first division. Interdicts retinendæ possessionis were prohibitory; interdicts adipiscendæ or recipierandæ possessionis were restitutory.

3. Adipiscendæ possessionis causa interdictum accommodatur bonorum possessori, quod appellatur 'quorum bonorum,' ejusque vis et potestas hec est, ut, quod ex his bonis quisque, quorum possesio alci data est, pro herede aut pro possessore possideat, id ei, cui bonorum possessionis data est, restituere debeat. Pro herede autem possidere videtur, qui putat se heredem esse: pro possessoris est possidet, qui nullo jure rem hereditariam vel etiam totam hereditatem sciens, ad se non pertinenti, possidet. Ideo autem adipiscendæ possessionis vocatur interdictum, quia ei tantum utile est, qui nunc primum constaret adipisci rei possessionem: itaque si quis adeptus possessionem amiserit eam, hoc interdictum ei inutile est. Interdictum quoque, quod appellatur Salvianum, adipiscendæ possessionis causa comparatum est eoque utitur dominus fundi de rebus coloni, quas est pro mercedibus fundi pignori futuras pepigisset.

8. To acquire possession an interdict is given to the bonorum possessor, termed Quorum bonorum, of which the effect is to compel the person possessing, as heir or possessor, any of the goods of which the possession is given to another, to make restitution to that person as the bonorum possessor. A person is said to possess as heir, who thinks himself to be heir, and as possessor, who, without any right, and knowing that it does not belong to him, possesses a part or the whole of an inheritance. It is said of this interdict, that it is given to acquire possession, because it is only available for a person who wishes to gain, for the first time, possession of a thing. If, then, a person who has gained possession loses it, he cannot avail himself of this interdict. There is, too, another interdict given to acquire possession, viz. the interdictum Salvianum, to which an owner of land has recourse to enforce his right over the things belonging to the farmer, which the farmer has pledged as a security for his rent.

GAL. iv. 144, 147.

The interdict Quorum bonorum ran thus:—

Quorum bonorum ex edicto meo illi possessione data est, quod de his bonis pro herede aut pro possessori possides, possidereve si nihil usucaptum esset, quod quidem dolo malo faciisti ut designeres possidere, id illi restitution. (D. xliii. 2. 1. pr.) Although the interdict was only given when the bonorum possessor had never before had possession, yet it was restitutory, a term used very widely, as has been observed in the note to paragr. 1, and the word restitution appears in its terms. Restitution, therefore, must be used as meaning 'to give up,' not 'to give back.'

The use of this interdict, which could be brought only with respect to the inheritance as a universitas, not with respect to the particular things composing it (D. xliii. 2. 1. 1), was to secure the possession to those whom the prætor treated as having a right to the inheritance, but who had not a right recognised by the civil law. Not being heirs, properly so called, they could not bring a real action for the inheritance. (See Bk. iii. Tit. 9. pr.) It will be observed from the formula that the interdict might be used against the person possessing pro herede or pro possessor, although the time of usucapion had run in his favour, and against such
a person, if, having possessed, he had, through *dolus malus* on
his part, ceased to possess. The person possessing *pro possessore*,
*pro* without any allegation of title, is sometimes spoken of as
*prædo*. (See Tit. 6. 28, note.)

We must not confound the *interdictum Salvianum* with the
*actio Serviana* (see Tit. 6. 7), but it was probably only a step to
that action, and may have fallen into disuse when the *actio
Serviana* was established as a means of redress for the creditor.
The *interdictum Salvianum* was not given to every mortgage
creditor, but only to the owner of a rural estate, as a means of
getting possession of the goods of the occupier of the estate which
had been pledged for the rent. Probably the interdict was granted
even if the goods had passed into the hands of a third party. (D.
xliii. 33. 1; but see C. viii. 9. 1.) Gaius mentions two other inter-
dicts coming under this head, one given to *bonorum emptores*,
and one to *sectores*, or purchasers of public goods (iv. 145, 146).

4. Retinendae possessionis causa
comparata sunt interdicta 'uti possi-
detes' et 'utrubi,' cum ab utraque
parte de proprietate alicujus rei con-
troversia sit et ante queritur, uter
ex litigatorio possidere et uter
petere debeat. Namque nisi ante
exploratum fuerit, utrius eorum
possessio sit, non potest petitoria
actio institui, quia et civilis et na-
tralis ratio facit, ut alius possidet,
alis a possidente petat. Et quia
longe commodus est possidere po-
tius quam petere, idque plurumque et
defe sing ingentes existit contentio
de ipsa possessione. Commodum
autem possidendi in eo eat, quod,
etiam ejus res non sit, qui possidet,
si modo actio non potuerit suam esse
probare, remanet suo loco possessio:
propter quam causam, cum obscura
sint utriusque iura, contra petitorum
judicari solet. Sed interdicto qui-
dem 'uti possidetes' de fundi vel
selenium possessione contenditur,
'utrubi' vero interdicto de rerum
mobilium possessione. Quorum vis
et potestas plurimam inter se diffe-
rentiam apud veteres habebat: nam
'uti possidetes' interdicto is vince-
bet, qui interdicti tempore posside-
bet, si modo nec vi nec clam nec
precario nancitus fuerat ab adversario
possessionem, etiam si alium vi ex-
pulerat aut clam abriuperant alienam
possessionem nec precario rogaverat
aliquem, ut sibi possidere liceret:
'utrubi' vero interdicto is vincebat,
qui majore parte ejus anni nec vi
nec clam nec precario ab adversario

4. To retain possession there are
given the interdicts *uti possidetes* and
*utrubi*, when in a dispute as to the
ownership of a thing, the question first
arises, which of the parties ought to be
possessor and which plaintiff. Frr.,
unless it is first determined to what
the possession belongs, it is impossible
to shape the real action, as law and
reason both require that one party
should possess, and the other bring
his claim against him. And as it is
much more advantageous to possess
than to claim the thing, there is gen-
erally a keen dispute as to the possession
itself. The advantage of possession
consists in this, that even if the thing
does not really belong to the possessor,
yet, if the plaintiff does not prove
himself to be the owner, the possessor
still remains in possession, and, there-
fore, when the rights of the parties
are doubtful, it is customary to decide
against the claimant. The interdict
*uti possidetes* applies to the possession
of land and buildings, the interdict
*utrubi* to that of moveables. There
were formerly great differences in
their effects; for in the interdict *uti
possidetes* he prevailed who was in
possession at the time of the interdict.
Provided that he had not acquired
possession from his adversary by force
or clandestinely, or as a concession;
but it made no difference if he had
acquired it from any one else, by
forcibly expelling him, secretly de-
priving him of possession, or obtaining
from him possession as a concession.
In the interdict *utrubi*, on the contrary,
he prevailed, who during the greater part of the preceding year had had the possession without having obtained it as against his adversary by force, clandestinely, or as a concession. At the present day, it is different, for the two interdicts have the same effect as regards possession, so that, whether the thing claimed is an immoveable or a moveable, he prevails, who, at the time of the *litis contestatio*, is in possession, without having obtained it as against his adversary by force, clandestinely, or as a concession.

Gal. iv. 148–152; D. vi. 1. 24; D. xliii. 17. 1; D. xliii. 81; C. iv. 19. 2.

The interdict *uti possidetis* ran thus: —

*Ut i aedebus, quibus de agitur, nec vi, nec clam, nec precario alter ab altero possidetis, quominus ita possideatis, vim fieri veto.*

(D. xliii. 17. 1. pr.)

It was granted to defend the possession of all immoveables, except *cloace*, which were expressly excepted by the praetor's edict. The word _aedes_ in the text of the interdict is only an example.

By possessing *precario* is meant possessing at the will of another, possession having been requested from him (D. xliii. 26. 1. pr.). When the person from whom the possession had been extorted wished to do so, he could always resume it; and hence the word *precarius* came to mean uncertain. Perhaps the origin of *precario possession* was the interest that clients had in a portion of the *ager publicus*, which their patron might permit them to use, and which they were bound to restore immediately if their patron demanded it back.

The words _alter ab altero_ are inserted, because it would be no ground for disturbing the possession that had been obtained _vi_, _clam_, or _precario_, unless it had been so obtained from the other litigant party.

It was necessary that application should be made for this interdict within a year after the security of the possession had been threatened. (D. xliii. 17. 1. pr.) It did not signify how it had been threatened. The text only refers to the case of an action being brought to dispute it, but the interdict would be granted in whatever way the possession had been attacked.

The interdict _utrubis_ ran thus: —

*Utrubi hic homo quo de agitur majore parte hujusce anni fuit, quominus is cum ducat, vim fieri voto.* (D. xliii. 31. pr.)

The example is taken from the case of the disputed possession of a slave, but the interdict applied to the case of all moveables. This interdict was considered one *retinendae possessionis*, although, before Justinian applied the same rule as in *uti possidetis*, as it was granted to the person who had possessed during the greater part of the preceding year, it might happen that it was granted to a person who had not the possession at the exact time it was
granted, but who had possessed the thing during more months in the year than the person who happened to be in possession at the end of the year.

5. Possidere autem videtur quia non solum, si ipse possideat, sed et si ejus nomine alius in possessione sit, licet is ejus juri subjectus non sit, quals est colonus et inquilinus: per eos quoque, apud quos deposuerit quis aut quibus commodaverit, ipsae possidere videtur et hoc est, quod dicitur, retinere possessionem posse aliquem per quemlibet, qui ejus nomine sit in possessione. Quin etiam animo quoque retineri possessionem placet, id est ut, quamvis neque ipse sit in possessione neque ejus nomine alius, tamen si non relinquenda possessionis animo, sed postea reversurus inde discesserit, retinere possessionem videatur. Adipisci vero possessionem per quos alius potest, secundo libro exposuimus. Nec ulla dubitatio est, quin animo solo possessionem adipisci nemo potest.

5. A person is considered to possess not only when he himself possesses, but also if any one is in possession in his name, although not a person in his power, as the tenant of a farm or building. He may also possess through a depository or a borrower, and this it is that is meant by saying that a person may retain possession by any other who is in possession in his name. Moreover, it is held that possession may be retained by mere intention only, that is, that although a person is not in possession himself, nor is any one else in his name, yet, if it is not with any intention of abandoning the thing, but with the intention of returning again to it, that he has placed himself at a distance from it, he is considered still to retain the possession. Through whom possession may be acquired, we have already explained in the Second Book. But it most certainly can never be acquired by mere intention only.

Gal. iv. 158.

In the introductory note to Bk. ii. Tit. 6. pr., the distinction has been pointed out between civilis possessio, that is possession bona fide and ex justa causa, which could be transmuted by usucapion into ownership, and naturalis possessio, which again is divided into possessio, where, although there is not possession such as will ripen by usucapion, there is still possession as a matter of fact, coupled with the intention of treating the thing as if the possessor were the owner, and in possessione esse, where the person has the detento, but not the animus possidenti. Civilis possessio and naturalis possessio with the intention of ownership were protected by these possessory interdicts, whereas the being merely in possession was not. This paragraph points out (1) that one person may be in possession while another is the possessor, and that the first is not, while the second is, entitled to the interdicts; and (2) that a possessor may sometimes possess only with the animus without being actually on the spot possessing. An instance given by Paulus is that of a man who possesses a mountain pasture, and leaves it when the season for its use is over, with the intention of returning (Sent. v. 2. 1). But the mere intention to possess as owner, without the physical fact of detention having ever taken place, was of no avail.

6. Reciperandae possessionis causa solet interdici, si quis ex possessione

6. To recover possession an interdict is given in case any one has been
fundi vel sedium vi dejectus fuerit: nam ei proponitur interdictum 'unde vi,' per quod is, qui dejectit, cogitur ei restitutum possessionem, licet is ab eo, qui dejectit, vi vel clam vel precario possidebat. Sed ex sacris constitutionibus, ut supra diximus, si quis rem per vim occupaverit, si quidem in bonis ejus est, dominio ejus privatur, si aliena, post ejus restitutionem etiam restitutionem rei dare vim passo compellitur. Qui autem aliquem de possessione per vim dejecerit, tenetur legem Julia de vi privata aut de vi publica: sed de vi privata, si sine armis vim fecerit, sin autem cum armis eum de possessione expulerit, de vi publica. Armorum autem appellatione non solum scuta et gladios et galeas significari intelligimus, sed et fustes et lapides. expelled by violence from the possession of land or a building. He has then given him the interdict unde vi, by which he who has expelled him is forced to restore to him the possession, although the person to whom the interdict is given has himself taken by force, clandestinely, or as a concession, the possession from the person who has expelled him. But, as we have said above, the imperial constitutions provide that if any one seizes on a thing by violence, he shall lose the ownership of it, if it is a part of his own goods, and if it belongs to another, he shall not only restore it, but, in addition, pay to the person who has sustained the injury the amount at which the thing is estimated. Moreover, a person who has expelled by violence another from his possession, is liable under the lex Julia de vi publica seu privata: for private violence, if his violence was exercised without the use of arms; for public violence, if the expulsion from possession was made by armed force. Under the term arms are included not only shields, swords, and helmets, but clubs and stones.

Gal. iv. 154, 155; D. xlvi. 7. 7; D. l. 16. 41; C. viii. 4. 7.

The interdict unde vi ran thus:—

Unde tu illum vi dejectisti, aut familia tua dejectit, de eo, quaeque ille tunc ibi habuit, tantummodo intra annum, post annum de eo quod ad eum qui vi dejectit pervenerit, judicium dabo. (D. xliii. 16. 1. pr.)

Formerly a distinction was made in granting this interdict, according to the degree of violence used. If it had been ordinary violence (vis quotidianae), the interdict was only granted if the possession had not been obtained vi, clam, or precario, with respect to the adversary (Gal. iv. 154), and could only be obtained within a year; but if vis armata had been employed, the interdict was granted in all cases. (Cic. Epist. xv. 16.) This difference had ceased long before the time of Justinian, and apparently before the time when the interdict assumed the shape in which we now find it in the Digest, by which, as will be seen, possession was given, within a year, of the thing as it then was; after a year, only of the thing as it came into the hands of the dispossessor.

The interdict unde vi only applied to inmoveables (D. xliii. 16. 1. 6); but the constitution of Valentinian, Theodosius, and Arcadius, A.D. 389, referred to in the text (and in Tit. 2. 1), protected moveables as well as inmoveables. (C. viii. 4. 7.)

The lex Julia de vi is treated of in Tit. 18. 8.

Possession could be recovered by uti possidetis and utrubi as
well as by unde vi, and it was by utrubì that, previously to the constitution above mentioned, possession of moveables was recovered. But the interdict unde vi was in some respects more advantageous than uti possidetis. (1) It gave a remedy against the dispossession, even if he was no longer in possession (D. xliii. 16. 1. 42); (2) it gave, if brought within a year, the fructus from the time of the ejectment, not as uti possidetis merely from the commencement of proceedings (D. xliii. 16. 1. 40); and (3) it was not, if the vis had been armata, or after the distinction between the characters of the violence employed had been done away, barred by the vices of the possession of the applicant for the interdict; (4) it applied not only to immovable, but to any moveables thereon (D. xliii. 16. 1. 6).

There were other interdicts under the head of reciperasdor, possessionis—that de precario and that de clandestina possessione (D. xliii. 26. 2. pr.; D. x. 3. 7. 5); but little is known of them.

7. Tertia divisio interdictorum haec est, quod aut simplicia sunt aut duplicia. Simplicia sunt, in quibus alter actor, alter reus est: qualia sunt omnia restitutoria aut exhibitoria: namque actor est, qui desiderat aut exhiberi aut restitui, reus is, a quo desideratur, ut restituant aut exhibeant. Prohibitorum autem interdictorum alia simplicia sunt: alia duplicia. Simplicia sunt, veluti cum prohibet prætor in loco sacro vel in flumine publico ripase ejus alicuam fieri (nam actor est, qui desiderat, ne quid fiat, reus, qui alicuam facere conatur); duplicia sunt veluti ‘uti possidetis’ interdictum et utrubí. Ideo autem duplicia vacantur, quia per utrimumque litigatoris in his condicione est nec quisquam precipue reus vel actor intellegitur, sed unusquaque tam rei quam actoris partem sustinet.

7. The third division of interdicts is, that they are either simple or double. Those are simple in which one person is plaintiff and the other defendant, as is the case in all that are restitutory or exhibitory. For he is the plaintiff who wishes that a thing shall be exhibited or restored, and he is defendant against whom the claim is made. But of prohibitory interdicts some are simple, some double: simple, as, for instance, when the prætor forbids anything to be done in a sacred place, or in a public river, or on its banks; for he is plaintiff who wishes that the thing should not be done, and he is defendant who wishes to do it: double, as in the case of the interdicts uti possidetis and utrubí; and these interdicts are called double, because in them the possession of each party is equal, for neither can be said to be properly plaintiff or defendant, but each is at once plaintiff and defendant.

Gal. iv. 156-160.

Duplicita sunt, veluti uti possidetis interdictum et utrubí. These interdicts here and in Gains (Gal. iv. 160) are, seemingly, only adduced as examples, but we know of no others having the same character. Compare the actions familiaris eircumunda, communi dividundo, and finium regundorum (see Introd. sec. 103).

8. De ordine et veteri exitu interdictorum super vacuo est hodie dicere; nam quoties extra ordinem jus dicitur, qualia sunt hodie omnia judicia, non est necesse reddi interdictum, sed perinde judicatur sine

8. Of the process and effect of interdicts in former times it would be now superfluous to speak. For whenever the jurisdiction is extraordinary, as is the case now in all actions, there is no necessity for an interdict; for
interdictis, atque si utilis actio ex causa interdicti redditas quisset. judgment is given without interdicts, exactly as if a utilis actio had been given in pursuance of an interdict.

C. viii. 1. 8.

From the Institutes of Gaius (iv. 161 et seq.) we gather a general notion of the manner in which the proceedings on an interdict were conducted. But the text of Gaius is, in this part, very imperfect and difficult to understand, and as the whole process was obsolete in the time of Justinian, a very short sketch of the proceedings must suffice here.

The parties were made to appear in jure exactly in the same way when an interdict was to be applied for as when an action was to be brought. The prætor heard the statement of the party who made the application, and if the adversary confessed the truth of the statement, the prætor announced his decree at once, and had it executed, if necessary, by the strong arm of the law (manu militari, D. vi. 1. 68). If the defendant asserted that he had not done wrong, the prætor gave an action based upon the interdict, to ascertain whether the facts were as the plaintiff, in applying for the interdict, alleged; that is, the intentio of the formula was the language of the interdict put as a hypothetical case. The interdict would run,—Hoc vel illud te facere veto: the intentio, Si hoc vel illud A. A. fecerit (condemna, &c.). The parties bound themselves by a sponsio and restitutatio in a penal sum, which the defendant was to pay if he was in the wrong, and to receive if he was not. But this practice, which was always adopted when the interdict was prohibitory, was probably gradually abandoned when the interdict was restitutory or exhibitory; and in these cases, in order to compel the actual performance of the act ordered by the prætor, an action was given with a formula arbitraria, so that the judex might issue a preparatory order to the defendant, and, if it was not complied with, might make him pay the amount of all damage sustained (quanti eae res erit), or would compel him, at least at the date when Ulpian wrote (D. vi. 1. 68), to restore the thing if it is in his possession. As to actiones arbitrariae see note on Tit. 6. 31.

Tttr. XVI. DE PENA TEMERE LITIGANTIUM.

Nunc admonendi sumus, magnam curam egisse eos, qui jura sustinebant, ne facile homines ad litigandum procederent: quod et nobis studio est. Ideo eo maxime fieri potest, quod tementias tam agentium quam eorum, cum quibus agitur, modo pecunia ria poena, modo jurisjurandi religione, modo metu infamiae coercetur.

We may here observe, that the authors and preservers of our law have always sought most anxiously to hinder men from engaging too recklessly in law-suits, and it is what we ourselves desire also. And the best method of succeeding in it is, to repress the rashness alike of plaintiffs and of defendants, sometimes by a pecuniary penalty, sometimes by the sacred tie of an oath, sometimes by the fear of infamy.

GAL. iv. 174.
In the days of Gaius, the means of punishing persons who recklessly brought or defended a suit were more numerous. The plaintiff was restrained from recklessly bringing an action not only by being condemned in damages and costs, but (1) by an action of calumny—that is, the defendant could bring against a plaintiff who had sued him dishonestly an action by which the defendant could recover one-tenth of what the plaintiff had claimed, if by action, and one-fourth of what he had claimed, if by interdict (GAI. iv. 175); (2) by what was termed the 'contrary action' the unsuccessful plaintiff, although he had honestly brought his action, was made to pay a tenth or a fifth of what he claimed, but then it was only failing in a few special actions, such as that injuriarum, that exposed him to this risk (GAI. iv. 177); (3) by oath, i.e. by the defendant calling on him to swear to his bona fides, but if the defendant did this, he could not afterwards bring an action of calumny, or the contrary action (GAI. iv. 179); and (4) by restipulatio, i.e. by being called on to wager a sum to be lost if he failed, which was allowed in certain actions; this mode of proceeding excluded the three others previously mentioned. (GAI. iv. 180, 181.)

In the law as described by Gaius, the defendant was restrained from recklessly defending an action (1) by the sponsio, or wager that he had done all he was bound to do, allowed in certain actions (the sponsio and restipulatio made up the wager of the parties) (GAI. iv. 171); (2) in certain actions, as, for instance, for deposit in case of necessity, the penalty was double in case of denial (Tit. 6. 17), and all actions with a penalty are looked on by Gaius as restraining the defendant (iv. 171); (3) if the case was one where no restraint operated under these first two heads, the defendant was obliged to take an oath of bona fides (GAI. iv. 172); (4) certain actions carried infamy with them against the persons condemned (GAI. iv. 182).

1. Ecce enim jusjurandum omnibus, qui conveniuntur, ex nostra constitutione defertur: nam res non aliter suis allegationibus utitur, nisi prius juraverit, quod putans, se bona instantia uti, ad contradicendum pervenit. Ad adversus initiantes ex quibusdam causis dupli actio constituitur, veluti si damni injuriae ant legatorum locis venerabilibus relictorum nomine agitur. Statim antem ab initio pluri quam simpli est actio veluti furti manifesti quadrupli, nec manifesti dupli: nam ex his causis et alius quibusdam, sive quae negat sive fatetur, pluri quam simpli est actio. Item auctoribus quoque calumnia coercetur: nam stiam actor pro calumnia jurare cogitur ex nostra constitutione. Utriusque

1. And first, under our constitution, an oath is administered to all defendants. For the defendant is not admitted to state his defence until he has sworn that it is from a persuasion of the goodness of his own cause that he resists the demand of the plaintiff. In certain cases where the defendant denies liability an action for double the value is given; for instance, in the case of wrongful damage, or of legacies left to holy places. The action is from the very beginning for more than the single value in such cases as the action furti manifesti, where it is for the quadruple value, and that furti nec manifesti, where it is for the double. In these cases and in some others, whether the defendant denies or confesses, the action
etiam partis advocati jusjurandum subeunt, quod alia nostra constitutione comprehensum est. Hec autem omnia pro veteris calumniae actione introducta sunt, que in desuetudinem abit, quia in partem decimam litis actorem multabat, quod nusquam factum esse invenimus; sed pro his introductum est et praetium jusjurandum et ut improbus litigat etiam damnum et impensae litis inferre adversario suo cogatur.

is for more than the single value. The litigiousness of the plaintiff is also restrained, for he is obliged by our constitution to take the oath de calumnia. The advocates also of each party take an oath prescribed by another of our constitutions. All these formalities have been introduced to replace the old action calumnia, which is fallen into disuse, for it subjected the plaintiff to a fine of the tenth of the value of the thing in dispute; but we have never known this penalty enforced. In its stead, there has, in the first place, been introduced the oath we have just mentioned; and, in the next place, a person who brings a groundless action is made to reimburse his adversary for all losses and expenses he has been put to.

Gal. iv. 178; C. ii. 59. 2; C. iii. 1. 13. 6; C. iii. 1. 14. 1.

For the terms of these oaths see C. ii. 59. 2; C. iii. 1. 14. 1.

2. Ex quibusdam judicii damnati ignominio; siunt, veluti furti, vi bonorum raptorum, injuriarum, de dolo, item tutelae, mandati, depositi directis, non contrariis, actionibus, item pro socio, que ab utraque parte directa est, et ob id quilibet ex sociis se judicio damnatus ignominia notatur. Sed furti quidem aut vi bonorum raptorum aut injuriarum aut de dolo non solum damnati notantur ignominia, sed etiam pacti et recte; plurimum enim interest, utrum ex delicto aliquis an ex contractu debitor sit.

2. In certain actions the person condemned becomes infamous, as in the actions furti, vi bonorum raptorum, injuriarum, de dolo; as also in the actions tutelae, mandati, depositi, if direct, but not if contrary; and also in the action pro socio, which is direct, by whichever of the contracting parties it may be brought, and in which infamy is attached to whichever of these parties may be condemned. But in the actions furti, vi bonorum raptorum, injuriarum, and de dolo, it is not only those condemned that are branded with infamy, but also those who have made a compromise with their opponents; and rightly, for there is a great difference between being debtor by a delict, and by a contract.

Gal. iv. 182; D. iii. 2. 7.

Directis non contrariis. The reason is given by Ulpian: In contrariis non de perfidio agitur sed de calculo, qui fere judicio solet dirimi (D. iii. 2. 6. 7). Contrariis actiones were such as those brought against the pupil, the mandator, or deposer, by the tutor, mandator, or depositary. There could be no reason why infamy should attach to a pupil who did not know the amount of the claims of the tutor, or to a depositor who did not know the amount of the expenses to which the depositary had been put.

The consequences of infamy were to prevent the guilty person from being a witness, receiving any public honours, or bringing a public prosecution. We have also seen (Tit. 13. 11) that, previous
to the legislation of Justinian, a person declared infamous could not appear as procurator in the cause of another.

3. Omnium autem actionum instituendarum principium ab ea parte edicti profiscitur, qua pretor edicit de in jus vocando: utique enim in primis adversarius in jus vocandus est, id est ad eum vocandus est, qui jus dicturus sit. Qua parte pretor parentibus et patronis, item liberis parentibusque patronorum et patronarum hunc praebat homorem, ut non alter locat liberis libertisque eos in jus vocare, quam si id ab ipso pretore postulaverint et impetraverint: et si quis aliter vocaverit, in eum pensam solidorum quinquaginta constituit.

GAL. iv. 188; D. ii. 4. 1; D. ii. 4. 4. 1; D. ii. 4. 24.

The earliest method of vocatio in jus was to seize on the defendant, and drag him before a magistrate. Afterwards the seizing became symbolic, and the plaintiff called some one to witness that the defendant had been seized, but would not come. (See Introd. sec. 93.)

Tut. XVII. DE OFFICIO JUDICIS.

Superest, ut de officio judicia dispiciamus. Et quidem in primis illud observare debet judex, ne aliter judicet, quam legibus aut constitutionibus aut moribus proditionis est.

D. v. 1. 40. 1; D. xlvii. 10. 1. 8.

Judex qui contra saecras principium constitutiones, contrave jus publicum quod apud se recitatum est, pronunciat, in insulam deportatur. (Paul. Sent. v. 25. 4.)

If the judge gave a sentence manifestly wrong, or if the sum was fixed in the condemnation by the pretor, and the judge condemned the defendant in a different sum (GAL. iv. 52), the sentence was treated as void without any appeal being necessary. If the judge was mistaken, as, for instance, in the mode in which he regarded some fact, an appeal was allowed, notice of which had to be given within two days (prolonged to ten days by Justinian in Nov. 23. 1) after the sentence, or three days if a procurator, and not the party himself, had conducted the suit. There seems to have been no system of appeals under the Republic, further than that one magistrate of equal or higher standing could veto
the acts of another. Under the Empire the emperor was the supreme judge of appeal, the technical term for an appeal to him being relatio. But Hadrian made the decisions on appeal of the Senate final (D. xlix. 2. 1. 2), and Constantine made those of the praetorian prefect (C. vii. 62. 19). The prefect of the city and the presides of provinces sat as intermediate judges of appeal for Rome and the provinces respectively (C. vii. 62. 17 and 32). (See Hunter, 885–889.)

1. Ideo si noxali judicio addictus est, observare debet, ut, si condemnandus videbitur dominus, ita debet condemnare: 'Publilium Mavium Lucio Titio decem aureis condemno aut noxam dedere.'

D. xli. 1. 6. 1.

2. Et si in rem actum sit, aive contra petitorum judicavit, absolvere debet possessorum, aive contra possessorum, jubere eum debet, ut rem ipsum restituat cum fructibus. Sed si in presenti neget se possessor restituere posse et sine frustratione videbitur tempus restitutendi causa petere, indulgendum est ei, ut tamen de litis estimatione caveat cum fidejussore, si intra tempus, quod ei datum est, non restituisisset. Et si hereditas petita sit, eadem circa fructus intervenient, que diximus intervenire in singularum rerum petitione. Illorum autem fructuum, quos culpa sua possessor non perceperit, in utraque actione eadem ratio pene habetur, si prdeo fuerit. Si vero bona fide possessor fuerit, non habet ratio consumptorum neque non perceptorum: post inchoatam autem petitionem etiam illorum ratio habetur qui culpa possessoris percepti non sunt vel percepti consumpti sunt.

D. vi. 1. 17. 1; D. vi. 1. 35. 1; D. vi. 1. 62. 1; C. iii. 82. 22.

What the words eadem ratio pene habetur refer to is not easy to say. There do not seem to be any passages in the Digest which satisfactorily indicate any difference between the responsibilities of the mala fide possessor for fruits, according as the action was in rem, or was a petitio hereditatis. Justinian here says that the position of a bona fide possessor
was the same in the case of an inheritance and of a particular object; for that in neither case was he answerable for fruits gathered and consumed. But this was not the case after a senatusconsultum made in the time of Hadrian (D. v. 3. 20. 6), which made the bona fide possessor of an inheritance answerable for all that he had profited by (D. v. 3. 28); and he was therefore answerable for the fruits he had consumed. Perhaps the text may be based on some passage in the writings of a jurist, who wrote before the senatus-consultum was made.

3. Si ad exhibendum actum fuerit, non sufficit, si exhibeat rem is, cum quo actum est, sed opus est, ut etiam causam rei debet exhibere, iudicis rem exhibere, si est ut vocat causam habeat actor, quam habiturus esset, si, cum primum ad exhibendum egisset, exhibita res fuisse: ideoque si inter moras usucapta sit res a possessore, nihil minus condemnabitur. Preterea fructuum medii temporis, id est ejus, quod post acceptum ad exhibendum judicium ante rem judicatam excussit, rationem habeere debet iudex. Quod si neget is, cum quo ad exhibendum actum est, in presenti exhibere se posse et tempus exhibendi causa petat idque sine frustratione postulare videatur, dari ei debet, ut tamen caveat, se restituturum: quod si neque statim iusiudicis rem exhibeat neque postea exhibeturum se caveat, condemnandus est in id, quod actoris interesat ab initio rem exhibitam esse.

8. In the action ad exhibendum it is not sufficient that the defendant exhibits the thing, but he must also exhibit his title to the thing; that is, he must give the claimant the same title as he would have had, if the thing had been exhibited immediately on the demand being made. If, therefore, during the delay, the possessor completes the usucaption of the thing, he will still be condemned. The judge ought also to make him account for the fruits of the intermediate time, that is, of the time elapsed between the granting the action ad exhibendum and the sentence. If the defendant in this action states that it is out of his power to make the exhibition immediately, and asks for time, and his request for delay seems honestly made, he should have time given him, but he must first give security that he will give the thing up. But if he neither exhibits the thing at once, upon the order of the judge, nor gives security for exhibiting it afterwards, he must be condemned in an amount equivalent to the interest of the claimant in having it exhibited immediately.

D. x. 4. 9. 5, 6; D. x. 4. 12. 4, 5.

4. Si familie erossunda judicio actum sit, singulas res singulis hereditibus adjudicare debet et, si in alterius persona praegravare videatur adjudicatio, debet hunc invicem coheredi certa pecunia, siuct jam dictum est, condemnare. Eo quoque nomine coheredi quisque suo condemnandus est, quod solus fructus hereditarii fundi perceptit aut rem hereditarium corruptit aut consumptit. Quae quidem simuliter inter plures quoque quam duos coheredes subsequuntur.

4. In the action familie erossunda, he ought to adjudge each object to each heir separately, and if any one heir has more than his share adjudged him, the judge ought, as we have said above, to condemn him to pay his coheir a fixed sum as an equivalent. So, too, an heir ought to be condemned to make compensation to his coheirs, who has alone enjoyed the fruits of the land of the inheritance, or has damaged or consumed anything forming part of the inheritance. And these rules apply, whether the coheirs are two or more.

D. x. 2. 51. 1; D. x. 2. 52. 2.
As to the office of the judge in the three actions noticed in this and the two succeeding paragraphs, see Introduct. sec. 108.

5. Eadem interveniunt et si communi dividundo de pluribus rebus actum fuerit. Quod si de una re, velut in fundo, si quidem iste fundus commodum regionibus divisionem recipiat, partes ejus singulis adjudicare debet et, si unus pars pregravare videbitur, in invicem certa pecunia alteri condemnandus est: quod si commodum dividi non possit, vel homo forte aut mulus erit, de quo actum sit, uni totus adjudicandus est et is alteri certa pecunia condemnandus.

D. x. 2. 55; C. iii. 87. 8.

6. Si finium regradorum actum fuerit, discipere debet iudex, an necessarium sit adjudicatio. Quia sane uno casu necessaria est, si evidenteribus finibus distingui agros commodi sit, quam olim fuissent distincti; nam tune necesse est ex alterius agro partem aliquam alterius agri domino adjudicari: quo casu conveniens est, ut iis alteri certa pecunia debet condemnari. Eo quoque nomine damnandus est quia hoc iudicio, quasi forte circa fines malitiose aliquid commissit, verbi gratia quia lapides finales furatus est aut arbore sepultus. Contumacia quoque nomine quia quoce eo iudicio condemnatur, veluti si quis jubente iudice metiri agros passus non fuerit.

D. x. 1, 2, 1; D. x. 1, 3; D. x. 1, 4, 3, 4.

7. Quod autem istis jussiis aliqui adjudicatrum sit, id statim ejus fit, cui adjudicatum est.

7. In these actions, anything adjudged becomes at once the property of the person to whom it is adjudged.

TIT. XVIII. DE PUBLICIS JUDICIIS.

Publica judicia neque per actiones ordinantur nec omnino quidquam simile habent ceteris judiciis, de quibus locuti sumus, magnaque diversitas est eorum et in instituen-
dis et in exercendis. both in the mode in which they are
begun and in that in which they are
carried on.

The subject of public prosecutions is foreign to a treatise which,
like the Institutes, professes to treat only of private law. It is not
noticed at all in the Institutes of Gaius, and is treated in a very
cursory manner in this Title. For the comprehension of this Title,
it will be sufficient to observe that, in the later times of the Re-
public and in the first years of the Empire, a series of laws was
made, fixing the penalty to be attached to particular crimes, and
prescribing the procedure to be employed in the trial. Many of
these laws are briefly referred to in this Title; and it was the trials
conducted under their provisions that alone received the name of
publica judicia. Under the Empire, most of the crimes not coming
under these special laws, and especially those provided against by
a senatusconsultum or constitution, were judged by the prætor or
prefectus urbi in a more summary method. The judicium was
then said to be not publicum, but extra ordinem; and gradually
the method of procedure prescribed by the law for the different
publica judicia fell into desuetude, and nothing was retained of
the special laws but the penalty they fixed (D. xlviii. 1. 8), the pro-
cedure being the same as in the judicia extraordinaria. (See
Introduction, sec. 112.)

1. Publica autem dicta sunt, quod 1. They are called public, because
cuius ex populo executio eorum generally any citizen may institute
plerumque datur.

D. xiii. 2. 48. 10.

There were certain persons excluded from the right of bringing
a criminal accusation; for instance, women, unless the injury com-
plained of was done to themselves or their near relations, persons
below the age of puberty, persons made infamous by a judicial sen-
tence, and persons so poor as not to possess fifty aurei. (D. xlviii.
2. 1, 8 and 10.) But, generally speaking, it was the right of any
one to make a criminal charge, although he might be totally uncon-
ected by any ties with the person who suffered from the crime.

2. Publicorum judiciorum que-
dam capitalia sunt, quedam non
capitalia. Capitalia dicimus, que
ultimo supplicio adsecunt vel aque
et ignis interdictione vel deporta-
tione vel metallo: cetera si qua in-
famiam irragunt cum damno pecu-
niario, hee publica quidem sunt,
non tamen capitalia.

2. Some public prosecutions are
capital, some are not. We term capi-
tal those which involve the extreme
punishment of the law, or the inter-
diction from fire and water, or depor-
tation, or the mines. Those which
carry with them infamy and a pecu-
niary penalty are public, but not
capital.

D. xlviii. 1. 2.

3. Publica autem judicia sunt
hec. Lex Julia majestatis, qua
in eos, qui contra imperatoriem vel
rem publicam aliquid militi sunt,

3. Public prosecutions are insti-
tuted under the following laws. The
lex Julia majestatis, which subjects to
its severe provisions all who attempt
anything against the emperor or State. The penalty it inflicts is the loss of life, and the memory of the guilty is condemned even after his death.

D. xlviii. 4. 11.

The lex Julia majestatis was passed in the time of Julius Cæsar. (D. xliii. 4.)

Ait quid motiti sunt. The design, without any overt act, was enough to sustain the charge. (C. ix. 8. 5.)

Et post mortem. (See Bk. iii. Tit. 1. 5.)

4. Item lex Julia de adulteriis coercedis, quæ non solœm temeratores alienarum nuptiarum gladio punit, sed etiam eos, qui cum masculis infandam libidinem exercere audent. Sed eadem lege Julia etiam stupri flagitium punitur, cum quis sine vi vel virginem vel viduaem honeste viventem stupraverit. Pœnam autem eadem lex irrogat pecatoribus, si honesti sunt, publicationem partis dimidio honorum, si humiles, corporis coercitionem cum relegatione.

4. Also the lex Julia de adulteriis, which punishes with death not only those who are guilty of adultery, but those also who give themselves up to works of lewdness with their own sex. The same law also punishes the seduction without violence of a virgin, or of a widow of honest character. The penalty upon offenders of honourable condition is the confiscation of half their fortune, upon those of low condition, corporal punishment and relegation.

D. xlviii. 5. 84.

The lex Julia de adulteriis belongs to the time of Augustus, about B.C. 17.

Gladio punit. The lex Julia only punished the guilty with confiscation of a portion of their property and relegation. (PAUL. Sent. ii. 26. 14.) Constantine affixed the graver penalty. (C. ix. 9. 31.)

5. Item lex Cornelia de sicariis, quae homicidas ultere ferro persequitur vel eos, qui hominis occidendi causa cum telo ambulant. Telum autem, ut Gaius noster in interpretatione legis duodecim tabularum scriptum reliquit, vulgo quidem id appellatur, quod ab arco mittitur, sed et omne significatione, quod manu cujusdam mittitur: sequitur ergo, ut et lapsis et lignum et ferrum hoc nomine continetur. Dictumque ab eo, quod in longinquum mittitur, a Graeco voce figuratum, ἀπὸ τοῦ τελευταίου: et hanc significationem invenire possumus et in Graeco nomine: nam quod nos telum appelamus, illi βαλλεθαί appellant ἀπὸ τοῦ βάλλεσθαι. Admonem nos Xenophon; nam ita scripsit: καὶ τὰ βαλλομένη ὑμῶν ἐφίστη, λάγχα, ταξιμεία, σφαιράια, πλεύτα ὁι καὶ λίθοι. Sicarii autem appellantur a sica, quod significat ferreum

5. Also the lex Cornelia de sicariis, which strikes with the sword of vengeance murderers and those who for the purpose of killing a man go armed with a telum. By telum, according to the interpretation given by our Gaius in his commentaries on the Twelve Tables, is ordinarily meant anything that is shot from a bow, but it equally signifies anything sent from the hand. Thus, a stone, a piece of wood, or of iron, is included in the meaning of the term, for it merely implies something impelled to a distance, being derived from the Greek word τελέω. And the corresponding word in Greek has the same significance, for what we call telum they call βαλλομένη, from βαλλεσθαι, as we may learn from Xenophon, who says, 'they collected the weapons (βαλλομένη) —spears, arrows, slings, and a great quantity of stones.' Assassins are called sicarii from sica, an iron knife. By the
cultrum. Eadem lege et venefici capite damnantur, qui artibus odiosis, tam venenis quam susurris magicis homines occiderunt vel mala medicamenta publice vendiderunt.

D. xlviii. 8. 1. pr. and 1; D. l. 16. 288. 2.

Lex Cornelia de sicariis, passed during the dictatorship of Sylla, b.c. 81.

6. Alia deinde lex asperrimum crimen nova poena persequitur, quse Pompeia de parricidio vocatur. Qua caveat, ut si quis parentis aut filii aut omnino adfessionis ejus, quae nuncupatiae parricidii contemptur, data propteraverit, sine clam sive palam id ausus fuerit, nec non is, cujus dolo malo id factum est, vel conscius criminis existit, licet extraneus sit, poena parricidii puniatur et neque gradus neque ignibus necque ulli alii sollemni poena subjugetur, sed insitus culeo cum cane et gallo gallinaceo et vipera et simia et inter ejus ferales angustias comprehensus, secundum quod regionis qualitas tulerit, vel in vicinum mare vel in annem projiciatur, ut omni elementorum usu vivus carere incipiatur, et ei celum superstiti, terra mortuo auferatur. Si quis antem alias cognitione vel adfinitate conjunctas personas necaverit, poenam legis Corneliae de sicariis sustinebit.

6. Another law, the lex Pompeia de parricidio, inflicts on the most horrible of crimes a strange punishment. It provides, that anyone who has hastened the death of a parent or child, or of any other relation whose murder is legally termed parricide, whether he acts openly or secretly, and whoever instigates or is an accomplice in the commission of the crime, although a stranger, shall undergo the penalty of parricide. He will be punished, not by the sword, nor by fire, nor by any ordinary mode of punishment, but he is to be sewed up in a sack with a dog, a cock, a viper, and an ape, and enclosed in this horrible prison he is to be, according to the nature of the place, thrown into the sea, or into a river, that even in his lifetime he may begin to be deprived of the use of the elements, and that the air may be denied to him while he lives, and the earth when he dies. He who kills persons allied to him by cognation or alliance, other than those we have mentioned, shall undergo the penalty of the lex Corneliae de sicariis.

D. xlviii. 9. 1, 9; C. ix. 17.

Lex Pompeia de parricidio, passed in the consulship of Pompeius, b.c. 52. The punishment mentioned in the text is borrowed from the legislation of the Twelve Tables. The lex Pompeia, under the term parricidium, embraced the murder of any ascendant, of a brother or sister, of a husband or wife, of consobrini, of a step-father, step-mother, father-in-law, mother-in-law, &c., of a patron, and of a child if killed by the mother or grandfather, but not if killed by the father. (D. xlviii. 9. 1.) If there was no river at hand, the offender was torn to pieces by wild beasts. (D. xlviii. 9. 9. pr.)

7. Item lex Cornelia de falsis, quae etiam testamentaria vocatur, poenam irrogat ei, qui testamentum vel aliud instrumentum falsum scripserit, signaverit, recitaverit, subjecserit, quive signum adulterinum fecerit, soulsorat, expresserit scienis dolo malo. Ejusque legis poena in

7. Also the lex Cornelia de falsis, otherwise called testamentaria, punishes any one who shall have written, sealed, read, or substituted a false testament, or any other instrument, or shall have made, cut, or impressed a false seal, knowingly and maliciously. The penalty is, upon a slave, the ex-
servos ulteriorium supplicium est, quod
et in lege de sicariis et veneficiis ser-
vatur, in liberis vero deportatio.

treme punishment of the law, as is
pronounced by the lex Cornelia upon
assassins and poisoners; that upon
freemen is deportation.

D. xlviii. 10. 1. 4, 18; D. xlviii. 10. 16. 1.

Lex Cornelia de falsis, or Cornelia testamentaria, was passed
under the dictatorship of Sylla, B.C. 81.

8. Item lex Julia de vi publica
seu privata adversus eos exoritur, qui
vmin vel armatam vel sine armis
commisserint. Sed si quidem armata
vis arguat, deportatio ei ex lege
Julia de vi publica irrogatur: si
vero sine armis, in tertiam partem
bonorum publicato imponitur. Sin
autem per vim raptus virginis vel
vidus vel sanctimonialis, velatæ vel
alii, fuerit perpetratus, tunc et pec-
catores et ei, qui opem flagitiu dede-
runt, capite puniuntur secundum
nostre constitutionis definitionem,
ex qua hac apertius possibile est
scire.

D. xlviii. 6. 10. 2; C. ix. 18. 1.

Lex Julia de vi, passed in the time of Julius Cæsar or Augustus,
but its exact date is not known.

9. Lex Julia peculatus eos punit,
qui pecuniam vel rem publicam vel
sacram vel religiosam furati fuerint.
Sed si quidem ipsi judices tempore
administrationis publicas pecunias
subtraxerunt, capitali animadver-
sione puniuntur, et non solum hi,
sed etiam qui ministerium eis ad
hoc adhibuerunt vel qui subtracta
ab his scientes susceperunt: alii
vero, qui in hane legem inciderint,
pensè deportationis subjugantur.

D. xlviii. 18. 1, 3; C. ix. 28.

Lex Julia peculatus. The exact date of this law is also un-
known. It probably belongs to the same epoch as the lex Julia
de vi.

9. Also the lex Julia peculatus pun-
ishes those who have stolen public
money or property, or anything sacred
or religious. Magistrates, who, during
the time of their administration, have
stolen the public money, are punishable
capitally, as also are all who aid them
in their robbery, or who knowingly
receive their plunder from them. Other
persons who offend against this law are
subject to the penalty of deportation.

10. Est et inter publica judicia
lex Fabia de plagiariis, quae inter-
dum capitis ponam ex sacris consi-
tutionibus irrogat, interdum levio-
rem.

10. There is also among the laws
giving rise to public prosecutions the
lex Fabia de plagiariis, which inflicts,
in certain cases, capital punishment
according to the constitutions, some-
times a lighter punishment.

C. ix 20. 7.

Cicero refers to this law (pro Rabirio, 3), but nothing more is
known of it. A *plagiarius* was one who knowingly kept in irons, or confined, sold, gave, or bought a citizen (whether freeborn or a freedman) or the slave of another.

11. Sunt præterea publica judicia *lex Julia ambitus* et *lex Julia repetundarum* et *lex Julia de annona* et *lex Julia de residuis*, quæ de certis capitulis loquentur et animæ quidem amissionem non irrogant, alliis autem panis eos subjiciunt, qui precepta earum neglexerint.

D. xlviii. 11; D. xlviii. 13. 2. and 4. 3, 4, 5; D. xlviii. 12. 2;

*Lex Julia ambitus*, made in the time of Augustus, to repress illegal methods of seeking offices. (D. xlviii. 14.)

*Lex Julia repetundarum*, made in the time of Julius Cæsar, to punish magistrates or judges for receiving bribes. (D. xlviii. 11.)

*Lex Julia de annona*, made to repress combinations for heightening the price of provisions. (D. xlviii. 12.)

*Lex Julia de residuis*, made to punish those who gave an incomplete account of, or misappropriated, public moneys committed to their charge. (D. xlviii. 13. 2.)

It is uncertain whether these last two laws belong to the time of Julius Cæsar or of Augustus.


12. This notice of public prosecutions has only been meant to give you the merest sketch that might serve you as a guide to studying them. You may, with the blessing of God, gain a more complete knowledge of them from the fuller account given in the *Digest* or *Pandects*. 
SUMMARY.

BOOK I.

SOURCES OF LAW.

PRIVATE LAW: ITS SOURCES.—The Institutes treat of private law, *jus privatum*, the law that has to do with individuals, as distinguished from *jus publicum*, that which regards the Roman Empire and regulates religious worship and civil administration. (Tit. 1. 4, note.) The sources of private law are natural law, the law of nations, and the civil law. (A.) The two first are, in the system of Gaius, identical. That law which right reason commands, *jus naturale*, is also that law which is found to be common to the legal systems of different nations. Justinian sometimes adopts this method of speaking, and sometimes borrows passages in which the *jus naturale* has a larger sense, is thus distinguished from the *jus gentium*, and is extended to the rules which instinct makes animals obey. (Tit. 2. pr. note.) (B.) The civil law is the special law of the Romans, and is derived from the following sources:—

Sources of the Jus Civile.—1. Laws (*leges*) passed by the *comitia curiata* or centuriata. 2. Plebiscita, which by the *lex Hortensia* bound the whole people. (Tit. 2. 4.) 3. *Senatusconsulta*, which, especially after the beginning of the Empire, had the force of laws. (5.)

4. The imperial constitutions, which, by virtue of the *lex regia* or law passed by the *comitia curiata* conferring the *imperium*, had the force of law, and which were of three kinds: (a) *epistola*, *mandata*, *rescripta*, announcements of the imperial will to different authorities; (b) *decreta*, judicial decisions of the Emperor; (c) *edicta*, enactments. (6.)

5. The edicts of the pretors (*jus honorarium*), who announced at the beginning of their year of office the rules they would follow in what was termed the *edictum perpetuum*, which ran on from year to year under successive pretors, with such additions and changes as each might think necessary, and which assumed a final shape in the time of Hadrian. The curule ediles also issued edicts, which were part of the *jus honorarium*. (7.)

6. The *responsa prudentium*, who were first called on officially by Augustus to give their opinions, and

* When a number is placed between brackets, as here (5), it shows to which paragraph of the Title last mentioned reference is made.
whose decisions, when those who gave them agreed, were invested by Hadrian with the force of law. Special authority was given by Theodosius II. to the writings of the five great jurists, and, in case of their disagreement, to the writings of Papinian. (8.) 7. Custom, too, is one of the sources of private law, for customs are like laws, legem imitantur. Laws might be abrogated by desuetude (11), but particular customs could not prevail against general law. (9.)

**LAW RELATING TO PERSONS.**

Private law relates to persons, to things (including obligations), and actions. The law relating to persons is first treated under the three heads of status, that is, the legal capacity of persons, viz., libertas, civitas, and familia; and as libertas comes first, the first division of persons noticed is that into persons who are not free, i.e. slaves, and those who are freed, libertinii, or free by birth, ingenui.

**Slaves.**—Slavery, contrary to the law of nature, but recognised by the law of nations, is based on the fact that those who were originally treated as slaves had been preserved from death when defeated and captured in war. But all slaves are not captured in war: how then do these others become slaves? 1. By birth, for the children of a female slave always follow her condition; and, 2, slavery is inflicted as a punishment on persons born free, as upon a free person who, to share the price, colludes with a fictitious vendor who sells him as a slave, and on others guilty of great crimes, servi poma. (Tit. 3.) Opposed to slaves are those who are born free, born in matrimony, or, if not, of a woman who at any time after conception was free. (Tit. 4.) Lastly, there is an intermediate class, those born slaves, but made free (libertini), and their position depended on the mode and circumstances of the manumission.

**Manumission.**—If manumission was made in any one of the three modes known to the old law, censu, vindicta, or testamento, it was said to be legitima; the slave became by manumission a Roman citizen until the time of Augustus, when, by the lex Aelia Sentia, another condition was imposed, and it was necessary that, unless the manumission was made vindicta, the emancipated slave should be thirty years old and the manumittor twenty (Tit. 6. 4); unless some good cause (5) for dispensing, with this rule was shown to the council. The requirement of age, in the testator, in the case of manumission by testament, was first reduced by Justinian from twenty years to seventeen, and subsequently done away with. (Tit. 6. 7, note.) It was also necessary that the master should have complete ownership of the slave. (Tit. 5. 8, note.) But if the manumission failed in any of these respects, or if it was made in a private manner, as by letter, or in presence of friends, the emancipated slave was in the position of a Latinus, not in that of a Roman citizen, it being, however, open to him to rise to the position of a citizen by certain modes, and chiefly
by rendering public services. (Tit. 5. 8. note.) If, previously to
emancipation, slaves had been guilty of some great crime, then they
were only raised by emancipation to the rank of dediticii or surrendered
enemies. Justinian abolished these distinctions and made every eman-
cipated slave a Roman citizen. (Tit. 5. 8.) Further, the lex Ælia
Sentia nullified manumissions made in prejudice of creditors, except
that a slave, for the purpose of administering the inheritance, might
be made the sole and necessary heir of the testator (Tit. 6. pr., 1);
and the lex Furius Caminia, abolished by Justinian, limited the number
of slaves a testator might manumit (Tit. 7). The power of a master
over his slave, formerly unlimited, was gradually subjected to many
restrictions. The Emperor Antoninus Pius extended the provisions of
Sylla's law, the lex Cornelia de sicariis, which punished with death or
exile the homicide of the slave of another, to the case of a master
killing his own slave; and also protected slaves cruelly treated and
fleeing to the statue of the emperor. (Tit. 8. 2.) Gradually, not only
the life, but the person, and even the property, in fact though not in
law, of the slave were protected. (Tit. 8. 2. note.)

CIVITAS is indirectly treated in the preceding notice of Latini, and
in the twelfth and sixteenth Titles, in which the loss of citizenship is
noticed. But the subject mainly belongs to the sphere of public law,
and the rest of the First Book is occupied with considering the third
head of status, Familia.—Here the main division is into persons not sui
jurus and persons sui juris. The position of persons not sui juris is a
consequence of the patria potestas. The subject of the patria potes-
tas, the power of the father over his descendants, originally not much
less than that of a master over his slaves, is discussed in the ninth
and three following Titles. Justinian inquires, 1, How it arises;
2, How it is ended?

Patria Potestas: How it Arises.—It arises in three ways, by,
1, Marriage; 2, Legitimation; 3, Adoption.

I. Marriage.—In order that marriage may give rise to the patria
potestas, it must be according to law (justa nuptia), and for this there
were three requisites: 1, Puberty (fourteen years for husband, twelve
for wife); 2, Consent of the parties, the intention to be married mani-
fested by the woman passing into the possession of the man; and
3, Connubium; the parties must be legally capable of being married
to each other.

There were three ways in which the parties might fail to have this
legal capacity. 1. They, or one of them, might be persons or a person
whom the State held to be incapable of forming the nexus termed
justa nuptia; as, for instance, a citizen and a foreigner could not
form the tie of justa nuptia, &c. (Tit. 10. pr. and 11, note.) 2. They
might be within the prohibited degrees of relationship (Tit. 10. 1–10);
and it is to be remarked that relationship by adoption, as well as by
blood, constitutes a bar. (Tit. 10. 2.) 3. They might, or one of them
might, be in potestate, and then, unless the consent of the person in
whose potestas they were was obtained, the marriage was invalid. (Tit. 10. pr.) Divorce was always permitted by mutual consent, but repudiation by one party only under penalties, except in case of misconduct, and with certain solemn forms.

II. LEGITIMATION, by which the offspring of concubinage were placed in the position of liberi legitimi, and this could be effected in three ways. 1. Oblation to the curia, i.e. enrolling the child in the number of those on whom the chief burdens of provincial towns fell. 2. The subsequent marriage of the parents; an act attesting the marriage and the ratification by the children being necessary. 3. The rescript of the emperor, granted in case one of the parents was dead. (Tit. 10. 19.)

III. ADOPTION.—A general term, under which is included adoptio properly so called, when a person in potestas was given in adoption, and arrogatio when the person adopted was sui juris. (Tit. 11.) Adoption in the old law was effected by three sales to destroy the patria potestas of the person given in adoption, and a fictitious process, in jure cessio, by which the person adopted was given over to the adopter; for which process Justinian substituted the execution of a deed before a magistrate. Arrogatio had a more public character, and was made originally before the curia, then before lictors representing the curia, and subsequently by imperial rescript. (1.) Originally a person adopted or arrogated was in the potestas of the person adopting or arrogating, exactly as if he had been so by birth, and was not in any way protected against him; but Justinian entirely altered the law as to adoptio, and under his legislation (unless the adopter was an ascendant paternal or maternal of the adopted, in which case the rules of the old law operated), the person adopted did not pass at all into the family of the adopter, but remained in his natural family; and the only effect of adoption was to give the adopted a right of succession to the adopter if intestate. Provisions were also made to protect the arrogated if he was not of the age of puberty. Such an arrogation was not permitted unless after inquiry it had been found to be beneficial to the arrogated, and if he was emancipated under the age of puberty, although for a good reason, he got all his own property back, while, if he was disinherited or emancipated without good reason before that age, he not only got his own property back, but got a fourth of the arrogator's property (quarta Antonina); and lastly, when he attained puberty, he could have the arrogation rescinded if prejudicial to him. (8, note.) Women, who had lost their own children, were permitted by the emperors to adopt. (10.) The chief rule as to the capacity of adopting is that adoption is said to imitate nature, and therefore the adopter must be eighteen years at least older than the adopted, so as to permit physically of his having been the natural father. (4.)

Patria Potestas: how ended.—The patria potestas might be dissolved in four ways. 1. Death of the parent; the grandson, however, whose father was living, passing into the power of the father on the grandfather's death. (Tit. 12. pr.) 2. Dementiae capitis;
the father or son losing that civic position which was necessary for the exercise of patria potestas; and this might happen by (a) deportatio in insulam (1); (b) condemnatio to be a servus ponsae (8); and (c) captivitas. But if the capite minutas was restored by the emperor to his former rights (1), or if the prisoner became free, then (by what in the second of these cases was termed ius postliminis) the father was placed in exactly the same position as if the deportatio or captivitas had not taken place. (6.) 9. Attainment of dignities, by the son attaining the patriciate (4) or, subsequently to the date of the Institutes, other dignities. (4, note.) 4. Emancipation, which, under the old law, was effected by three fictitious sales made by the father, and then the purchaser reselling the son to the father, who then manumitted him; the object of this being that the father, being the manumittor, might have the rights of patronage, the chief of which was the same right of succession to the son as the manumittor of a slave had, in case of his enfranchisement. (Tit. 12. 6, note, and Tit. 5. 3, note.) Under the legislation of Justinian, emancipation was effected by a declaration before a judge or magistrate. (Tit. 12. 6.)

Other Forms of Potestas.—In order to make the subject of Potestas complete, we ought to notice not only, 1, the power of the master over the slave, and 2, the power of the father over his descendants, but 3, the power of the husband over the wife who passed in manum, as she did when married, by (a) conforreatio; (b) coemption, or fictitious sale; and (c) usus, the parties living together for a year without the wife breaking the use by three nights' absence (Tit. 10. pr., note); and 4, the power, in the old law, of the purchaser over a person in mancipio, that is, sold to him by the father of the person sold, the person in mancipio being, as regards the purchaser, almost in the position of a slave, although, as regards others, he was still ingenuus. (Tit. 8. pr., note.)

Persons Sui Juris: their Inincapacities. Tutors and Curators.—From the beginning of the 8th Title we have been considering persons in potestate. We now turn to persons sui juris; but it is only of certain incapacities of persons sui juris that the Institutes treat: incapacities arising from, 1, age; 2, physical or mental infirmity; or (so far as reference is made to an earlier period of law), 3, sex. Tutors were appointed to protect the interests and authorise the acts of pupils under the age of puberty; and curators might be appointed to watch over 1, prodigals; 2, persons afflicted with mental or great physical infirmity; 3, persons above the age of puberty, but under the age of twenty-five years. The rest of this book is taken up with the subject of tutors and curators.

Tutors: how appointed.—Tutors are first divided, according to the mode of their appointment, into, 1, Testamentary, 2, Legitimate, 3, Fiduciary, and 4, Given by the magistrate.

I. Testamentary Tutors: who may appoint.—The paterfamilias may appoint testamentary tutors to all descendants under his power
who become *sui juris* on his death. (Tit. 18. 8.) This excludes grand-
children having a father living, who, by the death of the *paterfamilias*,
come under the power of their own father (5), and includes posthumous
children of the *paterfamilias*, who become *sui juris* at his death. (4.)
The wishes of the father were also carried out by the magistrate (usually
as a matter of course), if he appointed a *testator* by his testament to an
emancipated child; and the magistrate generally ratified, after he had
inquired into the circumstances, the appointment of a testamentary
tutor by a father in case of his natural children, or such an appointment
by others who had a strong interest in, or had left property to, any child
under the age of puberty. (5, note.)

**Testamentary Tutors: who may be appointed.**—A *filiusfamilias*
could be appointed to the office, as it was of a public character. (Tit.
14. pr.) Women could not, although the emperor would sometimes
interfere to confirm their appointment. (Tit. 14. pr., note.) Slaves could
not; and, if a slave of the testator was appointed tutor, the appointment
was held to carry the freedom of the slave with it, and if the *testator*
appointed the slave of another, this imposed on the testamentary heir
the duty of purchasing, if possible, the freedom of the slave. If a
madman, or a person under the age of twenty-five years, was appointed
a testamentary tutor, he could only act if he became sane, or after
he was twenty-five, and, meantime, the magistrate appointed another
tutor. (2.) A tutor could be appointed to hold his office after or up
to a certain time (8), but he could not be appointed to discharge one
portion only of the functions of a tutor, as he was given to the person
not to the property. (4.)

**II. Legitimate Tutors** (i.e. called to their office by the statute law).—
1. In case no testamentary tutor had been appointed, the *agnati* had a
claim, under the law of the Twelve Tables, to be tutors, and hence
were called *legitimi tutores* (Tit. 15. pr.), and this includes the case of
the testamentary tutor dying in the lifetime of the testator. (2.) Under
the later emperors the mother, and even the grandmother, might be
appointed tutors, where none was appointed by testament. (3, note.)
The right to be tutor did not belong to all the *agnati*, but only to
those nearest in degree, all those in the same degree sharing the office.
(Tit. 16. 7.)

**Capitis Deeminutio.**—The tie of agnation being severed by *capitis
deminutio*, the Institutes digest to explain, in the 16th Title, what
*capitis deminutio* means. It means a change in the *caput*, or legal exist-
ence, of a person, so that his *status* undergoes change in one or more
or all, of its elements, viz. liberty, citizenship, and family. (Tit. 16. pr.)
The *deminutio* is termed *maxima* when all three elements are lost, when
the *capite minuto* ceases to be free and to be a citizen, and loses his
family position, as would happen in the case of *servi penna*, freedmen
condemned to be again slaves for ingratitude, and freemen joining in a
fraudulent sale of themselves. (1.) The *capitis deminutio* was called
*media* when liberty was not touched, but citizenship was lost, and with
it family position, as would happen in the case of any one interdicted fire and water, or deported to an island. (2.) The *capitis deminutio* was said to be *minima* when liberty and citizenship were not touched, but the family position was altered, as in the case of adoption, arrogation, emancipation, or, in the old law, a wife's passing *in manum*. (3.) The rights of agnation are affected by all the three kinds, but those of cognation only by the *maxima* and *media*. (6.) The *minima capitis deminutio*, or change of family, so far changed the legal existence of the person undergoing it that, under the old law, he not only lost his place in the intestate succession of the family he quitted, but he could not be sued for his antecedent debts, and any usufructs he held came to an end. (8, note.) Mere loss of dignity, and even infamy, produced no change of *status*. (5.)

2. To return to the subject of legitimate tutors. Patrons are the legitimate tutors of their freedmen and freedwomen. In case the manumittors are dead, their children are the legitimate tutors of the freedmen and freedwomen. (Tit. 17.)

3. Parents are the legitimate tutors of their children or other descendants whom they have emancipated below the age of puberty. (Tit. 18.)

**III. Fiduciary Tutors.**—In case the master emancipated his slave, and died before the freedman attained the age of puberty, the tutelage of this slave passed by law, or rather by an extension of the law of the Twelve Tables (Tit. 17), to the children of the emancipator. But if an ascendant emancipated his descendant, and died before the person emancipated attained the age of puberty, the tutelage also passed to the children of the emancipator, but it was not supposed to do so by any express law, and the tutors in this case were called, not *legitimi*, but *fiduciarii*, a term properly applied to the nominal tutor, who, in case of emancipation, did not resell to the father, but himself emancipated the son, and had thus, as emancipator, the tutelage, which he held in trust (whence he was called *fiduciarius*) for the father. (Tit. 19.)

**IV. Tutors appointed by the magistrate.**—Tutors were appointed by the magistrate under the *lex Atilia* and the *lex Julia et Titia*. Under the first of these laws a tutor was appointed at Rome by the *praetor* and a majority of the tribunes; and under the second, in the provinces, by the *præses* (Tit. 20. pr.), if there was no tutor on whom the office devolved under the heads of appointment already noticed, or if from any cause there was a vacancy in the office. (1, 2.) Subsequently, under the empire, the tutor was in such cases appointed at Rome by the *praefectus urbis*, if the position of the pupil was a high one, and by the *praetor urbanus* if it was not. The *præses* appointed in the provinces, and, in cases of small importance, the local magistrates; but these magistrates needed the preliminary authority of the *præses*. In all cases, inquiry was made into the circumstances before the appointment was made. (Tit. 20. 4.) Justinian, in cases where the fortune of the pupil or adult (for here we have a provision extending to curators)
did not exceed 500 solidi, allowed the local magistrate to appoint without any authorisation, merely taking security from the person appointed, without inquiring into the circumstances of the case. (5.)

TUTELAGE OF WOMEN.—Under the old law women were in tutelage all their lives, even after they had become sui juris, the tutor being appointed by the testament of the husband, if she was in manu, and the husband could not only appoint a tutor, but give the wife the option of choosing one. If no testamentary tutor was appointed, the nearest agnatus was the tutor; and the tutor might be changed, either by his act, or on the woman’s application. After she had attained the age of puberty, the woman under tutelage managed her own affairs, but the tutor had to intervene in order to sanction solemn acts. All this tutelage of women above the age of puberty had become obsolete before the time of Justinian. (6, note.)

AUTHORITY OF THE TUTOR.—The tutor had, in the first place, to manage the affairs of the pupil; and, in the second place, to add his auctoritas, i.e. the supplement of what was wanted to make the pupil legally competent to act. If the pupil was under seven years old, the tutor could only in very rare cases, where the benefit was clearly great for the pupil, go through any acts on behalf of the infant beyond such as were necessary for the ordinary management of his affairs. It was only, for example, at a late period of the empire, that the tutor was allowed to enter on an inheritance on behalf of the infans. Between the ages of seven and fourteen, the pupil could contract without the authorisation of the tutor, so far as the contract was beneficial to him; but every unauthorised contract was inoperative to his prejudice. (Tit. 21. pr., note.) The pupil could not take any very serious step involving possible risk, such as entering on an inheritance, demanding possession of goods, or taking an inheritance under a fideicommissum, without the authorisation of the tutor. (1.) The tutor was obliged to give this authorisation personally, not by writing, and could not give it by ratification. (2.) If there was a suit between the tutor and pupil, a curator was appointed to intervene in this suit on behalf of the pupil. (8.)

TERMINATION OF TUTOR’S OFFICE.—The office of a tutor came to an end—

(a) By the pupil reaching the age of puberty, which had previously been regarded as a time varying according to the facts of each case, eighteen years being the maximum, but which Justinian fixed at fourteen for males, and twelve for females. (Tit. 22. pr.)

(b) By the pupil being arrogated, deported, reduced to slavery, or made a captive, or dying. (1.)

(c) By the condition being fulfilled on which the testamentary tutor was to cease to be tutor, or the time having expired during which the testamentary tutor was to act. (3, 5.)

(d) By the tutor dying (3); or—

(e) Undergoing, however appointed, the maxima or media capitis diminutio (4); and
(f) In the case of a tutor legitimus, his undergoing the minima capitis diminutio. (4.) And

(g) By the tutor being removed as suspected, or being relieved from his office on good grounds of excuse. (6.)

CURATORS: WHOM THEY WERE TO PROTECT.—Curators were appointed to protect the property and interests of four classes of persons:

1. Madmen (furiosi).—This was by the law of the Twelve Tables, and was extended by the pretors so as to include all forms of mental alienation (Tit. 28. 3, note), and the deaf, mute, and permanently infirm. (4.)

2. Prodigals (i.e. persons wasting recklessly their property).—This was also by the law of the Twelve Tables, but that law only applied to the case of a prodigal wasting goods received under an intestate succession, while the pretor extended it to all cases of prodigality. The fact of the madness or prodigality was first ascertained by the pretor, and then the prodigus was absolutely interdicted from managing his own affairs, but the furiosus was not so interdicted, and was only placed under the care of the curator. When the case came within the law of the Twelve Tables, the curatorship of the furiosus and prodigus belonged to the nearest agnate. The magistrate appointed in cases of the praetorian extensions of the terms, and in the time of Justinian in all cases. (Tit. 28. 3.)

3. Adolescents.—Persons of either sex, above the age of puberty, and under the age of twenty-five years.

The lex Platoria subjected to prosecution and infamy persons overreaching adolescents under twenty-five years, and possibly allowed curators to be appointed to protect them. Subsequently pretors protected such persons by ordering, in case they had been prejudiced, a restitutio in integrum, that is, that they should be put in the same position which they would have occupied if not prejudiced. Lastly, Marcus Antoninus ordered that curators should be appointed in all cases on the application of the minor. (Tit. 28. pr., note.) The adolescent was not obliged to have a curator for general purposes unless he wished, but a curator could be forced on him in case of a lawsuit, or his debtor wishing to pay him, or his late tutor wishing to settle accounts with him; and if he had a curator he could not alienate any part of his property without the sanction of the curator. (Tit. 23. 2, note.) The curator to an adolescent could only be appointed by the magistrate, the same magistrates appointing who appointed tutors; but a magistrate would generally have regard to the wishes, as to curatorship, expressed in the testament of a person who could have appointed a tutor. (1.)

4. Pupils.—Pupils sometimes received curators, as, for example, if the tutor legitimus was unfit, a curator was appointed to protect the pupil and act, to a great extent, instead of the tutor; or, if the testamentary tutor, or the tutor appointed by the magistrate, was unfit, a curator
was appointed to act conjointly with him, and curators were assigned in place of tutors excused for a time only. (5.)

If a tutor was prevented by illness or other causes from administering the affairs of his pupil, a person might be appointed to act for him, but this person was not a curator, but a delegate of the tutor. (6.)

**Modes of Protection against Tutors and Curators.**—Persons having tutors and curators were protected against the misconduct of these in the following ways:

1. Security was required and enforced by the exaction of pledges from *tutores* and *curatores legitimi*, and from those appointed by inferior magistrates. (Tit. 24. pr.)

2. If such security was not taken, or was taken to an insufficient degree, the magistrate was himself liable in an action, which extended to his heirs. (2.)

3. Every tutor or curator was bound to make an inventory of the property of the pupil or person under care. (Tit. 24. pr., note.)

4. Every tutor or curator was, after the publication of the 78th Novel, obliged to pledge himself by oath that he would act as a *bonus paterfamilias*. (Tit. 24. pr., note.)

5. The property of tutors and curators was subjected to a tacit hypothec to make good losses sustained through their neglect. (Tit. 24. pr., note.)

6. An action might be brought against tutors or curators when their office was ended, to make them account. (Tit. 22. 6, note.)

7. Tutors and curators might be removed by the *actio suspecti* (Tit. 26.)

**Removal on Suspicion.**—All tutors, including the patron (though in his case the grounds of a decision against him were not to be disclosed, in order to save his reputation—Tit. 26. 2), and all curators, might be removed, after or even before entering on office, on a charge of suspicion, *suspecti crimen*—a charge permitted by the Twelve Tables (Tit. 26. pr.)—being successfully brought before the pretor at Rome, the *prasses*, or proconsular legate, in the provinces, by any one, even a woman (8), except that the pupil could not bring this charge against his tutor, while the minor could bring it against his curator. (4.)

Infamy attached, if fraud, but not if neglect, was proved. (6.) The tutor or curator might be removed although solvent (5), and although he offered to give security. (12.) While the action was pending, the accused was suspended from his administration (7), but if he died the action was at an end. (8.) It was the duty of the tutor to see that the amount of the pupil’s maintenance was fixed by a magistrate. If he failed to do so, this was a ground for his being removed on a charge of suspicion. (9.) If he falsely asserted that the pupil’s means did not suffice to allow maintenance, he was to be handed over to the *prefectus urbis*, or *prasses*, to be punished, as also was a tutor who had obtained his office by bribery, and a freedman proved to be guilty of fraud while acting as tutor to the son or grandson of the patron. (10, 11.)

Where there were more than one tutor or curator, one might offer
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to his co-tutor or co-curator to give security, and alone act as administrator, the other co-tutor or co-curator having, however, the preference if he, when thus challenged, was willing to give security. If no tutor or curator came forward in this way, the person, if any, appointed by the testament to administer was allowed to act; and, if there was no such person, the majority of the tutors or curators was to decide who should act, and, if an agreement could not be come to in this way, the magistrate would decide. (Tit. 24. 1.)

TUTORS AND CURATORS WHEN EXCUSED.—Tutors and curators might be excused from holding their offices on grounds which may be classed under four heads:

1. Having rendered a service to the public, or being engaged in the discharge of some public duty.—(a) Having a certain number of children living (three at Rome, four in Italy, five in the provinces), children slain in battle, and grandchildren, in lieu of their parent, being reckoned in the number (Tit. 25 pr.); (b) being engaged in the administration of the fiscus (1); (c) being absent on the service of the State (2); (d) being magistrates (8), military persons (14), or members of learned professions (15).

2. Being in a position adverse to the pupil or adult.—(a) Being engaged in a law-suit with the pupil or adult, if the suit embraced the whole of the latter's property, or was for an inheritance (4); (b) being a creditor or debtor (4, note); (c) being appointed by a father through enmity (9); (d) having been in deadly enmity with the father (11); (e) having had their status questioned by the father (12); (f) being the husband of the woman under care (19).

3. Being incompetent to sustain the burden of the office.—(a) Through being in extreme poverty (6); (b) being in bad health (7); (c) not being able to read (8); (d) being over seventy years of age (18).

4. Filling, or having filled, similar offices.—(a) Holding already three offices of the kind in question (5); (b) having already been the tutor of the person to whom a curator was to be appointed (18).
BOOK II.

LAW RELATING TO THINGS.

DISTINCTIONS OF THINGS.—We now come to the law relating to things, but the Institutes only deal with private law. The first step is, therefore, to notice the distinction of things according as they are extra nostrum patrimonium or in nostro patrimonio, that is, according as they are or are not capable of being the property of private persons. It is only of things in nostro patrimonio that the Institutes treat. Of things within the compass of private law the principal division is that into things corporeal and incorporeal; into things like a field, quae tangi possunt, and things like a right of way over a field, an inheritance, or an obligation, quae tangi non possunt. (Tit. 2.)

MODES OF ACQUISITION.—How do we acquire things in nostro patrimonio, whether corporeal or incorporeal? The answer to this question takes up the Second Book of the Institutes, and the Third Book down to the end of the Twelfth Title. First the inquiry is made how we acquire particular things, res singulae, and then how we acquire groups of things, universitates rerum, like an inheritance.

We acquire particular things by, 1. Occupatio; 2. Accessio; 3. Traditio; 4. Usucapio; 5. Donatio; the first three being modes of acquiring jure naturali; the last two, jure civili. We acquire groups of things by, 1. Testamentary succession; 2. Intestate succession; 3. Arrogation; 4. Honorum addictio; 5. Honorum venditio; 6. Forfeiture under the senatusconsultum Claudianum.

The First Title of the Second Book treats of the distinction of things according as they are extra nostrum patrimonium or in nostro patrimonio, and then of the acquisition of particular things by occupatio, accessio, and traditio.

RES EXTRA NOSTRUM PATRIMONII are, 1, Communes, common to all men, such as the air, the sea, and the sea-shore as far as the limit of the highest winter flood (Tit. 1. 1. 8); every one being allowed to use the sea-shore, as for drying nets (5); avoiding, however, injury to existing buildings thereon (1); and each State having the sea-shore adjacent to its territory under its supervision. (2, note.) 2. Publica, belonging to the State, as rivers and ports, and the right of fishing therein, and the use for purposes of navigation of the banks thereof, although these banks might belong to private proprietors. (2, 4.) 3. Universitatis, belonging to a corporate body, as, e.g., a racecourse belonging to a city. (6.) 4. Nullius, in the sense of being so devoted...
to the gods that they cannot belong to men; and such res nullius may be (a) sacra, consecrated, as temples, by the pontiffs, with the sanction of the State (8); (b) religiosa, invested with a religious character by interment, private proprietors being at liberty to impress this character on their ground by simply burying a dead body there (9); and (c) sancta, hallowed, or protected against violation, like the gates or walls of a city (10).

**Modes of acquiring particular things jure naturali.**—

Particular things in nostro patrimonio are acquired by—

I. Occupatio, i.e. the taking or holding, as the holder’s own, of res nullius, in the sense of things which previously belonged to no one, such as:—(a) Wild animals wherever found, which you have actually captured, not merely wounded (Tit. 1. 18), and not let go again. (12.) Bees you have hived. (14.) (But swarms issuing from your hive and staying in your sight and power (14); wild animals, such as pigeons and deer, that have acquired the habit of returning to your keeping, and fowls, not wild, but that stray from your keeping (16), are considered as your property and not res nullius, and to take them is theft.) (16.) (b) Things taken from the enemy; if the things taken from the enemy by a Roman army have been previously taken by him from a citizen, they will, as a general rule, form part of the praeda or booty of the Roman army; but special things, such as land and slaves, are, by a kind of postliminy applied to them, allowed to revert to the owner. (17, note.) (c) Anything found on the sea-shore. (18.) (d) Islands formed in the sea. (22.) (e) Things found which have been intentionally abandoned by their owner (17), as distinguished from things which the owner has not wished to cease to own, as things thrown overboard in a storm or dropped out of a carriage. (48.)

II. Accessio.—There is no notice in the Institutes of accessio as a distinct mode of acquisition. The subject is treated as growing out of occupatio.

Acquisition by accession may be regarded as arising in two classes of cases. 1. In cases of natural increment. 2. In cases where, the things of two owners being mixed, the law decides which owner shall have the thing resulting from the mixture.

I. Accession by natural increment.—1. An owner gains something new by natural increment in the following instances:—(a) The young of his animals. (19.) (b) New soil added imperceptibly to his soil by alluvion. (20.) (c) A portion of his neighbour’s soil borne by a river to his soil and remaining there till the roots of trees thereon become attached to his soil. (21.) (d) An island being formed in a river; the owner of the bank has the ownership in this island up to the line of the mid channel. (22.) (e) The bed of a river left dry, up to the same line. (23.)

Accessions by natural increment might occur when a possessor or a usufructuary, and not the owner, held the land. To whom did the fruits belong? It is only of gathered fruits we can speak, for if the
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owner dispossessed the possessor, the owner immediately took all the fruits ungathered, and if the usufructuary died the same thing happened. With regard to the possessor, the bona fide possessor was not responsible for the fruits he had consumed, while the mala fide possessor was responsible. (36, note.) The usufructuary had a right to take all the fruits, including the young of animals; but the children of female slaves belonged to the owner, not to the usufructuary. (36, 37.)

2. Accession in favour of one of two owners.—The following instances are given in the Institutes of cases where, the things of two owners being mixed, the law decides which owner shall have the thing resulting from the mixture.

1. A makes a thing with the materials of B. Here, if the thing can be reduced to its rude materials, like a vessel of silver, the thing made belongs to B; if not, it belongs to A, as the maker of a nova species. (25.)

A makes a thing partly with his own materials and partly with the materials of B. The thing made belongs to A. (25.)

2. A weaves in his garment the purple of B. If the purple is still separable, the purple belongs to B; if not, to A, the garment being considered the principal, the purple the accessory thing. (26.)

8. Two owners consent to mix their materials. The product belongs to them in common. (27.)

4. The materials of two owners are mixed by accident.

If the mixed particles are physically inseparable, as when two metals are fused together, the product belongs to them in common. (27.)

If the mixed particles are physically separable, as when two qualities of wheat are mixed, each remains the owner of his share of the mixed wheat. (28.)

5. The owner of the soil builds with the materials of another.

The owner of the materials remains the owner, but he cannot have the house pulled down. He may wait, if he pleases, till the building is destroyed, and then reclaim his materials, or he may bring an action de tigno juncto and get double the value of the materials, and then his claim for the materials is at an end if the owner of the soil did not know that the materials were not his; but if he did this, the owner of the materials may bring the action de tigno juncto, and also make the wrongdoer pay a further penalty by bringing an action ad exhibendum, and may, if the building is pulled down, reclaim the materials. (29.)

6. The owner of materials builds on the soil of another.

(a) Let us suppose the owner of the materials is still in possession of the soil. The owner of the soil seeks to recover it. He is obliged to compensate the owner of the materials for the additional value given by the building to the soil, if the builder did not know that he was building on another's soil. If he did know this, the owner is obliged to let him take away such of the materials as can be removed without damage. (30, note.)
(b) Let us suppose the owner of the materials is not still in possession of the soil. Then, whether he knew or did not know that he was building on another's soil, he may, if the building is destroyed, reclaim the materials, but can get no compensation for the additional value he has given to the soil. (80, note.)

7. A tree belonging to A is planted in the soil of B. Until it takes root in the new soil, the tree continues the property of A; but a rooted tree is always the property of the owner of the soil. (81.)

8. The wheat of A is sown in the land of B. Sown wheat is on the footing of rooted trees. The wheat belongs to B; but the sower, if in bona fide possession, is protected against B turning him out without compensation for the value of the wheat sown. (82.)

9. A writes a poem or history on the parchment or paper of B. B, the owner of the parchment, still remains owner, after the parchment has been written on. But if B is in bona fide possession of the parchment, A cannot get it from him without offering to pay him the cost of writing. (83.)

10. A paints a picture on the tablet of B. Here, in consequence of the possible value of pictures, the decision is the other way. The painted tablet belongs to A. If B, the owner of the tablet, is in possession of it after it has been painted on, A cannot get it from him without offering to pay the cost of the tablet. If, however, A is in possession of the tablet, B may claim the tablet by an action in which he is supposed still to be the owner, offering to pay the cost of the painting; but the painter could stop the action by paying the cost of the tablet. (84.)

11. A, without express search, finds treasure in the land of B. Half goes to A, half to B. (89.)

III. TRADITIO: or delivery. Its constituent elements are three. 1. The owner of a thing means by the transfer to pass the property he transfers. 2. He, or any one entitled to act for him (42, 48), transfers by actually passing the thing, or by giving the transferee command over it, as when he gives the keys of a granary. (45.) 3. The transferee, meaning thereby to become owner, receives it. Traditio was necessary to pass property of all kinds; and in Justinian's time, land, wherever situated, passed by tradition. (40, note.)

The handing over and the meaning to pass the property are both necessary. The seller may hand over a thing, but he generally does not mean to pass the property till he is actually paid; and then not till the seller is paid, does the thing handed over become the property of the buyer. (41.) The lender, again, hands over a thing, not meaning to cease to be owner of it. If he changes his mind and wishes to give it, his purpose of giving unites with the previous act of handing over, and the legal traditio is accomplished. (41.) Things on board ship may be thrown overboard to lighten the ship, but their owners do not
mean to cease to be owners, and therefore the property in them does not pass to those who may pick them up. (48.) It is not, however, necessary that the transferee should be a person definitely ascertained, for if money is thrown to a mob, the incertae personae who pick it up become the owners by traditio. (48.)

Servitudes.—The Institutes, at the end of this explanation of the modes of acquiring particular things jure naturali, pause, before speaking of the modes of acquiring such things jure civili, to treat of servitudes, which are introduced by noticing at the beginning of the Second Title the division of things into corporeal and incorporeal, and saying that among incorporeal things are servitudes, or portions of the right of ownership enjoyed by persons other than the owners of the thing itself. Servitudes are (a) prædial when enjoyed over one thing in virtue of the ownership of another thing; (prædial servitudes being of two kinds: rural and urban), and (b) personal when attached to the person of the owner of the servitude.

Prædial Servitudes.—Rural prædial servitudes (affecting the soil) were so called because they were of kinds most frequently met with in the country; while urban prædial servitudes (affecting something built on the soil) were so called because they were of kinds most frequently met with in the city. The four kinds of rural prædial servitudes noticed in the Institutes, with an intimation that there are others (Tit. 3. 2), are, 1, iter, the right of passing; 2, actus, the right of driving cattle; 3, via, the right of driving a vehicle over another man's land; the more extensive always involving the less extensive right; and, 4, aquaeductus, the right of conducting water through another man's land. (Tit. 3. pr.) Of urban servitudes the instances given in the Institutes are the right—1, to make a neighbour's house sustain the weight of that of the owner of the servitude; 2, to insert a beam in another man's house; 3, to make another man receive the overflow of water from the roof or gutters (or to allow him not to be subject any more to the servitude of receiving such an overflow, if this, which does not seem a servitude, is the meaning of stillicidium non recipiendi); 4, to prevent another man raising his house higher than that of the owner of the servitude; 5, to prevent another man blocking up the lights of the owner of the servitude. (1.)

Personal Servitudes are the following: 1, Ususfructus; 2, Usus; 3, Habitatio.

Ususfructus is the right of using and taking the fruits of anything, the fruits including the fructus civiles, i.e. the profits derived from selling or letting the right of taking the fruits. The usufructuary or owner of this servitude had to act as a good paterfamilias, taking and giving security that he would take, good care of the thing, and making losses good. If the substance of the thing ceased to exist, his servitude was at an end, and it was personal to himself and did not pass to his heirs, and only the fruits actually gathered by him belonged to him. (Tit. 4. pr.) In the old law only things not consumed in the
use could be the subjects of usufruct; but things consumed in the use, such as garments or wine, might, under a *senatusconsultum* of the time of Augustus, be made subject to a usufruct in favour of a legatee, the usufructuary having to give security that at the termination of the usufruct he would pay their value as estimated at the commencement of the usufruct. (2.)

*Usus*, or the naked use, is the right of using the thing, not of taking the fruits of it except for his daily wants. (Tit. 5. 1.) In the case of a house, it is the use for the purpose of living in it with his family only, and at the most receiving a guest in it. (2.) *Habitatio* is the use of a house for the purpose of living therein, with something more added in the right of letting it. (5.)

**Creation of Servitudes.**—Servitudes were created in the following ways:—1. *Mancipatio.*—This only applied to prædial rural servitudes.
2. *In jure cessio.*—(Both these were obsolete in the time of Justinian.)
3. Pacts and stipulations, followed by quasi-tradition, i.e. affording the means of actual exercise of the rights. 4. Testament. 5. *Adjudicatio.* 6. *Deductio.*—A thing is transferred, *minus* the servitude, which is reserved by the transferer.
7. *Usucapion.*—The acquisition of servitudes by usucapion was forbidden by the *lex Scribonia*; but long possession of them, or at least of some of them, was protected by the praetor after a time, the length of which is uncertain, but which was probably ten years for those present, and twenty years for those not present, in the same province. If land was acquired by usucapion, so were the servitudes that existed with it, and a servitude lost by disuse might be regained by usucapion. Usucapion applied principally to prædial urban servitudes. It also applied to at least some prædial rural servitudes, and probably to usufructs. (Tit. 3. 4, note; Tit. 4. 1, note.) 8. *Lege,* or express enactment.—This only applied, perhaps, to usufructs, an instance being the acquisition by the father of the usufruct of the son’s *peculium* under Justinian’s legislation. (Tit. 4. 1, note.)

**Extinction of Servitudes.**—Servitudes were extinguished in the following ways (Tit. 4. 3, note):—1. *In jure cessio,* the owner of the servitude denying that he owns it (obsolete in time of Justinian).
2. *Confusio* or *consolidatio*; the right to the *res serviens* and the *res dominars*, or to the *dominium* and the usufruct, vesting in the same person.
3. The termination (a) of the rights under which the servitude is enjoyed by the surrender of the servitude to the owner of the *res dominans*, either by agreement or by permitting something that destroyed the servitude; or (b) the termination of the duration of the servitude, i.e. the period for which it has been fixed by the creator.
4. Non-usage; not using it for a period which, previously to Justinian, was two years, and, after Justinian’s legislation, was fixed at ten or twenty, according as the parties were present or absent. If the servitude was a prædial urban one, it was necessary that, to free the *res serviens* by usucapio, the person affected by the servitude should do some distinct act inconsistent with submission to the servitude.
(usucapio libertatis). (Tit. 4. 8, note.) In usufructs, if the usufructuary did not use the thing according to the terms of the usufruct, it came to an end. (Tit. 4. 8, note.) Habitatio did not cease by non-use. (Tit. 5. 5, note.) 5. Perishing of the thing in virtue of which, or over which, the servitude was exercised. 6. In the case of usufruct and use, the death or capitis deminutio (including, before Justinian, the minima capitis deminutio) of the owner of the servitude.

Emphyteusis, Superficies, Pignus.—Before returning to the modes of acquisition of particular things, we have to notice three other incorporeal rights, which naturally connect themselves with personal servitudes:—1. Jus emphyteuticarium. 2. Jus superficiarum. 3. Jus pignoris. (A summary of the law relating to them is given in Tit. 5. 6, note.)*

IV. Usucapion.—The Institutes, as we have said, notice five modes of acquiring res singula, three being modes of acquiring jure naturali, and two being modes of acquiring jure civili. We now come to the first of these two latter, viz., usucapion, or the process by which possession ripens into ownership by lapse of time.

It is only civil possession that is capable of so ripening. Civil is opposed to natural possession. If a man has physical control over a thing, detains it, as the jurists say, he is in possession of it; but, to possess it, he must mean to hold it as his own. If he not only is in possession of it, and means to hold it as his own, but if also his possession is bona fide and ex justa causa, then such possession is civil possession, the possession that in Roman law (civiliis) gave rise to usucapio. If he is merely in possession, or if he has also the animus possidendi, but his possession is not bona fide and ex justa causa, then his possession in either case is only natural, and does not give rise to usucapio. The civil possessor and the natural possessor, who had the animus possidendi, were protected in their possession by praetorian interdicts, but the person merely in possession was not. (Tit. 6. pr., note.)

With regard to usucapio, we have to ask three questions. 1. What things can be acquired by usucapio? 2. What is meant by the terms bona fide and ex justa causa, as applied to possession? 3. What time was requisite to run before usucapio ripened the possession into ownership?

1. What things can be acquired by usucapio?—At the outset we have to notice a point of great importance. Lands in the solum provinciale never could become the property of an individual. The possessor could not, therefore, become the owner of such land by usucapio. But after a certain length of possession the praetor protected his possession by allowing a plea, prescriptio, of long possession to be effectual in an action brought against him for the recovery of the possession of the land he

* Where a summary of any distinct portion of law is given in the body of the work, it is not repeated in this general Summary.
held. But as the time was much longer than was required to run for the protection in this way than the time required for usucapio, the term prescriptio, or possessio longi temporis, was used to describe, with regard to the solum provinciale, the equivalent of usucapio with regard to moveables and solum Italicum. There were some differences in their operation; the chief of which were, 1, that possessio longi temporis did not give ownership; 2, that usucapio was only interrupted by a judgment, longi temporis possessio by a litis contestatio; and 3, under usucapio the thing was acquired subject to its liabilities, i.e. servitudes or mortgages; and under longi temporis possessio, it was held free from them. Yet as they were nearly of the same effect, and as the requisites of possession in each case were the same, they are generally spoken of together. (Tit. 6. pr., note.) Under Justinian’s legislation (Tit. 6. pr.) the possessio longi temporis gave the dominium. Moveables, it may be added, could, in all parts of the Roman Empire, be acquired by usucapio, and the possessio longi temporis did not apply to them. (Tit. 6. pr., note.) We may, therefore, break the first question into two heads. 1. What moveables could be acquired by usucapio? 2. What immoveables could be acquired by usucapio or possessio longi temporis?

Generally speaking, all things in nostro patrimonio could be so acquired, but things such as res sacra, or a free man, could not. Nor, as a general rule, could things incorporeal. (1, note.) Things stolen could not be acquired, and a fugitive slave was reckoned among such things. (1.) The thief, of course, could not acquire by usucapio what he had stolen; but neither could an innocent holder, and, as theft included every handing over by a person of a thing he knew not to be his, it was rare that moveables could be acquired by usucapio (8); but it might happen, as if an heir bona fide deals with a thing merely deposited with the testator as if it had belonged to the testator (4), or a usufructuary so deals with the child of a female slave, believing bona fide that it is his property. There is no taint of theft, and the thing, when alienated by the heir or usufructuary, may be acquired by usucapio. Theft only applied to moveables. (7.) As to immoveables, they could not be acquired by usucapio or longi temporis possessio, if they were res vi possessae, forcibly seized on (2); but if the possession was originally sine vi, but still mala fide, e.g. if a person took possession of land left unguarded, knowing it not to be his, and then alienated it to a bona fide possessor, this possessor could gain the ownership by usucapio, and therefore usucapio applied much more frequently to immoveables than to moveables. (7.) Bona vacantia (the property of a person dying without successors) belonged to the fiscus, and, before being reported on as such, could, but afterwards could not, be acquired by usucapio. (9.) Nor could things belonging to pupils or minors or things forming part of a dowry. (10, note.)

2. What were the requisites of civil possession? What were the conditions possession must fulfil in order for usucapio to operate?
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(1) The thing possessed must not have any *vitium* in it, i.e. must not be of any of those kinds of things which we have just described as incapable of being acquired by *usucapio*. (10.)

(2) The thing must be possessed *ex justa causa*, that is, must have come into the power of the possessor by some recognised legal mode of acquisition, such as sale or gift (10, note); and, if there had been a mistake about this, and the *causa*, or title, was not just, the error, under Justinian’s legislation, prevented *usucapio*. (11.)

(8) The possession must be *bona fide*; the possessor must not know that he was possessing what did not belong to him, and, although reasonable ignorance of facts could be permitted, ignorance of leading principles of law could not. In the case of a sale it was necessary that the *bona fides* should exist at the making and also at the performance of the bargain. The general rule was that the possession must be *bona fide* at its commencement. Subsequent discovery of the real facts did not stop the process of *usucapio*. (10, note.) This was equally true, if it was not the same person, but two persons that possessed, one taking from the other, the thing during the time requisite for *usucapio*. If, at its commencement, the possession of the testator was *bona fide*, that of the heir was available for *usucapio*, although the heir knew that the testator had been mistaken. (12.) The times during which two persons held the thing, the one from the other, as in the case of a seller and a buyer, counted together for the purposes of *usucapio*. (18.)

*Usurpatio.*—The interruption of *usucapio*, the breaking the use, was termed *usurpatio*, as if the possessor lost possession or fell into the power of the enemy, or an action was brought to contest the right, the use being, under Justinian, broken from the time of the first moving of the controversy (*mota controversia*), instead of from the *litis contestatio*, which had no longer the important place it had under the formulatio system. (13, note.)

In three exceptional cases the *mala fide* possessor might acquire by *usucapio* :—1, under the old law (altered by Hadrian), if the thing possessed was an inheritance, or part of one, the *mala fide* possessor could in a year acquire the thing, whether moveable or immovable; 2, so could the original owner of a thing given over in trust as against the fiduciary; and 3, the original owner of a thing sold by the State for non-payment of a mortgage debt could again acquire it, as against the *prediator*, or purchaser from the State, but in this case two years’ possession was necessary for immovable. (10, note.)

3. What time was required for the possession to run on in order that *usucapio* might take effect?

By the Twelve Tables it was provided that *usucapio* should be completed in two years in the case of immovable, and in one year in the case of moveables. (Tit. 6. pr.)

The *longi temporis possessio*, introduced by the prae tors chiefly for the protection of possessors of provincial lands, required ten years if
the parties were domiciled in the same province, *inter presentes*; and twenty years if they were not, *inter absentes*. (Tit. 6. pr., note.)

Justinian changed the system generally. He lengthened the time for the acquisition of moveables from one year to three years, and gave the name of *usuacpio* to the acquisition of moveables by possession during three years. He made the *longi temporis possessio* apply to lands everywhere (abolishing the distinction between *solum Italicum* and *solum provinciale*), and he made the *longi temporis possessio* give the ownership and not merely bar actions. (Tit. 6. pr., note.)

*Possessio longissimi temporis.*—There was also *possessio longissimi temporis*, which possession, lasting in the case of ecclesiastical property and mortgaged property in possession of the debtor for forty years, and in other cases for thirty years, enabled the possessor to repel all actions, whatever the defect in the possession might be. (18, note.)

Possession for five years of things purchased from the *fiscus* gave, under an edict of Marcus Aurelius, complete ownership to the purchasers, whatever might be the defects of the possession, as if, for example, there were rights of an owner or mortgagee which the *fiscus* ought to have respected. Those damned by the action of the *fiscus* were during four years at liberty, under a constitution of Zeno, to seek compensation from the *fiscus*, while the purchasers had under this constitution an incontestable title at once. (14.)

V. Gift.—The second mode of acquisition *jure civili* noticed in the Institutes is gift, but, unless on account of the ceremonies accompanying gifts under Justinian's legislation, it is not properly a mode of acquisition separate from tradition. It is a delivery of a thing from a particular motive. (Tit. 7. pr.) The subject of gifts is treated of under three heads: gifts *mortis causa*, gifts *inter vivos*, and gifts *propter nuptias*.

1. *Donationes mortis causa*.—Gifts on account of death (*donationes mortis causa*) were gifts made in contemplation of death, revocable before the death of the donor, and failing if the donee died first. They might be made in either of two ways. The donor might hand over the thing to the donee, but the gift was not to be completed until the donor was dead; or the donor might hand over the thing, giving it there and then, but bargaining that it was to be restored to him if he did not die on the occasion contemplated. In either case, although he had certainly in the second case lost the *dominium*, the donee was allowed to get back the thing by a real action. (Tit. 7. 1, note.)

Justinian required that a *donatio mortis causa* should be made in the presence of five witnesses. (1, note.)

*Donationes mortis causa* very closely resembled legacies. They were subjected to the deduction of the Falcidian fourth, and were not valid if the giver was insolvent: but they differed from legacies in the following particulars. 1. They took effect on the death of the donor without its being necessary that the heir should enter. 2. The same
person who could take or could not take the one, could or could not take the other; but capacity was regarded, in the case of donationes mortis causa, at the time of the death only, not, as in the case of legacies, also at the time of the disposition. 3. A filiusfamilias could, with his father's permission, make donationes mortis causa, but could not give legacies of other things than his peculium castrense. 4. A peregrinus could make donationes mortis causa, but could not give legacies. (1, note.)

ii. Gifts inter vivos require tradition, but if the intentions of the donor have been manifested he is bound to deliver. A mere agreement to give was not originally binding, but Constantine enacted that such an agreement should be binding if in writing, and Justinian made the agreement binding in every case. Some donations looked on with peculiar favour, such as gifts to or from the emperor, were valid, without anything more than the intention to give being manifested; but other gifts, if exceeding 200 solidi previously to Justinian, and 500 solidi under his legislation, needed to be registered by public deeds. Gifts requiring to be registered were, however, valid up to the limit below which registration was not necessary. Gifts, as a rule, were not revocable; but Justinian made them revocable in case of the ingratitude of the donee. (2.)

iii. Gifts propter nuptias.—Gifts between husband and wife were prohibited by law. But as an equivalent to the dos contributed by the wife, the husband frequently made a gift before marriage, donatio ante nuptias, which was the inalienable property of the wife managed by the husband; and this donation might, like the dos, be increased after marriage. Justinian enacted that such gifts, like donates, might be not only increased, but made after marriage, and should receive the more appropriate name of donationes propter, instead of ante, nuptias. The wife, if survivor, received a portion of the donatio, equal in quantity before Justinian, and in value under Justinian, to that which the husband, if survivor, would have received out of the dos. (3, note.)

Justinian, in closing the subject of the mode of acquiring particular things by the civil law, notices that there had been at one time a mode of acquiring per jus accrescendi, which took effect when one joint owner of a slave enfranchised him in such a way that, if the enfranchisement had been effectual, the slave would have become a citizen; the share of the enfranchising owner passed by accrual to the other owner, and this other owner became the sole owner of the slave. Justinian did away with this by enacting that in such a case the slave should be free, and the other part-owner should receive a pecuniary compensation from the enfranchising part-owner. (4.)

Before passing to consider the modes of acquiring groups of things, the Institutes deal with two subsidiary subjects, viz. 1, Separation from ownership of the power of alienation, and 2, Acquisition through others.

i. Separation from Ownership of the Power of Alienation.

1. A person who is owner cannot always alienate. Two instances
are given. (a) A husband cannot alienate immovable forming part of the dos of his wife, although the ownership is in him. The lex Julia prevented a husband selling such immovable, when in Italico solo, without his wife’s consent, or mortgaging them with her consent. Justinian enacted that immovable, forming part of the dos, wherever situated, could not be sold or mortgaged by the husband, even with the consent of the wife. (Tit. 8. pr.)

(b) A pupil cannot, without the authorisation of the tutor, alienate. The pupil could not transfer the property in anything belonging to him, but he could acquire the property in anything transferred to him. Three illustrations of this doctrine are given.

(a) A pupil unauthorised could not enter into the contract of mutuum, i.e. could not lend a thing so that the thing lent became the property of the person to whom it was lent, he in his turn having to give as much back. If the pupil made such a contract, he could by a real action get the thing back, if not consumed; if consumed bona fide, he could recover the value of it by a condicio; if consumed mala fide, he could get not only the value, but damages by an actio ad exhibitendum.

(b) If the pupil unauthorised paid a debt, he could not make the money paid belong to the creditor. It was still his, and if not spent might be got back by a real action from the creditor; if spent bona fide, the debt due by the pupil was considered as liquidated; if spent mala fide, the pupil would have an actio ad exhibitendum.

(c) If a debtor made a payment to a pupil without the tutor authorising the payment, the money paid became the property of the pupil, and the debt still remained unextinguished. If the pupil sued for the sum owing, the debtor could only repel the action to the extent to which the pupil then had the money in hand, and if the pupil had spent it all, the debtor had to pay over again. Even if the tutor authorised the payment, the debtor was not quite safe, for the tutor might not hand over to the pupil the money paid; and then the pretor might give a restitutio in integrum, placing the pupil in the position in which he would have been if the debt had not been paid, and so the creditor might have to pay over again. To obviate this risk, Justinian enacted that if the debtor paid under the authority of a judicial order, which was to be given gratis, he was to be absolutely secure, and under no circumstances could he have to pay again. (Tit. 8. 2.)

2. A person not owner can sometimes alienate. The instance given is that of a creditor who has a power (of which he cannot be deprived even by agreement) of selling the thing pledged or mortgaged (pignus, hypotheca). Justinian enacted, that unless the parties otherwise agreed, the sale should take place two years after notice to pay; and in two years more, if no purchaser could be found, the creditor should be considered the owner. (Tit. 8. 1, note.)

ii. Acquisition through others.—We may acquire through, 1, filiifamil iarum; 2, slaves belonging to us, and, to a certain extent, slaves of whom we have the usufruct; 3, procurators.
1. Acquisition through filiusfamilias.—The old rule of law was that everything acquired by a filiusfamilias was acquired for and belonged to the paterfamilias. The son might have a peculium or property under his control, which, so far as third persons went, who could sue and recover to the extent of the peculium, was like the son’s property; but the father remained the legal owner of it, and it was only under the son’s control because the father permitted this. The first change was the introduction of the peculium castrense, dating from the beginning of the empire, consisting of everything given to a son on setting out for military service, or acquired while that service lasted. This peculium was the son’s; he could dispose of it as he pleased in his lifetime or by testament, but if he did not dispose of it by testament, then his father took it not as the heir of the son, but as the claimant of a peculium. Justinian, however, allowed the children or brother of the filiusfamilias to take the peculium before the father. The next change was the introduction by Constantine, or perhaps previously, of the peculium quasi-castrense, i.e. property acquired by the son in personal attendance on the emperor; and this peculium too could, under Justinian, be, like the castrense, given by testament. (Tit. 9. 1, note.)

Lastly, Constantine introduced the peculium adventitium, which, having been previously confined to property coming from a mother or maternal ancestor, or husband or wife, was made by Justinian to include all property coming to the filiusfamilias, except the peculium profectitium, i.e. the property coming to him from the father himself. Of this peculium adventitium the son had the ownership, the father the usufruct. (Tit. 9. 1.) From the peculium falling under the three above heads as not belonging to the father, a third used to be deducted by the father when he emancipated the son. Justinian gave the father the usufruct of half, instead of the ownership of a third, of such peculium, in case of emancipation. (2.)

2. Acquisition through slaves.—(a) The slave stipulates for the master’s benefit, but cannot make his master’s position worse. The slave enters on an inheritance only if the master directs him, for the inheritance may be such as to cause loss. The slave takes a legacy for the benefit of the master whose slave he was at the date of the decease of the testator. The slave possesses for the master, who must have knowledge of the possession and supply the animus, the slave only being capable of physical detention—except when the slave possessed a thing as part of his peculium; for the master, in allowing him to create this peculium (which always belonged to the master), has exercised the animus necessary for possession. And what is here said of the slave may, with the necessary exceptions as to the peculia castrensia, quasi-castrensia, and adventitia, be said of the filiusfamilias, who equally stipulated for his father’s benefit, could not make his father’s position worse, took inheritances only under his father’s direction, received legacies for his father’s benefit, and possessed
physically for his father, but needed his father’s animus possidendi. (8, note.)

(b) Through slaves of whom any one has the usufruct, he acquires whatever they acquire (including possession as well as ownership) by means of anything belonging to the usufructuary or by their own labour. Everything else which they acquire, as for example an inheritance or a legacy, is acquired for their owner. The same may be said of a slave possessed bona fide, but who is really not the slave of the possessor, either as being free or belonging to another. If the slave possessed bona fide becomes in time the property of the possessor by usucapio (which cannot happen in case of a slave of whom there is a usufruct), he acquires thenceforth everything for the owner by usucapio. (4.)

8. Acquisition through procurators.—On the other hand, a man could not acquire by means of free persons not in his power or possessed by him bona fide, nor by slaves belonging to another, of whom he had neither the usufruct nor the bona fide possession. He could acquire nothing ‘per extraneam personam,’ except that a procurator could acquire possession for his principal, even when his principal did not know of the acquisition, and then if the thing possessed was handed over by the owner, the ownership was acquired by the principal in any case, but if it was not handed over, then the usucapio began to run on behalf of the principal only from the time when he knew of and adopted the possession. (5.)

Testaments.

We now come to the first mode of acquiring universitates rerum, viz. by testament, and this subject occupies the rest of the Second Book.

We have to consider (1) the legal position of the maker of the testament: (a) how he must make it, which will vary according as he is or is not a soldier; (b) who are legally incapable of making wills; (c) the duties and powers of the testator as to the disinheritson, institution, and substitution of heirs; (d) the causes that make a testament invalid; and (2) the legal position of those who take under a testament, that is, of (a) heirs, (b) legatees, and (c) those who receive or benefit by a trust.

I. Legal Position of the Maker of the Testament.

1. Form of the Testament.—In the earliest period of Roman law, a testament might be made (a) in the calata comitia, called twice a year for this purpose, where the gentes watched over the transfer of the hereditas, or (b) in procinctu, in time of war, when an army was setting out to fight. Then a new form of will was introduced in the shape of a fictitious sale, by which originally the heir figuring as the familia emptor bought the inheritance from the testator in the presence of the holder of the scales and five witnesses. Afterwards the familia emptor became merely an outsider, going through the ceremony for the
benefit of the heir, whose name was concealed during the lifetime of the testator. (Tit. 10. 1.)

Then came the pretorian testament. The form of sale was no longer required. The libripens and the familia emtor became two additional witnesses, making seven in all, but the seven witnesses had to go through a new formality. They had to seal the testament with their seals. (2.)

Lastly came the imperial form of will introduced in the fifth century by Theodosius the Second. Here a new precaution was introduced: the seven witnesses had not only to seal, but to subscribe the testament, and so had the testator, or, if he could not write, an eighth witness had to subscribe for him. This testament was said to be tripartitum, that is, taking its origin from three sources. The necessity for the testament being made at one single time, and the necessity of the presence of seven witnesses, came from the old civil law; the sealing of the testament by the witnesses came from pretorian law; the subscription of the witnesses and the testator came from imperial law. (3.) Justinian added, and subsequently abolished, another requirement, that the name of the heir should be in the handwriting of the testator or of one of the witnesses. (4.)

It made no difference what seal the witnesses used, and before the time of Theodosius and Valentinian they used, and after that time they were obliged, to write by the side of the mark of their seal their names and the name of the testator. (5, and 2, note.)

Any one, as a general rule, could be a witness with whom the testator had testamenti factio, i.e. to whom he could leave his inheritance. But there were exceptions: such as women, children below the age of puberty, slaves, the mad, the deaf, the dumb, and persons considered as intestabiles on account of having committed certain offences, such as writing libels or denying their signature to a former testament which they had witnessed. (6.) A testament would, however, be valid, although witnessed by a slave, if, at the time of witnessing it, he was reputed to be free. (7.) Members of the same family might be witnesses of the same testament (8); but the filiusfamilias could not be a witness of the father's testament, nor could the father be a witness of the son's testament affecting his peculium castrense. (9.) Neither the heir nor any one in the same family with him could be a witness— but legatees and fideicommissarii, and those connected with them, might. (10, 11.)

The testament might be written on any material, wax, parchment, &c. (12); and any number of copies of a testament might be made. (18.) A testament need not be made in writing at all. It might be merely nuncupative, that is, the testator might orally declare his wishes in the presence of seven witnesses. (14.)

Military Testaments.—Special privileges, however, as to making testaments were accorded to soldiers by Julius Cesar, and confirmed by other emperors. A soldier, while serving in a campaign, was not re-
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quired to observe the formalities incumbent on civilians; and this applied to a soldier filiusfamilias making a testament as to his peculium castrense. But if he was not in a campaign, the filiusfamilias had to observe the usual formalities. Under Justinian it was undoubtedly necessary that the soldier’s testament should be made during a campaign, but whether this had previously been the law is doubtful. (Tit. 11. pr.)

The following were the chief privileges of soldiers with regard to military testaments: (a) All that was necessary for the validity of a soldier’s testament was that he should have meant in some way to express his testamentary intentions; if orally, in the presence of a witness. (b) Any words would suffice to institute his heir. (Tit. 11. 1.) (c) The soldier might die partly testate and partly intestate. (6, note.) (d) He need not disinherit his children by name. (Tit. 18. 6.) (e) His testament would not be rendered invalid by those causes which would render invalid the testament of a civilian (paganus), and his testament, however informally made, would suffice for revocation of a previous testament. (Tit. 17. 2, note.) (f) He could institute as heirs persons generally incapacitated, such as deportati and peregrini. (Tit. 11. 6, note.) (g) He could give more than three-fourths of his property in legacies. (Tit. 22. 8, note.) (h) He could dispose of the inheritance by codicils. (Tit. 11. 6, note.) (i) He might make a testament although deaf or dumb. (2.) (j) A testament made irregularly before he acquired the power of making a military testament became valid as the expression of his wishes after he had acquired that power. (4.) (k) Nor did a minima capitis diminutio affect the validity of a military testament, nor the two greater kinds, if inflicted for merely military offences. (5, note.) (l) The rule treating institutions ex certo tempore or ad certum tempus as a superveniency did not extend to military testaments. (Tit. 14. 9.) (m) Soldiers could make a testament for their children without having made their own, and could substitute to emancipated children and to strangers. (Tit. 16. 9, note.)

The testament of a soldier made without the forms required from civilians remained in force for a year after his discharge (post missionem); and if he inserted a condition that could not be fulfilled within a year, yet his testament was valid, supposing he died while he could make a military testament. After a year from his discharge had elapsed, he was obliged, to die testate, to make a testament with the ordinary forms. (Tit. 11. 8.)

2. PERSONS INCAPABLE OF TESTATION.—All persons, however, could not make testaments. This power was confined to Roman citizens sui juris. The filiusfamilias could, however, dispose by testament of his peculium castrense, and this privilege was first in some, and then in all, cases extended to the peculium quasi-castrense (Tit. 12. pr.; Tit. 11. 6); the father taking these peculia, however, by the patria potestas, if the son died intestate leaving no child or brother. (Tit. 12. pr.) Children under age, mad persons, except in lucid intervals (1); inter-
dicted prodigals (2); deaf and dumb and blind people, except under special precautions provided by the emperors (3, 4), could not make testaments.

Captivity.—A testament made by a man during captivity was invalid, but a testament made before he became captive was valid, by the *jus postliminis*, if he returned; or if he died, by a deduction from the terms of the *lex Cornelia*, punishing the forgery of the testament of a person dying in captivity. It was argued that a testament made by a person who subsequently died in captivity must be valid, or the law would not punish a forgery of such a testament. (5, note.)

3. We now come to the rules as to the (a) disinherison, (b) institution, and (c) substitution of heirs.

(a) Disinherison.—The *sui heredes* of the testator, i.e. those persons who were made *sui juris* by his death, had such an interest in the inheritance that if he wished to exclude them he must do so expressly. He had to exclude his sons by name, and if he did not, the testament was wholly invalid. Other *sui heredes*, such as daughters, he might exclude by the general term *ceteri exheredes sunto*; but if he did not do this, then the testament was not invalid, but these excluded *sui heredes* took by a kind of accural their proper share, if the instituted heirs were *sui heredes*, and half the inheritance if the instituted heirs were strangers. (Tit. 18. pr. note.)

The birth of a new *suus heres* after the testament had been made introduced a new participator in the inheritance, and unless this person was expressly disinherited by anticipation, the testament was made invalid. The term posthumous was in strictness applied to any person born after the death of the testator. In the theory of law, *postumi* were *incerta persona*, and could not be instituted or disinherited; but the civil law permitted the institution of *postumi sui heredes*, born after the death of the testator (1, note); and the *lex Junia Velleia* permitted the institution of *postumi sui heredes*, conceived before and born after the date of the testament, but born before the testator’s death (*postumi Velleiani*). (2, note.) And *postumi* who could be instituted must be disinherited. The jurist Gallus Aquilius invented a form of institution by which the case was met of a son dying in the testator’s lifetime, and then the testator dying, and then there being a posthumous son of the son, who would be a *suus heres* of the testator. (1, note.)

There was also another way in which new *sui heredes* might come into existence after the date of the testament. A son might die in the lifetime of the testator, and then the children of that son would pass into the rank of *sui heredes*. The *lex Junia Velleia*, by a further provision, permitted the disinherison of all such children, who were said to be *postumorum loco* (*postumi quasi Velleiani*). (2, note.)

The disinherison of *postumi* had to be made nominatum: *Quicumque mihi filius genus fuerit exheres esto*. (1.) *Postuma* might be disinherited by the general *ceteri* clause. It was, however, necessary that the *postumae*, if disinherited by the general clause, should have some-
thing left them, to show they were not passed over through forgetfulness. (1.) Other persons, who came into the family after the date of the testament, such as children subsequently adopted, and children both conceived and born after the date of the testament, in the lifetime of the testator, necessarily invalidated the testament. (2, note.)

So far we have been considering the provisions of the civil law. The prætor also came to the aid of those who were not, in his opinion, properly disinherited, by giving them bonorum possessor contra tabulas. (3.)

If a daughter or a grandchild was omitted, the prætor permitted the testament to be set altogether aside, but the Emperor Antoninus made a distinction, and allowed the daughter to have only what she would take by the jus accrescendi, that is, her share, which, if the instituted heir was a stranger, would be one-half, whereas the grandson, if omitted, could get the testament set aside, and would take all the inheritance, as against an instituted stranger. (8, note.)

Under the prætorian law grandsons as well as sons must be disinherited nominatim. (3, note.) Perhaps also the prætor did not permit the testament to be set aside because a son had not been properly disinherited who died in the lifetime of the testator, although the law is laid down by Justinian positively to this effect, that the testament was ipso facto invalid in such a case. (Tit. 18. pr. and 8, note.)

The prætor required all sons and grandsons to be disinherited, whether they were or were not in the power of the testator, provided they were not in another family. This included those emancipated (8), and those given in adoption and subsequently emancipated by the adoptive father. (4.) The emancipated son, however, had to bring into account the property he had acquired since emancipation, if the effect of his getting the testament set aside was injurious to a properly instituted suus heres. (3, note.)

Justian made some further changes. 1. He required the child and the grandchild, male or female, whom it was necessary to disinherit at all, to be disinherited nominatim. (5.) 2. In case this was not done, the testament was absolutely invalid. There was no longer any jus accrescendi for daughters and grandchildren. (5.) 3. The testator was obliged to disinherit nominatim his child given in adoption to any one but an ascendant. (5, note.)

Soldiers in expeditione were not obliged to disinherit expressly any one. (6.) Mothers and maternal ancestors, also, were not obliged to disinherit expressly those who would have taken their inheritance ab intestato. Their silence was sufficient; but then these persons, if unjustly passed over, might present a querela inofficiosi testamenti, just as those might who, although disinherited in due form, complained that their disinherison was unjust. (7.)

(b) Institution.—The institution of the heir was the basis of the whole testament. In the old law some such formal phrase as Titius heres esto was considered necessary; but, under the empire, any form of institution would suffice. (Tit. 14. pr., note.)
Who could be instituted.—Those only could be instituted heirs who had the testamenti factio with the testator, who had, in the old language of the law, the commercium with him. Many persons, however, who had not the testamenti factio in the sense of being able to make a testament, had the testamenti factio in the sense of being capable of being instituted as heirs, as, for instance, persons below the age of puberty. Among those who could not be instituted were peregrini, deportati, and uncertain persons; an example of an uncertain person being ‘whoever shall marry my daughter,’ but a person whom the testator had not seen was not an uncertain person. (12.) The institution of uncertain persons was permitted by Justinian. Further, it was not permitted to institute municipalities; the gods, with certain exceptions, and so forth; and, under the law of Justinian, certain others, as apostates, heretics, or persons whose institution seemed contrary to the rules of law or of justice as to marriage; and, though cautibes and orbis could be instituted as heirs, the former took (unless of an age too young for marriage, or in case of near relationship to the testator) nothing, and the latter only half of what was given them by the testament, so long as the lex Papia Poppaea, abolished by Constantine, was in force. (Tit. 10. 6, note.)

Institution of Slaves.—The master might institute his slave, and, under Justinian, without expressly enfranchising him, and Justinian permitted the institution of a slave in whom the testator had only a bare ownership, the slave having, however, still to serve the usufructuary; but a mistress could not institute, and so enfranchise, a slave accused of adultery with her. (Tit. 14. pr.) The slave of the testator, if instituted, was obliged to take the inheritance, if not emancipated before the testator’s death.

If the testator instituted the slave of another, the master of the slave decided whether the slave should accept the inheritance, and the slave took it for his master, or masters, if there were several, rateably (8); and if the master of the slave was dead, the slave could take the inheritance of the testator for the benefit of his dead master’s inheritance. (2.) In order to decide, in cases of the slave being alienated, for what master the inheritance was taken, it was necessary to look to the time when the inheritance was actually accepted, as the slave took the inheritance for the master to whom he then belonged. (1.)

A testator might appoint one heir, or as many as he pleased. (4.)

Calculation of the parts of an inheritance.—The calculation of the parts into which the testator divided the inheritance was made in the terms of the as, its multiples and its fractions. The real as contained twelve ounces, but the testamentary as, or unit of the inheritance, was held to contain as many ounces as the testator pleased. A person could not die partly testate and partly intestate, and so, if a testator instituted only one heir and gave him six ounces, it was held that the as in this case only contained six ounces, and he took the whole. (5.) If he instituted several heirs, and the number of parts, or ounces, he gave
to each came, in the whole, to 11 or 18, this was taken to be the number included in the as. But if he gave two parts to one, and two to another, and instituted a third heir, without expressing how many parts were given him, then recourse was had to the normal as, and this third heir had the number of parts (eight) necessary to make up the twelve ounces of the as; or if the parts given reached, or exceeded, twelve, then the testator was supposed to have had the double as, or dupondius, in mind, and the instituted heir, to whom no express number of parts was given, took the number of parts necessary to make up the dupondius, i.e., if twelve were given, he took twelve, or one half of the inheritance, and, if more than twelve, as thirteen or twenty-five, were given, then he took enough parts to make up the dupondius, or, if necessary, the tripondius. The fractions of the dupondius or tripondius could, of course, be brought back to fractions of the as. (6, 7, 8.)

Conditional Institution.—Sui heredes could not be instituted conditionally unless the condition was one in their own power to fulfil, and was one lawful to carry out, but other heirs might be instituted conditionally. (9.) An impossible condition—and conditions of a kind contrary to law or boni mores were reckoned among impossible conditions—was treated simply as if it had not been inserted at all, and the institution was valid. (10.) So too, if an heir was instituted from, or to, a certain time, this was treated as something altogether superfluous, for to say that a man, after a date, or up to a date, should be heir, offended the rule that a testator could not die partly testate, and also the rule semel heres semper heres. But if the time was uncertain, in the sense that the heir was to be heir when a thing did happen that must happen some time, as when A died, this uncertain time was looked on merely as a condition, and the inheritance was in abeyance until it was seen whether the instituted heir survived A. If he did, he entered on the inheritance, and, in all cases, when an heir entered on a condition being fulfilled, his rights were made, by his entering, to date back to the time of the death of the testator.

(c) Substitution, which was either ordinary, or to a pupil. Substitutio vulgaris, as opposed to pupillaris, was the institution of another heir in case the heir first named did not take; and the law allowed any number of such substitutions, to which resort was had, partly from the prevailing wish not to die intestate, and partly because, while the lex Julia et Papia Poppea was in operation, the testator, by substituting an heir, could give to a person he wished to benefit the share of an instituted heir disqualified from taking under this law. (Tit. 15. pr. and 1, notes.)

One important use of the power of substitution was that which regarded co-heirs. Three instances are given which show the benefits of substitution to co-heirs. i. Their position, if substituted to each other, was better than their position under the law of accrual, jus accrescendi. For though the share of an instituted heir who did not take it passed to co-heirs by the right of accrual, the effect was not the same as in
case of substitution, for those substituted had a liberty of choice as to taking this vacant share, whereas they must take what accrued to them.

ii. The surviving substituted co-heirs might possibly get more in the case of one of their number dying, for one co-heir might die after entering on his own share of the inheritance, but before the share of a co-heir subsequently renouncing was offered him. If there was no substitution, the heirs of this co-heir would take by accrual the vacant share; but the benefit of substitution was personal. If the co-heir did not live to take the vacant share, it did not go to his heirs, but went to the surviving co-heirs, who thus had the advantage of excluding his heirs.

iii. Under the lex Julia et Papia some persons might take what was given them as co-heirs, who could not take caduca. Substitution might be beneficial to them, and they took as substituted heirs what they were disqualified from claiming as caduca. (1, note.)

Unless the testator otherwise provided, substituted co-heirs, if instituted with unequal shares, took the same unequal shares of what they got by substitution. (2.) If one of two co-heirs is substituted to the other, and a third person is substituted to the substituted co-heir, the third person is taken to be substituted also to the other co-heir, and, if both co-heirs die, takes the shares of both, although the co-heir to whom he was expressly substituted, died first. (3.) If a testator substituted an heir to an instituted heir, who, really a slave, was thought by the testator to be free, the master of the instituted slave and the substituted heir were permitted, by a kind of rough equity, each to take half. (4.)

Substitutio pupillaris.—Custom had also sanctioned what was termed pupillaris substitutio. A testator might, but only as a part of his own testament (Tit. 16. 5), substitute to each or to any of his children in his power at the time of making the testament and at his death (including posthumous children) (4), if they became heirs, but died under the legal age of puberty, or any previous date fixed by the testator (8); and a person substituted (whether specially named, or generally, as whoever might be the heir of the testator) (7) to such a child, was considered to be substituted both by vulgaris substitutio, so that he took if the child never lived to take the inheritance, and by pupillaris substitutio, so that he took if the child lived to take the inheritance but died under puberty. (Tit. 16. pr.) A substitution (quasi-pupillaris), framed on the model of the pupillaris, permitted any ascendant to substitute to persons of puberty deprived of reason any one of the descendants, or, if there were none, one of the brothers of the insane. (1.) By pupillaris substitutio the one testament of the father operated on two inheritances, and the substituted heir took all the inheritance of the son, and not only that which came from the father. (2.) The father might, if he thought proper, substitute, without letting the name of the substituted heir be known, unless the son died within the age of puberty, so as to guard against the substituted heir knowing that he had an interest in the death of the child. (8.)

Fathers
might substitute to disinherited children, but not to emancipated, as
they were no longer in the testator’s power, and the *patria potestas*
was the basis of the custom. (4, note.) If the *impubes* was arrogated,
the substitution was at an end, but the arrogator was obliged to under-
take, in case the child died *impubes*, to give up to the substituted heir
all he would have taken if the substitution had remained in force. (4.)

As the basis of the custom was the *patria potestas*, a father could
not substitute to a stranger or to a son above the age of puberty. All
he could do was to impose a *fideicommissum* on the person instituted,
binding him, if he died within a certain time, to give back that which
came to him from the testator to the person whom the testator wished
in that case to benefit. (9.)

4. Causes that made a Testament invalid.—A testament legally
made remained valid until revoked (*ruptum*) or rendered ineffectual
(*irritum*). (Tit. 17. pr.)

(a) *Testamentum ruptum.*—A testament was revoked (*ruptum*), 1,
by the subsequent arrogation or (if the testator was an ascendant)
adoption of a *suus heres*, unless the new *suus heres* had been insti-
tuted by anticipation. (1.) 2. By the testator subsequently making
another testament validly made or made in any way under which there
could have been an heir. (2.) If the heir under the second testament
could take *ab intestato*, the second testament, although not made with
sufficient formalities, revoked the first, and was treated as an expres-
sion of the testator’s wishes binding on the *heres ab intestato*. (2, note.)
8. The testament was also revoked by the testator tearing or defacing
it, or, if it had been made ten years when the testator died, by the
testator having before witnesses, or by a deed, signified his wish that
it should not remain in force. (2, note.) If the heir in the second
testament was instituted for certain things only, and it was declared
that the first testament should be valid, the first testament was revoked,
but the heir in the second had to content himself with the things so
given him, or with a fourth of the inheritance, as would be most
favourable, and had to restore the rest of the inheritance to the heirs
instituted in the first testament. (8.)

*Testamentum irritum.*—A testament was rendered ineffectual (*irri-
tum*) by the testator subsequently undergoing a *capitis diminutio*.
But if the testator had reverted to his former position, and had been
a citizen and *sui juris* at the time of his death, then the praetor would
give the heir instituted in his testament *bonorum possessio secundum
tabulas*, a distinct expression of the testator’s wish to that effect being,
however, required in case a testator who was arrogated after making
the testament had been subsequently emancipated. (6, note.) The
emperors, after Pertinax, would not accept an inheritance when they
were instituted on account of a suit, or to cure the informality of an
informal testament, or if instituted by word of mouth. (8.)

(b) Quebela Inofficiousi Testamenti.—Under the general head
of the invalidity of testaments we have to notice the special cases when
a testament would be attacked as *inofficiosum*. There were certain persons who might bring an action called the *querela inofficiosi testamenti* before the *centumviri*, to have the testament set aside, although it was formally perfect. The ground of the action was that the testator had not done his duty by them in his testament, and that he had cast a slur on their good fame by unjustly excluding them from sharing the inheritance, and, if this was made out, the testament was set aside under the fiction that the testator could not have been of sound mind when he made his testament. (Tit. 18. pr.)

On the ground of being unjustly disinherited or omitted, children, including posthumous children and children adopted by an ascendant (2), might attack the testaments of fathers or grandfathers in whose power they were. (Tit. 18. pr.)

On the ground of being unjustly omitted, children might attack the testament of their mother, and grandchildren those of their maternal grandfather. (Tit. 18. pr., note.)

Parents might, if omitted, attack the testaments of their children; and if infamous persons were preferred to them, brothers and sisters of the testator might attack the testament, and this liberty, which originally was given only if the tie of agnation continued, was extended by Justinian to brothers and sisters, if the tie of agnation had ceased, and even to brothers and sisters of the half blood on either side. (1, note.) No more distant relation could bring the action, nor could any one bring it, unless as a last resource, and if he could not get anything any other way. An arrogated pupil, for example, disinherited by the arrogator, had the *quarta Antonina*, and so could not bring the *querela de inofficioso*. (2, note.)

*Portio legitima.*—No one, if anything whatever was left to him by the testament, could attack it as *inofficiosum*. But he had a right to bring the *actio in supplementum legitima*, to have that which was left to him made up, if below, to the fourth part of that which he would have taken *ab intestato*. Before Justinian, if the gift to him had not reached the amount of this fourth, he could attack the testament, unless the testator had directed that the deficiency should be made up to him. Justinian directed the fourth to be made up without the direction on the part of the testator. (8. and note.)

If a person received the fourth part in any way under the testament, as heir, legatee, or *fideicommissarius*, or by a *donatio mortis causa*, or had received it by a *donatio inter vivos*, expressly as this fourth, or for the purchase of military rank, or had received it from a parent, as part of a *dos* or *donatio ante nuptias*, this person could not attack as *inofficiosum* the testament of the person from whom the part was thus received. (6, and 7, note.)

If there were several persons entitled to bring the action, each was to have the fourth of what he would have taken *ab intestato*. (7.)

*Extinction of the action.*—The right to bring the *actio de inofficioso* was extinguished, 1. By the person entitled to the *quarta legitima*
having died without having manifested an intention to dispute the testament; if he had done so, the action passed to his heirs. 2. If he had allowed a certain time, at first fixed at two years, and afterwards at five years, to elapse without bringing the action. 3. By acquiescing directly or indirectly in the testament (7, note); but a tutor who had acquiesced in the testament on behalf of his pupil might still attack the testament on his own account (4), just as, if he had attacked the testament on behalf of the pupil unsuccessfully, he did not lose to the fiscus what was given to himself, this being the usual penalty of unsuccessful attack. (5.)

System of the Novels.—Justinian in the Novels introduced a new system. (7, note.)

1. The portio legitima was fixed in a new way. If the number of those who could claim it was four or a less number, then they were all together entitled to one-third of the testator's whole inheritance, which third they shared between them; if more than four, to one-half.

2. Those entitled to receive a portio legitima must be instituted as heirs, and it was not enough to prevent the testament being attacked as inofficiosum, that they got their portions in some other way than as heirs.

3. If the testament was set aside as to the heirs, it still remained in force for all else, for trusts, legacies, and so forth.

4. The causes of just disinherison were enumerated, and on a specified one of these the testator must express himself to be acting.

II. Legal Position of Those Taking Under a Testament.

This is the second head of testamentary law, the legal position of the testator having been the first. Those taking under a testament were, 1, Heirs; 2, Legatees; 3, Fideicommissarii.

I. Heirs.—Heirs are of three kinds: (1) Necessarii; (2) Sui et necessarii; and (8) Extranei. (Tit. 19. pr.)

Heredes Necessarii.—The heres necessarius was a slave instituted by his master. He became at once free on the death of the testator, and he had no option as to taking the inheritance. He was obliged to take it (necessarius), and the object of the institution was that the testator might be sure of having a testamentary heir, so that if the testator was insolvent, his goods might be sold, not as his, but as those of the heir, and thus the testator's memory be saved the disgrace of such a sale. (Tit. 19. 1.)

The heres necessarius might claim the beneficium separationis, that is, to have his property acquired after the death of the testator, or anything due to him from the testator, kept distinct from the property of the testator, and free from claims against the testator's inheritance. (1, note.)

Sui Heredes.—Sui et necessarii heredes are the descendants of the testator, in his power at the time of his death, and not having any one preceding them in whose power they became by the death of the testator, as would be the case with the testator's grandson who had a living father. (2.)
SUMMARY.

*Sui heredes* were so called because they were, even in the lifetime of the *paterfamilias*, looked on as in a manner partners in the inheritance. They were, so to speak, heirs to their own inheritance; and the inheritance came to them without their entering on it, or wishing to have it, or proving that it came to them. They were, in the old civil law, obliged to take the inheritance, but the prætor gave them the *beneficium abstinenæi*—that is, allowed them to abstain if they pleased—and unless they mixed themselves up with the inheritance, the prætor inferred from their holding aloof that they wished to abstain, and then, if the goods were sold, they were sold in the name of the testator, and no actions could be brought against the *suus heres* as heir, although, if he pleased, he might afterwards alter his mind and accept the inheritance. (2, note.)

*Extranei Heredes.*—Heirs not subject to the power of the testator, are termed stranger heirs, *extranei heredes*. Children not within his power if instituted, children instituted by the mother, slaves instituted and subsequently manumitted, are *extranei*. (3.) These heirs were required to have the *testamenti factio* (in the sense, not of being able to make a testament, but of being able to take under a testament) at three epochs, (a) the making of the testament; (b) the death of the testator; (c) the entering of the heir on the inheritance. (4.) If his capacity was lost and regained between the first two of these epochs, the heir could enter on the inheritance, but not so if the loss and regaining took place between the second and third epochs. (4, note.) The *extraneus heres* was at liberty to accept or renounce the inheritance.

*Entering on the Inheritance.* Cretio.—How did the heir accept it? First, there was a method of instituting, obsolete by the time of Justinian, in which there was a *cretio*, or direction to the heir, to make up his mind within a given time, either from the date at which he knew of his rights and could exercise them, *cretio vulgaris*, or from the date at which his rights accrued to him, *cretio continua*. The heir, within the time fixed, could alter his mind. If he accepted, he announced his acceptance in a solemn form. (7, note.)

Ordinarily the heir entered on the inheritance either by doing some act as heir (*pro herede gerere*) or by the mere expression of his willingness to be heir. (7.) The heir, in acting as heir, must know that he is heir, and that the testator is dead. (7.)

There was no fixed time in which the heir must make his decision; but the prætor would, on application, fix the time, allowing not less than one hundred days, and Justinian enacted that it should not exceed nine months, or, by imperial favour, a year. If the heir did not decide within the time, he was, in an action on the part of the *heredes ab intestato*, taken to have rejected, and, in an action on the part of creditors, to have accepted, the inheritance. (5, note.)

A person could not enter for another, nor on part of an inheritance, nor conditionally; if he entered he succeeded to the *persona* of the deceased. (7, note.)
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If the extraneus heres accepted, he could, if under twenty-five years, be relieved from his position, if a disadvantageous one, by the prætor giving a restitutio in integrum. (5.) If he was over twenty-five, he could not be relieved, and must abide by all the consequences of accepting the inheritance, including the liability to pay the debts of the testator; but on a very special occasion, Hadrian relaxed this rule, and Gordian ordered that it should never be enforced against soldiers. (6.) Justinian introduced a new system by which the heirs might enter on the inheritance of even an insolvent testator without risk. The heir might claim to have an inventory made (beneficium inventarii) of the inheritance, this inventory to be begun within thirty, and finished within ninety, days of the time when he became acquainted with his rights and could exercise them, and made in the presence of a notary or three witnesses. Out of the property specified in the inventory he had to pay the creditors, paying himself anything that might be due to him. If the property was more than sufficient, he took the surplus. If insufficient, his own estate was in no way liable. (6, note.)

II. LEGATEES.—Although legacies constitute a title to particular things, not to groups of things, it is convenient to treat of legacies while treating of testaments. (Tit. 20. pr.) A legacy is a gift left by a deceased person (1), and the subject of legacies may be treated under six heads.

1. General Notions as to Legacies and their Forms. (A) Forms.—In the old law there were four modes of giving legacies: (a) per vindicationem, when the testator gave (Stichum do, lego) the Quiritary ownership of the thing given; (b) per damnationem, when the testator bound the heir (heres meus damnas esto dare) to give a thing to the legatee, who could compel him by a personal action to give it; (c) sinendi modo, when the testator ordered the heir to allow the legatee to take the thing given, the legatee having a personal action to make the heir give the opportunity of taking it; and (d) per praecipientem, a form strictly applicable to the heir, who was thus allowed to take something as a legacy before receiving his share of the inheritance. The senatusconsultum Neronianum provided that every form of legacy should be treated as equal to that per damnationem, which was the most favourable to the legatee, as anything could be given by it. Justinian enacted that all legacies should be of the same nature, and might be enforced by every kind of appropriate action. (2, note.)

Justinian assimilated fideicommissa to legacies, except that a slave was the libertus of the testator or of the fideicommissarius, according as he received his liberty by a legacy or a fideicommissum. (8.)

(B) Co-legatees.—The same thing might be left to more than one legatee. It might be left conjunctim, or, in other language, re et verbis, as, I give my slave to A and B; or disjunctim, or, in other language, re, as, I give my slave to A, I give the same slave to B; or verbis, when the co-legacy was only nominal, as, I give my slave to A and B in equal shares. Under the old law the effect of co-legacies differed according to the formula employed. Each under per vindicationem or per precepf
tionem could demand the whole thing, and then had to divide it, but under per damnationem (if the legacy was given disjunctim) the heir had to give the thing to one, and also its value to another; under sinendi modo (if the legacy was given disjunctim) it is doubtful whether the rule of per damnationem applied, or whether, having given the thing to one, he was free as to the other. The lex Papia Poppea introduced a new system, disqualifying calibes from taking at all, and orbi from taking more than half, and giving the legacies thus lapsed (caduca), and also all other legacies lapsed under the general law (in causa caduci), to those mentioned in the testament in the following order, if they were patres:—(a) co-legatees, (b) heirs, (c) substituted heirs, and in default to the public treasury (zerarium). Ascendants or descendants to the third degree were exempted from the effect of the lex Papia, except that they could take caduca under it. Caracalla gave all caduca to the fiscus; Constantine abolished the law of incapacity arising from celibacy; and Justinian did away with the lex Papia altogether. Any legacies passing carried with them burdens, and it was optional to accept them. Justinian gave rights of taking by accrual to every co-legatee, excluding those joined verbis, who were really not co-legatees, with this difference, that if the co-legatees were given re, the accrual was obligatory, but the burdens of the legacy did not pass. If re et verbis, the accrual was voluntary, but the burdens did pass. (8, note;)

(C) Time of Vesting.—The rights of a legatee were vested (dies cedit) at the date of the testator's death, or, under the lex Papia, at the day of the opening of the testament. The time when the thing was to be demanded (dies veniens) was the time of the heir's entering on the inheritance. The legatee took the thing, and his heirs, if he subsequently died, represented him in taking the thing as it was at the time of the dies cedens, excepting in the case of a gift of liberty to a slave or a gift of a personal servitude, when the dies cedens dated from the entering on the inheritance. (20, note.)

2. What could be given by way of Legacy.—The testator might give not only his property, or that of his heir, but a thing belonging to another, provided it was not a thing extra commercium, and provided that the legatee, on whom the burden of proof lay, could show that the testator knew that this thing belonged to another. The heir, if he could not purchase the thing, had to give the legatee its value. (4.) So the heir was obliged to redeem, unless the testator expressly said the legatee was to redeem, a thing which the testator gave as a legacy knowing it to be pledged. (5.) If the legatee had, in the lifetime of the testator, already got the thing given him as a legacy, he could claim the value if he had bought it, but not if he had taken it by a causa lucrativa, e.g. gift, unless he had taken it through a slave or descendant in his power. If he had received only the value of the thing, not the thing, under one testament by a causa lucrativa, he still could claim the thing under the testament of a different person. (6.) Future things might be given by way of legacy. (7.) A legatee might
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claim land given him by legacy, although the usufruct had already
come to him ex causa lucrativa, for the usufruct was treated as a
servitude only. (9.) A thing belonging to the legatee when the testa-
ment was made could not be given to him as a legacy, even if he had after-
wards parted with it; such a case fell under what was termed the regula
Catoniana, the rule that a legacy invalid when the testament was made
remained always invalid. (10.) If the testator gave what he thought
belonged to himself, although it belonged to another, the gift was valid,
and so it was if he gave what he thought belonged, but did not really
belong, to the legatee. (11.) The legatee was entitled to a thing alienated
by the testator, and to have redeemed a thing pledged by the testator,
after the testament was made, provided that the thing had not been
alienated or pledged with the intention of revoking the legacy. (12.)

A legacy to a debtor of what was due to the testator was valid, and
the heir could not recover from the legatee, and might be made to re-
lease him, and the debtor might also, by a legacy, have the time of
payment deferred. (13.) But a legacy to a creditor of what the testator
owed him was invalid, as it gave the creditor nothing unless the
testator gave absolutely, or at once, what was previously due condi-
tionally, or after a time. (14.) A husband might give to his wife her
dos as a legacy, for the legacy gave her a more speedy way of recovering
the dos; if he gave her her dos, and he had not received it, the legacy
was void; but if he gave her, by legacy, a definite sum or thing, de-
scribing it wrongly as having been brought by her as part of the dos, or
as mentioned in the instrumentum dotis, this description was taken as
surplusage, and she could take the legacy. (15.)

Things incorporeal as well as corporeal might be given by way of
legacy. Thus the testator might give a debt due to him, unless he had
exacted payment in his lifetime, and the heir would have to sue for the
benefit of the legatee; or he might order the heir to rebuild a house for
the legatee, or release him from debt. (21.) If he gave a slave or any-
thing else generally (legatum generis), the legatee had the choice among
the things of this description belonging to the testator. (22.) Under
Justinian, this right of choice, which had previously been personal to
the legatee, went to his heirs, if the legatee died after his rights had
accrued; and if there were more than one legatee to whom the right of
choice belonged, they must decide by lot which was to make the
choice if they could not otherwise agree. (23.) Unless a distinct legacy
of choice was given (legatum optionis), the legatee could not choose
the best of the kind. (22, note.) A legatee might have a share of the
inheritance given him (legatarius partarius), and not a specific thing,
but still he remained in the position of a legatee as towards the heir.
(23, note.)

3. To whom might legacies be given?—To those with whom the
testator had testamenti factio. (24.) There were excluded (a) before
Justinian: deportati, peregrini, Latini Juniani, unless they became
citizens within a fixed time, women under the lex Voconia, the unmarried
or childless (to the extent above mentioned, p. 546) under the lex Papia; (b) in the time of Justinian: heretics, apostates, the children of persons convicted of treason, and the children of, and the parties to, prohibited marriages. A legacy under the old law could not be given to an uncertain person, as e.g. to the man who might marry the testator's daughter, unless it was to an uncertain member of a certain class, as that one of the testator's cognati who might marry the testator's daughter; nor, as being an uncertain person, to a posthumous stranger. Justinian made all the legacies to uncertain persons valid (25), and permitted a posthumous stranger to be instituted heir (26); and even previously to Justinian a legacy paid to an uncertain person was not to be refunded. (25.) A legacy to the slave of an heir, unless given conditionally, was invalid; but not so a legacy to the master of a slave instituted heir, for he might not be the master at the time when the slave entered on the inheritance. (82, 88.)

4. Rules as to the position, terms, and construction of legacies.—A mistake in the name of the person benefited, or in the institution of an heir, does not invalidate a legacy, provided it is certain who is meant; nor is a legacy rendered invalid by either a falsa demonstratio, as if the testator gives 'Stichus my born slave' (Stichus passes though he is not the born slave of the testator), or by a falsa causa or reason assigned wrongly, as 'I give to Titius, because he took care of my affairs.' The legacy is valid whether or not, in fact, Titius did take such care; but if the legacy was conditional, as 'I give to Titius, if he has taken care,' then, of course, the condition must have been fulfilled for the legacy to be valid. (29, 80, 81.)

Justinian made it immaterial where in the testament a legacy was placed. Previously, if it was placed before the institution of the heir, it was invalid (84), and he made legacies valid which were to take effect after the death of the heir or legatee; whereas such gifts, except as fideicommissa, had previously been invalid, as even had legacies given to take effect the day before the death of the heir or legatee. (85.) Justinian also made valid gifts by way of legacy, or institution of heirs (and revocation and transfers of such legacies) made post mortem, that is, when something given to one of the persons benefited was to be given to another if the person originally benefited did or did not do something, such dealings with heirships or legacies having been previously considered invalid, even though the penalty was given to the emperor or a soldier, as intended to punish one man rather than to benefit another. (86.)

5. Loss, diminution, or increase of things given by way of legacies.—The loss of a thing given as a legacy falls on the legatee, unless the loss has been caused, however innocently, by the heir, on whom the loss then falls. (16.) If a female slave is given with her offspring, the legatee takes the offspring though the mother may be dead, and so he takes the vicarial slaves under a legacy of ordinary and vicarial slaves, though the ordinary slaves may have all died. But under a legacy of
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a slave with his peculium, or of land with its instruments of use or ornament, the legatee, if he cannot take the slave or the land, cannot take the peculium or the instruments. (17.) Under a legacy of a flock of sheep the flock will pass, though reduced to one sheep or increased by young. Under a legacy of a house, marble or pillars subsequently added by the testator will pass. (18, 19.) But as to the gift of a peculium, there is this distinction to be made:—If the gift was to a stranger, the amount of the peculium that passed was the amount at the death of the testator, with any increase arising out of the things contained in the peculium; but if the gift was to the slave himself, the slave had no right until the heir entered and was able to free him; and so for him the amount of the peculium was the amount when the heir entered. A gift by legacy to a slave of his peculium must be express, although if a man in his lifetime freed a slave the slave kept his peculium, unless the emancipator demanded it. (20.)

6. Ademption and transfer of legacies.—Legacies may be revoked by using directly contrary words, 'Whereas I gave I do not give,' or by any other words, or even by the naked wish of the testator becoming in any way declared, the legatee being then repelled by an exception of dolus malus if he sued for the legacy, or by some cause having arisen, e.g. an enmity having sprung up between him and the testator, which made it clear the testator could not, at the time of his death, have wished to benefit him. (Tit. 21. pr., note.) A legacy may also be transferred, as by saying what I gave to A I give to B, and then B would take even if A had died, and A would not take if B had died. (1.)

Lex Falcidia.—The wide testamentary power given by the Twelve Tables (ut legassit sua rei, ita jus esto) and practically used, so that, the inheritance being exhausted by legacies, there was no inducement to the heir to enter, was restrained (a) by the lex Furia, forbidding more than 1,000 asses to be given as a legacy, but ineffectually, because any number of legacies to that amount might be given; (b) by the lex Voconia, providing that no legatee was to have more than each heir had, but also ineffectually, as the number of legatees was not limited; and, lastly (c), by the lex Falcidia, by which a testator was restrained from giving away in legacies more than three-fourths of the inheritance. A fourth, the quarta Falcidia, must always remain to the heirs. (Tit. 22. pr., note.)

If the testator gave distinct shares in his inheritance to different heirs, each heir had a right to one-fourth of his share, even though the total thus deducted on the different shares exceeded one-fourth of the whole inheritance. (1.)

In the application of the lex Falcidia regard was had to the value of the estate at the time of the testator's death. A subsequent increase did not augment, nor did a subsequent decrease diminish, the amount the legatees received. But if the estate subsequently fell in value, so that the heir would get nothing by entering, the legatees would have to come to terms with him, to induce him to enter. (2.)
In order to apply the *lex Falcidia*, the testator's debts, his funeral expenses, and the price of the manumission of slaves were first deducted, and then the heir took a fourth of what remained, each legatee having a proportionate amount deducted from his legacy if the testator had given more than three-fourths in legacies. If he had given more than the value of the whole inheritance, no account was taken of the excess, and the heir received a fourth of the actual value. (3.)

The *lex Falcidia* did not apply to military testaments. (3, note.) The Novels introduced a new system. The heir could not claim a fourth unless he first had an inventory made, and he could not retain it at all if the testator forbade its retention, the legatees and other persons interested being then permitted to take under the testament, although the heir refused to enter. (3, note.)

III. FIDEICOMMISSARI. — *Fideicommissa*, or requests to the heir to do something in favour of some one else, and any words of request sufficed (Tit. 24. 3), were expressions of the last wishes of the person who made them, and were dispositions of the inheritance, or of parts of it, the position of the person profiting by them being in the former case analogous to that of an heir, in the latter to that of a legatee.

Either testamentary heirs or heirs *ab intestato* might have *fideicommissa* imposed on them, and *fideicommissa* could be made by testament or by codicils, or orally. (Tit. 28. 1, note.)

The person making the *fideicommissum* was termed the *fideicommittens*, the person requested to perform it *fiduciarius*, and the person to be benefited by it *fideicommissarius*. (2, note.)

The object of *fideicommissa*, when originally introduced, was to benefit persons legally incapable of taking as heirs or legatees. Augustus first gave them legal validity, by desiring the consuls to interfere to see them carried out. By degrees a permanent jurisdiction was established to maintain them, under a special magistrate, the *praetor fideicommissarius*. The proceeding was always *extra ordinem*. No action lay to enforce *fideicommissa*, but the magistrate interposed if he thought it equitable to enforce them. (Tit. 28. pr. and note.)

When first introduced, *fideicommissa* gave the maker of them a very wide range. He could by them give to *peregrini*, to a posthumous stranger, to an uncertain person, to *Latini Juniani*, and the whole inheritance to a woman prevented by the *lex Voconia* from being instituted as heir; and the *leges caducaria* did not apply. But subsequently this latitude was restricted: *fideicommissa* in favour of *peregrini*, posthumous strangers, and uncertain persons were declared invalid, and the rules of the *lex Papia Poppea* were made to apply to them. A tutor could not at any time be given by a *fideicommissum*. (Tit. 28. pr., note.)

If a *fideicommissum* was made by testament, the testament must duly institute an heir, or there would be no one to carry out the *fideicommissum*. Originally the heir sold the inheritance to the *fideicommissarius*, the former binding the latter, by stipulation, to indemnify
him against all claims in regard to the inheritance, and the latter binding the former to hand everything over \(\textit{empta et vendita hereditatis stipulationes}\). (9, note.)

The \textit{Senatusconsultum Trebellanum} protected the heir, by enacting that, directly the heir gave up the inheritance, all the actions for and against the inheritance should at once pass to the \textit{fideicommissarius} in the shape of \textit{actiones utiles}, and the heir be allowed to protect himself against all actions by an exception \textit{restituta hereditatis}. (4.)

\textit{Senatusconsultum Pegasianum}.—But, though the heir was thus protected, there was no inducement to him to enter on the inheritance. Accordingly the \textit{senatusconsultum Pegasianum} was passed, which permitted the heir to retain a fourth of the inheritance against \textit{fideicommissarius} as against legatees. The \textit{fideicommissarius}, who had been placed by the \textit{senatusconsultum Trebellanum} in the position of an heir, was now placed in the position of a legatee, or, to speak more strictly, of a \textit{legatarius partiarus}, that is, of a legatee who had a legacy, not of a thing, but of a share in the inheritance. When legacies of a share were given, actions belonging to the inheritance were brought by, and against, the heir, but the heir stipulated that the legatee should contribute to all outgoings in proportion to his share, and bound himself to pay what was due to the legatee for his share. Similar stipulations were, subsequently to the \textit{senatusconsultum Pegasianum}, made between the heir and the \textit{fideicommissarius} \(\textit{stipulationes partis et pro parte}\). (5.)

The \textit{senatusconsultum Trebellanum} was, however, still in force, for it operated \(a\) if the \textit{fideicommissa} did not exceed three-fourths of the inheritance, and \(b\) if the heir refused to enter in spite of being sure of his fourth under the \textit{senatusconsultum Pegasianum}, the \textit{prætor} made him enter, and then all the actions were transferred to, or against, the \textit{fideicommissarius}, and he was in the position in which he would have been if the heir had entered under the \textit{senatusconsultum Trebellanum}. (6.)

Justinian united the two \textit{senatusconsulta}, retaining the name of the \textit{senatusconsultum Trebellanum}. The heir was to retain his fourth, as under the \textit{senatusconsultum Pegasianum}; but actions were to be brought by or against the heir, or the \textit{fideicommissarius}, according to their shares, as under the \textit{senatusconsultum Trebellanum}, so that the \textit{fideicommissarius} was, as to his share, \textit{in loco heredis}. If the heir would not enter, he was compelled to do so, being protected against all loss, as under the \textit{senatusconsultum Pegasianum}. The heir could, under Justinian, but could not previously, redeem the fourth if he had paid it over. (7.)

If the heir had a specific thing given him to retain, equal in value to, or greater in value than, a fourth of the inheritance, he retained it as if he had had a specific legacy of the thing, and all actions as to the whole inheritance passed to, or against, the \textit{fideicommissarius}. If the specific thing to be retained by the heir was less in value than a fourth, then the heir retained also enough to make up the fourth,
and the actions for and against passed to the heir, as to the share retained to make up the difference. (9.)

A *fideicommissarius* might himself be turned into a *fiduciarius*, and be requested to give up to another all, or a part, of what he received; and he was not allowed, like the heir, to retain a fourth. (11.)

*Fideicommissa* might also be imposed by a person about to die on his *heredes ab intestato* (10), either by a written or oral declaration. If, under Justinian, such an oral declaration was made of his wishes to the heir, before five witnesses, the proof was sufficient. But if it was alleged to have been made before less than five witnesses, or before none at all, the *fideicommissarius*, having previously sworn to his own good faith, might call on the heir to deny, on his oath, that the *fideicommissum* had been made as alleged. (12.)

*Fideicommissa of particular things.*—An heir or a legatee might be charged by a *fideicommissum* to give up a particular thing specified by the testator (Tit. 24. pr.), and even a particular thing belonging to another person, the *fiduciarius* being thus obliged, if he could, to buy it for the *fideicommissarius*, or, if he could not buy it, to give its value to the *fideicommissarius*. (1.) Freedom, too, might be given to the slave of another person by a *fideicommissum*, and, if the *fiduciarius* could not at once purchase the freedom of the slave, he must wait to see if any opportunity of doing so might arise. The slave so enfranchised was the freedman of the *fideicommissarius*, whereas slaves who received their freedom directly by testament (and only those who were slaves of the testator, both at the time of his making the testament and at the time of his death, could so receive their freedom) were the freedmen of the dead man, and hence were called *orcini*. (2.)

*Codicils.*—*Codicilli*, or small tablets containing memoranda addressed to the heir, were held to create binding *fideicommissa* in the time of Augustus, on the authority of Trebatius and Labeo. (Tit. 25. pr.) If there was no testament, they were binding on the *heres ab intestato*. (2.) If there was a testament, then being considered as attached to the testament, they failed if it failed, but a testator could, by inserting in his testament an express clause to that effect (*clausula codiciliaris*), provide that his testament should, if invalid as a testament, be valid as a codicil. (Tit. 25. pr., note.) If the codicils were made before the testament, and not confirmed by it, they were binding, unless a contrary intention appeared in the testament. If made after the testament and not confirmed by anticipation in it, they were binding as creating *fideicommissa*; but by codicils made before or after the testament, and confirmed by it, not only *fideicommissa* could be created, but legacies given or a tutor appointed. (1, note.)

No form was necessary for codicils. The joint effect of enactments of Theodosius and Justinian was that they were to be made in the presence of five witnesses, who were to subscribe them. If they were not so made, the *fideicommissarius* might, having sworn to his own good faith, call on the heir to deny them on oath. (8, note.)
BOOK III.

INTESTATE SUCCESSION.

We now come to the second mode of acquiring universitates rerum, that is, intestate succession. In this there were three ranks:—1, sui heredes; 2, agnati; 3, in substitution for the gentiles of the old law, cognati.

I. Sui Heredes.—When a person died intestate, which might happen in five ways,—by (a) his having made no testament, (b) his testament not being legally valid, (c) its being revoked, or (d) made useless by change of status, or (e) no heir entering under it,—the inheritance passed, by the law of the Twelve Tables, in the first place, to the sui heredes (Tit. 1. pr., 1), i.e. the children, natural, adoptive, or made legitimate, in the power of the deceased at the time of his death (2), or, to speak more accurately, at the time when it was established that he died intestate (7); a grandson, however, the son of a deceased son, both conceived and born after the grandfather's death, but before the fact of intestacy becoming established, not ranking as a suus heres, as not having been connected with the deceased while alive by any tie of relationship. (8.) A child, however, might become a suus heres, though not in the power of the deceased at the time of his death, if he was a captive, and, returning subsequently to his father's death, was made a suus heres by postliminy. (4.) And, on the other hand, a child, though in the power of the deceased at the time of death, might not be a suus heres; for the deceased might be adjudged, even after his death, to have been guilty of perduellio (treason), and then, as the fiscus took his estate, there could be no suus heres. (5.) Sui heredes were, under the old law, obliged to take the inheritance (necessario), and, as they could take it without their knowledge or assent, the sanction of a tutor of a pupil, or of the curator of an insane person, was not required, but the pretor gave sui heredes the beneficium abstinendi, and enforced against them as against all heredes ab intestato, when necessary for the protection of creditors, the beneficium separationis. All children, of both sexes, took equally; more remote descendants per stirpes. (6.)

The pretor, by giving the possessio honorum unde liberi, placed in the rank of sui heredes (a) emancipated children (9); (b) if the emancipated father was dead, grandchildren conceived after his emancipation (9, note); (c) if the de cujus was an emancipated son, his unemancipated children conceived before the emancipation; emancipated children bringing into the inheritance their property, and married daughters
their dowry (9, note); (d) *sui heredes restituti in integrum* after a *capitis deminutio* (9, note.) The prætor also preserved in their rank of *sui heredes* those who were improperly disinherited. (12.) Those raised to the rank of *sui heredes* had the option of taking or refusing the inheritance within a given time. (Tit. 1. pr., note.)

Children given in adoption, or emancipated, and then giving themselves in arrogation, were, if emancipated by the adoptive father in the lifetime of the natural father, allowed by the prætor to rank among his *sui heredes*, but had no claim on the inheritance of the adoptive father. If emancipated by the adoptive father after the death of the natural father, they had no claim on the inheritance of the adoptive father, and only that of *cognati* on that of the natural father. (10, 11, 18.) Under Justinian the adopted son always, unless adopted by an ascendant, remained in the family of the natural father, and succeeded as a *suus heres* to his adoptive father, if intestate, but had no claim to be benefitted by his adoptive father's testament. (14.)

A constitution of Theodosius permitted the children and descendants of deceased daughters to succeed to the portion their mothers would have received as *sui heredes*, giving up one-third of it to other *sui heredes*, if there were any, and, if not, one-fourth to the *agnati*. (16.)

Under Justinian these persons succeeded to the whole share of the deceased daughter, without any deduction. (16.)

II. *Agnati*.—When there was no *suus heres* or any one called to rank with *sui heredes*, or none who entered on the inheritance, then the inheritance passed by the law of the Twelve Tables to the nearest *agnati*, i.e. those related to the *de cujus* through males by birth or adoption (Tit. 2. pr., 1, 2); by nearest being meant nearest at the time when the fact of intestacy was established. (6.) If the nearest *agnatus* did not enter, or if there were more than one in the same degree, then if none of the nearest *agnati* (5) entered, the inheritance passed, not to more remote *agnati*, but at once to the *cognati* or blood relations, among whom the more remote *agnati* were included by the prætors. (7.) For there was no devolution among *agnati*, just as there was none among those called to rank with *sui heredes*. Justinian altered this, and permitted devolution among *agnati*. (7.)

There are four special points to be noticed in the history of the changes made in the law of agnatic succession.

1. *The Position of Females*.—The law of the Twelve Tables placed males and females descended through males on an equality. The *media jurisprudentia*, i.e. the opinions of the jurisprudents, excluded altogether females descended through males except sisters so descended (*consanguinea*). The prætors allowed those excluded to come in as *cognata*. Justinian restored them to the place they held as *agnata* under the law of the Twelve Tables. (9.)

2. *The Position of Emancipated and Uterine Brothers and Sisters and their Children.*—Under the old law such persons had nothing to
do with the agnatic succession. They were introduced into it under the later empire. Anastasius gave the rights of agnation to emancipated brothers and sisters, one-fourth of what they would have received if they had remained in the family being deducted. Their children remained cognati. Justinian gave the rights of agnation to uterine brothers and sisters and their children; and subsequently admitted as agnati emancipated brothers and sisters, without deduction of a fourth, and their children. (4, note.)

3. The Position of the Ascendants.—The ascendant had under the old law no place in the agnatic succession, as he would take by virtue of his patria potestas, unless the deceased descendant had been emancipated. If emancipation had taken place with an understanding that the nominal emancipator should take everything he got as patron in trust for the emancipating ascendant (and, under Justinian, every emancipation was taken to be made on these terms), then this ascendant took as patron in default of sui heredes, but Justinian placed the brothers and sisters of the de cuius before him. (8, note.)

Under the later empire the goods coming from his mother to the de cuius passed (a) to his children and other descendants, (b) then to his brothers and sisters, and (c) to his father in preference to his grandfather. This too, under Justinian, was the order of succession to the peculium of a deceased son, except that here the rights given by the patria potestas were so far preserved that the father took after, not before, the grandfather. (8, note.)

4. The reciprocal Succession of Mothers and Children.—The mother was allowed to succeed to her children by the senatusconsultum Trebellianum, and children to their mother by the senatusconsultum Orphitianum. (A summary of the changes in the law under this head is given under Tit. iv. 4.)

III. COGNATI.—After the sui heredes and the agnati came, in the old law, the gentiles, or members of the same gens. But the succession of the gentiles became obsolete, and the prætor substituted the cognati, that is, persons bound together by blood relationship. (Tit. 6.) The cognati included those who had undergone a minima capitis deminutio (1), i.e. emancipated children, and children in an adoptive family (8), collaterals by the female line (2), and children born of the same mother, but of an uncertain father. (4.) Later legislation, as has been shown in the first four Titles of the Book, took many persons out of the rank (ordo) of cognati, and made them rank with sui heredes or agnati. (1.) There was no limit to the remoteness in which agnation was recognised, but the prætor only gave the possessio bonorum unde cognati to blood relations within the sixth degree, or, in the one case of children of a second cousin, to those in the seventh degree. (5.) The degrees of relationship of ascendants and descendants are calculated by the stages of ascent or descent. There is a stage to the father or the child, a second to the grandfather or the grandson. The degrees of collateral relationship are calculated by going up to and
down from a common ancestor, and adding up the total number of stages. (Tit. 6. pr.) Justinian, altering the old law, so far recognised ties of cognation among slaves, that in the case of the parents and the children being enfranchised, they had reciprocal rights of succession, and the children were in the position of children born in a regular marriage (10). It is scarcely necessary to add that among persons of the same natural degree (gradus) of relationship, those are preferred who belong to a higher rank (ordo), i.e. who are, or rank with, sui heredes or agnati. (11, 12.)

Before quitting the subject of intestate succession, we have to notice two subsidiary points connected with it: (1) the succession (modified by the assignation) of freedmen, and (2) the machinery by which the pretor modified intestate succession, bonorum possessio.

1. (a.) Succession of Freedmen.—Under the law of the Twelve Tables the sui heredes of the freedman, including adopted children and a wife passing in manum, excluded the patron, who, and whose children, succeeded only if there were no sui heredes, and the freedman might make what testament he pleased and exclude the patron. A freedwoman, however, being in the patron's tutela, could only make a testament with her patron's consent, and as she could have no sui heredes he necessarily succeeded to her if she died intestate. (Tit. 7. pr.) Under the prestorian system, the pretor thinking it hard that the patron should be excluded by adoptive sui heredes, or a wife married in manum, gave the patron possession of half the goods, whether the freedman died testate or intestate; the patron being still excluded altogether by natural children, although they had passed out of the freedman's family, unless they were properly disinherited. This change, however, did not apply in favour of a patrona or the daughter of a patronus; but by the lex Papia Poppaea, women having the jus liberorum were placed on a level with men in this respect. (1.) The lex Papia Poppaea also introduced a change in favour of patrons. If a freedman left a fortune of 100,000 sesterces, and fewer than three children, the patron took a virile part (i.e. half if there was one child, and a third if there were two) of the inheritance, whether the freedman died testate or intestate. (2.) Justinian did away with all distinction between the patrona and the patronus, and between the liberta and the libertus, and regulated the succession of freed persons as follows:—First came the children of the freedman (to speak only of a man), whether in his power or not, or even if born before he was enfranchised. Then, if he had no children, came the patron and his descendants; in default of these the collaterals of the patron to the fifth degree. If the freedman had children, he could make any testament he pleased; if he had not, he could only make what testament he pleased if his fortune was less than 100 aurei; if it was more, he must leave one third to the patron. (3.) By a change, subsequent to the date of the Institutes, Justinian, in case the freedman left no children, preferred the father and mother, and the brothers and sisters,
of the deceased to the patron. While, before Justinian, there were still *Latini Juniani*, their goods were treated as a *peculium*, which passed in all cases on their death to the manumittor, who could deal with it by testament as he pleased; but by the *senatusconsultum Largianum* the children of the patron, unless duly disinherited, were preferred to *extranei heredes*; and by an edict of Trajan, if a slave, against the will or without the knowledge of the patron, was made a Roman citizen by imperial rescript, he was considered, indeed, during his life a Roman citizen, but at the moment of death became a *Latinus*, and the rights of the patron were restored. (4.)

(B.) ASSIGNATION OF FREEDMEN.—A patron having two or more children in his power (Tit. 8. 2) might instead of allowing the goods of a freedman to go equally to all the patron's children in the same degree as they otherwise would do (Tit. 8. pr.), assign, by or without a testament, and in any terms (3), to any person in his power (2), a freedman or woman, so that after the death of the parent the person to whom the freed person is assigned is alone considered the patron, and excludes all other children. (Tit. 8. pr.) But if the assignee died or was emancipated (2), the force of the assignment was at an end.

II. BONORUM POSSESSIONES.—The prætor placed the person best entitled in possession of the *hereditas*, in case the possession was disputed, and then in process of time regulated this admission as he thought best to amend, to correct, or to supplement, the civil law (Tit. 9. 1); and usucapion ripened into ownership the possession he gave. The possessor was ordinarily protected by the interdict *quorum bonorum*; and to obtain this protection, the heir who had under the civil law an indisputable title often demanded the *bonorum possessio*; the prætor generally acting under his executive authority and giving possession according to his edict (*possessio edictalis*), and sometimes giving a special possession (*possessio decretalis*) after hearing the parties, and then sometimes only giving an interdict forbidding violent eviction. (1, note.)

The various kinds of possession of goods are divided according as there was, or was not a testament; out of ten kinds known before Justinian, two referred to testate, and eight to intestate succession.

*To testate succession* belonged (a) *possessio contra tabulas*, given to children passed over; (b) *possessio secundum tabulas*, given (but only after it had been ascertained that the *possessio contra tabulas* was not due) when the heir, under a duly made and valid will, wished for protection of the interdict *quorum bonorum*, when the prætor wished to uphold a testament defectively made, or in other cases, as that of the institution of a posthumous stranger, or of an heir under an unfulfilled condition.

*To intestate succession* belonged eight, four relating to the succession of freemen, four to that of freedmen. A summary is given of these eight kinds of possession under Tit. 9. 8. If there was no one to whom possession could be given, the *ararium*, or, later, the *fiscus*, took the goods. (8.)
Out of the ten kinds of possession just mentioned, Justinian suppressed four of those relating to intestate succession, viz., the *unde decem persona*, suppressed because under his system parents were themselves the manumittors of their children (4); the *tum quem ex familia*, the *unde liberi patroni patronaque et parentes eorum* (5), and the *unde cognati manumissoris* (6), rendered obsolete by his system, and regulating the rights of patronage. He, however, retained a kind of possession, known to the previous law, though not reckoned in the ten ordinary kinds; that, namely, *tum quibus ex legibus*, when possession was given in pursuance of a direct enactment, as, e.g., when the patron shared with the children of the *libertus* under the *lex Papia Poppaea*. (7.) Possession of goods had to be demanded by parents and children within a year, and by all others within a hundred days of the time of their knowing of their rights (8), *dies utiles* alone being counted. (9.) If not demanded, then the rights of possession of the person not demanding at the time fixed, or refusing it, passed to those in the same degree, and if there were none, then to those in the next degree. (9.) Demand was made before a magistrate, and special terms of demand, *da mihi hanc possessionem*, were necessary, until Constantius permitted any terms to be used, and Justinian did away with the necessity of an application to a magistrate. If a person having, as civil heir, right to demand possession, did not demand it, accepting the inheritance under his civil right, and the next in the order of praetorian succession did, after the delay had expired, demand possession, it was given him, but only *sine re* as opposed to *cum re*: he got the technical *possessio*, but not an interest in the goods conclusive against the heir. (10.)

**SYSTEM OF THE NOVELS.**—In the years 543 and 547, by the 118th and 127th Novels, Justinian introduced a totally new scheme of intestate succession, a summary of which is given under Tit. 9. 10.

**OTHER MODES OF ACQUIRING A UNIVERSITAS RERUM.**

We now pass to the four remaining modes by which a *universitas rerum* was acquired, in addition to testamentary and intestate succession.

i. **ARROGATION.**—The first is arrogation, which is specially mentioned as forming part of the customary law. (Tit. 10. pr.) By arrogation all the property and all the debts due to the arrogated passed to the arrogator, except only those things which were extinguished by the *capitis diminutio* which arrogation involved, such as the rights of agnation, and the services which a freedman bound himself by oath, as the price of his freedom, to pay to the patron, and which, being personal to the patron, were extinguished if the patron was arrogated. (1.) The arrogator was not bound to pay the debts of the arrogated, just as a *pater familias* was not bound to pay the debts of the son; but the property of the arrogated was made answerable, the pretor, by a sort of *restitutio in integrum*, allowing the creditors to proceed against the arrogated as if
the arrogation had not taken place, and unless the arrogator satisfied them the pretor gave them possession of the goods, and allowed them to be sold. (8.) Under Justinian's legislation, if any property was acquired by the arrogated from any source except the arrogator, the usufruct only went to the arrogator, and if the arrogator died, the property in it passed to the children, and, if none, to the brothers and sisters of the deceased, and only in default of them to the arrogator. (2.) What is said of arrogation as a mode of acquiring a universitas rerum is true of the conventio in manum of a wife under the old law. (1, note.)

ii. Bonorum Addictio.—The mode next noticed of acquiring a universitas rerum is the bonorum addictio, introduced by a constitution of Marcus Aurelius. (Tit. 11. pr.) If a testator (even by codicils) gave liberty to any slaves, then, after the inheritance had been successively (4) rejected by the heredes ex testamento, the heredes ab intestato, and the fiscus, any of these slaves, or, under a constitution of Gordian, any one else (1, note), might apply to have the goods given over to him (bonorum addictio), on his undertaking to satisfy the creditors in full, the application being entertained both in favour of liberty, and to spare the deceased the disgrace of a sale of his goods. (2.) The slaves enfranchised by the testament were, when manumitted, the freedmen of the deceased (orcini), unless there was only a fiduciary direction to manumit them, or the slaves had agreed to be the freedmen of the person to whom the addictio was made. The constitution further directed that even when, in such a case, the fiscus accepted, the directions as to liberty should be carried out. (1.) If a person while under twenty-five years did not accept as heres ab intestato an inheritance, and liberty was acquired by the addictio bonorum, then, although when he was twenty-five he might be restitutus in integrum and accept, yet the liberty once given could not be taken away. (5.) Justinian extended the addictio to cases where freedom was given not by testament but inter vivos or mortis causa (6), and also provided that the addictio might be made after a sale by the creditors had taken place, if the application was made within a year from the sale, which was then rescinded; and that a composition accepted by the creditors, or only enfranchisement of some of the slaves directed to be enfranchised, should be accepted, if necessary, as satisfactory; and that if those entitled to apply for an addictio did not all apply at the same time, the first applicant should have the possession. (7, note.)

iii. Bonorum Venditio.—The mode next noticed of acquiring a universitas rerum is the bonorum venditio, one of the pretorian modes of execution by which a transfer of the entire property of a debtor was made to the person who, in consideration of receiving it, would pay the largest proportion of the creditors' claims. A summary of the mode in which, and the circumstances under which, this process was carried out, is given under Tit. 12. pr. In the time of Justinian this process had become obsolete, and the goods of the debtor, being handed
over to the creditors, were sold by them separately as occasion might offer (bonorum distractio).

IV. FORFEITURE UNDER THE SENATUSCONSULTUM CLAUDIANUM.—

A universitas rerum was acquired under the senatusconsultum Claudianum, when a free woman was denounced three times by the master of a slave as having formed a disgraceful connection with the slave. A magisterial decree reduced her to the condition of an ancilla, and she and her property passed to the owner of the slave. If it was a freedwoman who formed such a connection, she became again the slave of her patron, unless he had assented to her conduct, in which case she became the slave of the owner of the slave with whom she had disgraced herself. Justinian abolished all this as unworthy of his empire. (Tit. 12. 1.)

OBLIGATIONS.

We now pass to obligations. A summary is given in the text, under Tit. 18. 2, of the meaning of the term obligation, and of the main features of Roman law with regard to the sources of obligations, contracts, culpa, interest, and the actions attached to obligations.

Of the ten recognised heads of contracts, the first noticed are those made re.

Contracts Re.—There were four kinds of contracts made re, i.e. by the delivery of the thing: mutuum, commodatum, depositum, pignus. In mutuum the receiver became the owner, in pignus he became the possessor, in commodatum and depositum he became in possessione of the thing delivered. (Tit. 14. pr.)

Mutuum.—Here the deliverer of the thing makes over the thing as the property of the recipient, who by receiving it binds himself to return an exact equivalent in genere, and who, if he fails to do this, can be sued by a condicio certi (1), although the thing handed over to him may have perished through mere accident. (2.)

Commodatum.—Here the deliverer gratuitously puts the recipient in possession of a thing which the recipient wishes to make use of. As it is the recipient who benefits by the contract, he has to take the care of it which a bonus paterfamilias exercises, and not merely the care he takes of his own property; but he is not answerable if the thing is lost through causes wholly beyond his control. He can, when the term for which the thing was lent has expired, be made to restore this identical thing or its value by the actio commodati directa, having in turn an actio commodati contraria (both actions being bona fide) for any extraordinary expenses or for losses through the fault of the deliverer. (2.)

Depositum.—Here the deliverer for his own benefit puts the recipient (who receives gratuitously) in possession of a thing which the deliverer wishes to have kept for him. The recipient, as he is conferring a benefit, is answerable not for carelessness, but only for negligence so great as to amount to fraud. When, however, the deposit
was made in circumstances of sudden calamity, as fire or shipwreck, the recipient had to pay double the value of the thing if he denied that he had received it. The identical thing can be reclaimed at any time by the deliverer, and must not be made use of by the recipient. The deliverer had the actio depositi directa for the restitution of the thing, and the recipient the actio depositi contraria (both actions being bona fidei) for all expenses incurred and losses sustained through the fault of the deliverer. (8.)

Pignus.—Here the deliverer, the debtor, puts the recipient, the creditor, in possession of the thing; but the creditor cannot make use of it, and although he may apply the fruits in reduction of principal, he cannot take them except by special agreement for interest. The creditor was bound to use the diligence of a bonus paterfamilias, but he was not liable for loss by accident. The creditor was compelled by the actio pingneratidia directa to restore the thing when his claim was settled, and could bring the actio pingneratidia contraria (both actions being bona fidei) to recoup himself for expenses and for losses caused by the debtor. (4.)

Contracts Made Verbis.—There were two forms of contract made verbis, besides stipulations, known to the old law, but obsolete in the time of Justinian, the dictio dotis and the jurata promissio liberti (Tit. 15. pr. note); but it is only of stipulations that any notice need be taken.

Stipulations.—Stipulations were a form of unilateral contract, in which the stipulator or questioner asked the promissor whether he would enter into the engagement proposed, and on the promissor replying that he would, the contract was complete. Originally the peculiar words, spondesne, spondeo, could only be used by Roman citizens, but in later times no special form of words was necessary as long as there was a question and an answer. (1.)

A stipulation may be made simply (pure), or may be modified, either with reference to a term (in diem), or by being subjected to a condition. (2.)

When a stipulation is made in diem, as to give on a future day named, the interest in the stipulation is at once fixed (cessit dies); and if the promissor pays before the day named, he cannot get his money back; but the time for enforcing the obligation does not come (non venit dies) until the whole of the future day fixed has expired. (2.) If a person promises to give in a distant place, a delay sufficient to make the execution of the promise possible is implied. (5.) Lapse of time was not a means recognised by law for the extinction of an obligation or promise to pay so much to a man every year while he lived: it was therefore theoretically never extinguished, but the heir of the stipulator would be prevented by an exception from enforcing the promise after the stipulator’s death. (8.)

When a stipulation is made conditionally, the interest of the stipulator is not fixed till the condition is fulfilled. He has only a hope
that the thing will be owed to him, but this hope (spes debitum iri) passes to his heirs, and they can enforce the contract when he could have enforced it. A promise to give if a man does not do something in his power is equivalent to a promise to give when he dies, and, as he must die some day, is made in diem. (4.) If the condition relates to past or present time, the knowledge of the parties as to the event is immaterial. Either the condition has not been fulfilled and the stipulation is of no effect, or it has been fulfilled and the stipulation can be enforced at once. (6.) Where the promise is to do something or not to do something, the proper course is to fix in the stipulation the penalty to be paid if the thing is not done or is done, as this avoids uncertainty as to what amount ought to be paid for the breach of promise. (7.)

Co-stipulators. Co-promissors.—A verbal contract might be made so that more than one person should be joined in the stipulation, the promissor undertaking to give to each, or in the promise, each promissor answering affirmatively the question. These contracts might also be made so as to create joint creditors or joint debtors (Tit. 16. pr.), and one promissor might answer so as to bind himself simply; the others in a modified manner. (2.) The thing was due to each co-stipulator and from each co-promissor. If the thing was given by or to any of the joint parties, the obligation was at an end. If one co-promissor ceased, as by deminutio capitis, to be bound, the other co-parties remained bound. If, however, an action was brought on the contract, then the obligation was at an end, but, under Justinian, if the co-promissor sued could not pay entirely, the others might be sued for the deficiency. (1, note.) The co-promissor who had paid all could recover their shares from the other joint debtors, either as a partner, if there was a partnership, or if not, by so paying, or by the law allowing him to feign that he had so paid, that the actions of the creditors were made available for his benefit. (1, note.)

Stipulations of Slaves.—A slave can stipulate (though he cannot promise) for his owner (Tit. 17. pr.), whether he names his owner or not (1); and if a slave stipulates after his owner's death and before the entry of the heir, he acquires for the inheritance. (Tit. 17. pr.) He may stipulate, however, for a personal right for himself, as for leave to cross a field, but he exercises this for his master's benefit. (2.) When a slave is held in common, he acquires for his joint owners in proportion to their interests in him, unless he is acting by the orders or in the name of one only of them, or unless the thing cannot be acquired by one of them, as, e.g., if it is already owned by one of his owners. (8.)

Division of Stipulations.—Stipulations may be divided according as they are voluntary or not. (Tit. 18. pr.) Those that are not voluntary are, 1, judicial, required by the judge; 2, prætorian, required by the prætor or sedile; 8, common, required properly by the prætor, but often, for the sake of avoiding delay, by the judge. Instances of those required by the judge are the security required de dolo, that a person
condemned to restore a thing shall restore it without fraudulently lessening its value; and de perseguendo servo, that a defendant will pursue or pay the price of a slave the subject of litigation, who has, through the defendant's fault, escaped out of the defendant's possession. (1.) Instances of those required by the praetor are damni infecti, security against apprehended injury, and legatorum, security by the heir that he will pay the legacies. (2.) Instances of those required sometimes by the praetor, sometimes by the judex, are rem salvam fore pupillo, security for the property of a pupil, and de rato, that a principal will ratify what the procurator does for him. (4.)

Stipulationes Inutiles.—Stipulations are invalid for various reasons, which may be classed under the following heads:

i. On account of their object, as when the stipulation is (a) for a thing that does not or cannot exist (Tit. 19. 1); or (b) for a thing of which the stipulator has not the commercium, as for a res sacra or a freeman; and in such cases the stipulation is invalid at once, though the thing may afterwards become such as he is capable of holding, as it also becomes void if the thing, without the fault of the promissor, becomes such as the stipulator cannot hold (2); (c) for a thing belonging to the stipulator or in case it may belong to him (2, 22); or (d) ex turpi causa, as to commit murder. (24.)

ii. On account of the persons by, for, or between whom they are made.—1. Stipulations are invalid when made by (a) dumb or wholly deaf persons (7); (b) madmen (8); (c) an infant pupil; or (d) a filius familias below the age of puberty. (9, 10.)

2. Stipulations are invalid when made for (a) a third person other than a person in whose power the stipulator is. (4.) But such a stipulation may be made valid by adding that, if payment to the third person is not made, a penalty shall be payable to the stipulator (19); and whenever the stipulator has an interest in the payment to a third person being made, as if it is a co-tutor who on retiring stipulates, to save himself, that the property of the pupil shall be safely administered by the remaining tutors, or if the third person is a procurator or creditor of the stipulator, the stipulation is valid. (20.) If a stipulator engaged for payment to himself or another, payment to the other extinguished the obligation. If he stipulated for payment to himself and another, he could recover half the sum stipulated for. (4.) (b) The stipulation was also invalid if the promise was so made to bind a third person as that this third person should give or do something (8, 21); but the stipulation might be made valid either by the promissor promising that he would manage that the third person gave or did the thing, or that he himself would pay a penalty in case the third person did not give or do the thing. (8, 19.)

3. Masters cannot stipulate with their slaves, nor fathers with their children in their power. (6.)

iii. On account of the manner in which they are made.—The parties must consent to the same thing (5, 23); and if several things are in-
cluded in the question, the promissor is, unless he gives a general
assent, only bound as to those things to which he bound himself by his
answer. (18.) The question is inferred from the record of the answer
in a written document embodying a stipulation. (17.)

iv. On account of the time or the condition subject to which they
are made. (a.) Time.—A stipulation was invalid that a thing should
be given after the death of the stipulator or the possessor, because the
right to have the engagement performed would then accrue not to the
party to the contract, but to his heirs, who were in the position of
third persons. (18.) An engagement to give the day before death was
equally invalid, as until the death occurred it could not be known when
the day was. (18.) But an engagement to give at the time of death was
valid, as the performance was considered to become due before the heir
occupied his position as heir (15), and a stipulation to give after the
death of a third person was valid as being merely an uncertain
term. (16.) A preposterous stipulation, that is, ‘If something hap-
pens to-morrow, will you give me to-day?’ was invalid. (14.) Under
Justinian, however, all the causes of invalidity under this head and as
to the time of death were removed. (18, 14.)

(b) Condition.—An impossible condition makes a stipulation void,
but a stipulation is valid and the thing is due at once, if it is given
in case an impossible condition is not performed. (11.) The heirs of
the stipulator and the promissor could sue and be sued if the condition
of a properly made conditional stipulation was fulfilled after the death
of the party to whom they were heirs. (25.)

Fidejussiores.—The general term for becoming surety was inter-
cessio, and the principal modes of intercessio were (1) adpromissio,
(2) fidejussio, (3) giving a mandate credenda pecunia, or a pactum
constituta pecunia, an engagement to pay the ascertained debt of
the principal. The Institutes only treat of fidejussores. The correi
stipulandi et promittendi, mentioned in Title 16, were parties to the
same verbal contract. But it was also possible for persons to enter
into a contract as accessories to the principal contract. If one of
these accessories, or the principal, was sued, no further action could,
until Justinian’s time, be brought by the creditors against those not
sued, the debt being extinguished by the liitis contestatio, and payment
to the accessory of the creditor was a good payment as against his
principal. (Tit 20. pr.)

In stipulations there could be added an adstipulator, and the prin-
cipal use of adding one was, before procurators were recognised, to pu:
a person in the position of a procurator, and, after procurators were
recognised, to make valid a stipulation for something after the death
of the stipulator. The rights of the adstipulator did not pass to his heirs.

The adpromissores (sponsores if Roman citizens, fidepromissores if
peregrini) might bind themselves for as much as, or for less than, their
principal bound himself, not for more. Their heirs were not bound,
and they had against their principal an actio mandati. Several laws
were made for their protection. By the *lex Apuleia* any one of them who had paid the whole debt could recover all beyond his share from the others by an *actio pro socio*. By a law of uncertain name the creditor had to give notice beforehand for what amount he was going to exact security, and how many accessories there were to be. By the *lex Furia* the obligation was only binding for two years, and the amount of the liability of all was divided equally among all living when the guarantee could be enforced. The *lex Publilia* gave a special privilege to *sponsores* (not to *fidepromissores*), allowing them, unless reimbursed in six months, to bring against their principal a special action, *actio depensi*, and, if he denied his liability, to recover double, or to take his person in execution. The *lex CorNELIA* provided that no one should bind himself for the same debtor, to the same creditor, in the same year, for more than 20,000 sestertes.

The *lex CorNELIA* applied, however, not only to *adpromissores*, but to *fidejussores*, which marks the first introduction of a form of suretyship which, at last, superseded entirely the use of *adpromissores*. The *fidejussor* bound himself by saying in Latin or in Greek (7) that he also ordered the thing on his faith, but no strictness of the formula was here necessary. Like the *adpromissor*, the *fidejussor* could not bind himself for more than his principal (5), and had an *actio mandati*, or, if he had intervened without the principal's authority, an *actio negotiorum gestorum* against the principal for what he paid for him. (6.)

The advantages of having *fidejussores* over *adpromissores* were:

(a) They could be used to guarantee any kind of obligation, including obligations arising out of delicts and natural obligations, whereas *adpromissores* could only guarantee verbal contracts. (1.) (b) The *fidejussor* bound his heirs, the *adpromissor* did not. (2.) (c) There was no limit to the time during which *fidejussores* were bound, whereas *adpromissores* were only bound for two years from the time when the obligation could have been enforced against them. (2, note.) (d) The *fidejussio* might be made beforehand to guarantee a principal contract not yet made—*adpromissio* could not. (8.)

The *fidejussores* were each liable for the whole debt, and one who paid had no means of making the others contribute, except by taking advantage of the *beneficium cedendarum actionum*, that is, the surety who was willing to pay in full could repel the creditor by an *exceptio doli mali*, unless the creditor would cede his actions to the surety who paid him; and by means of these actions the surety could force the principal, or his co-sureties, to pay him what he was entitled to receive. Hadrian, however, enacted that, if any *fidejussor* was sued, he should have what was termed the *beneficium divisionis*, i.e. he might force the creditor to divide his demand among all the *fidejussores* who were solvent at the time of the *litis contestatio*; but the *fidejussor* must make this demand formally, since the *beneficium* did not take place *ipso jure*, as the provisions of the *lex Furia* did in favour of *adpromissores*. And it might still be more to the interest of the surety to take advan-
tage of the *beneficium cedendarum actionum*, as he thus took over any property pledged to the creditor, and might satisfy his claim in this way. (4.)

Justinian introduced what was termed the *beneficium ordinis*, by which a surety might require that the principal should be sued first, and the sureties only called on to pay what could not be recovered from him. (4, note.)

By the *senatusconsultum Velleianum* women were forbidden to bind themselves for another person. (Tit. 20. pr. note.) A *fidejussor* who signs a writing (*cautio*), by which he binds himself as *fidejussor*, is taken to have gone through all the necessary forms. (8.)

Contracts made *litteris*.—A contract was made *litteris* when an entry, *expensilatio*, under the name of the debtor, was made in the ledger (*codex*) of the creditor with the assent of the debtor, to the effect that the creditor had paid, and the debtor received, a certain sum of money. The best evidence of the assent of the debtor was his making a corresponding entry in his ledger, but this was not necessary. As the contract was for a sum certain advanced, it was enforced by a *condictio*; and as the remedy by *condictio* was a short and simple one, other debts, as e.g. what was owing under a sale, were changed by novation into debts due under a literal contract (*transcriptio a re in personam*), by the debtor owning to having received as a loan the sum due from him on the sale; and, in the same way, the debtor might take, under a literal contract, the debt of a third person (*transcriptio a persona in personam*), by assenting to an entry that he, the debtor, had received a loan to the amount of the sum owed by the third person.

Contracts *litteris* were peculiar to Roman citizens. *Peregrini* had as a substitute *syngraphae*, signed by both parties, and *chirographa*, signed by the debtor only. These were not merely documentary evidence, but were writings on which an action could be brought; but if there was a stipulation this was always looked on as the contract, and the writing was only evidentiary. If the creditor sued on a contract *litteris*, the defendant might plead the *exceptio non numerata pecunia*, in case he could state that he never really had received the money, and then the creditor had to prove that he had really paid. Subsequently mere acknowledgments of debt (*cautiones*) were protected by the same exception, and superseded contracts *litteris*. This exception could only be pleaded within a period fixed first at one year, then at five years, and by Justinian at two years; and within the same period, if the debtor could show that he had not had the money, he could ask to have the writing, on which he was sought to be charged, given up to him. After this period had elapsed, the debtor was conclusively bound by any written admission of debt, but, under Justinian, the debtor, by going through certain forms, at any time during the two years, might get his exception made perpetual; and Justinian also made a person falsely denying his written acknowledgment of debt liable to pay double the amount. (Tit. 21, and note.)
Consensual Contracts.—We now come to the four kinds of contracts made simply by consent. No writing nor earnest is necessary; they may be made inter absentes, and all give rise to bona fidei actions. They are all bi-lateral, i.e. both parties are bound by them, whereas contracts under the three former heads were unilateral, except so far as commodatum, depositum, and pignus might give rise to actiones contraria. These four kinds of contract are sale, letting and hiring, partnership, and mandate. (Tit. 22.)

i. Sale.—The contract of sale is formed as soon as the price, i.e. a definite sum of money, not anything else than money, is fixed on. Earnest (arrhae), previously to Justinian, only served as a proof that the contract had been made. (Tit. 23. pr.)

Justinian made two changes. 1. If the parties chose to reduce their contract to writing, which they need not do, he enacted that they should not be bound until it had been reduced to writing, and one of three conditions had been fulfilled: viz. that the writing was (a) written by the parties, or (b) signed by them, or (c) formally written by a notary. 2. The earnest (arrhae), instead of a proof of the contract, became a measure of damages for not fulfilling the contract, whether written or unwritten, the purchaser forfeiting the earnest if he retracted, and the seller if he retracted forfeiting double.

The thing sold must be defined in some way, but it might be defined in many ways, as, e.g., by selling at so much a head the fish to be caught on a day, rei sperata emptio, or the chance of the whole take of fish on a day, spei emptio. (Tit. 23. pr., and note.)

The price must be fixed and certain. If a thing is sold at the price at which Titius shall value the thing, Justinian decides that if Titius does fix a value this is a contract of sale; but if he does not, there is no contract of sale. (1.)

The price must be in money, or else the contract is one of exchange (permutatio), not sale, the difference being that, if a contract of sale was made, the consent was the basis of the contract, but in exchange the contract was made re, by the delivery of one thing in exchange for which the other thing was to be given. (2.)

The duties of the seller were, 1, to deliver the thing and to give lawful and undisturbed possession of it (not to give the dominium of it). 2. To recompense the buyer, if evicted. 3. To secure the buyer against secret faults. If secret faults were discovered, the buyer might at his option, (a) by an actio estimatoria recover damages, greater or less, according as the seller knew (or did not know) of the faults, or (b), by what was termed redhibitio, get the contract rescinded, and return the thing to the seller. But this was not all. In order to fortify himself, the buyer frequently exacted by stipulation a promise from the seller that he would give him the dominium, and that if the buyer was evicted, he would pay him double the purchase money. After the use of this fortifying stipulation had become familiar, it was held that custom so far imported such a stipulation into the contract, that the
buyer, who had not demanded such a promise, and who, therefore, could not sue *ex stipulatu* if evicted, yet, if evicted, could, in the *bona fidei actio empti*, recover double the purchase money, on the ground that the seller ought to put the buyer in as good a position as if the stipulation had been made.

The buyer was bound, 1, to make the seller the receiver of the money fixed as the price, and, 2, to pay interest from the day of receiving the thing until he paid the price. (2, note.)

The contract of sale was complete when the price was fixed, but the thing sold remained in the ownership of the seller until he delivered it. If, after the sale was made, the thing bought improved in value, the buyer profited, and if it lost in value without the fault of the seller the buyer had to take it as it was. The risk, after the price was paid, was that of the buyer, and if the thing was wholly lost, by some cause beyond the control of the seller, the loss fell on the buyer, not on the seller, although the seller was the *dominus*, while generally it is true that *res domino perit*. But then the seller had to take the *care* of a good *paterfamilias* of the thing while it was in his custody, and if he did not, the buyer could sue him for damages; and, if the seller chose, he might take even a further responsibility and specially engage to be answerable even beyond the measure of responsibility of a *bonus paterfamilias*, as, e.g., that a slave purchased should not in any case escape out of his custody. If the thing, while retained by the seller, was injured or stolen by a third person, the seller had to cede to the buyer the action which, as *dominus*, he had against the wrongdoer or thief. (3.)

The contract of sale might be made to be fulfilled on a condition happening, or to be at an end on a condition happening, or with a subsidiary agreement added to it, such as (a) that it might be rescinded if the seller had a better offer before a given day (*in diem addictio*), or (b) a *lex commissoria*, a general agreement for the rescission of the contract, if not executed, this agreement being specially used to enable the seller to get back the thing if he had delivered it, and was not paid by a certain day. A seller could, under Justinian, have a sale rescinded, or the difference made up to him, if he had sold for less than half the value. (4.)

If the seller knowingly sold something that cannot be sold, as a *res publica*, or a freeman, the buyer, if he bought in ignorance, could recover from the seller all he had lost by entering into the bargain; he could, e.g., get interest on his purchase money.

The *bona fidei actio* of the buyer was termed *ex empto or empti*, that of the seller *ex vendito or venditi*. (5.)

ii. Letting on Hire.—The contract of letting and hiring (*locatio-conductio*) is the second of the consensual contracts, and was formed as soon as the price of the letting (*merces*) was fixed. The three heads of this contract were, 1, *locatio-conductio rerum*, where one person let and another hired a thing; 2, *locatio-conductio operarum*, where one person let his services and another hired them; 3, *locatio-conductio*
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operis faciendi, where one person, the locator, delivered over a thing, to have something done to it for a price, by another person, the conductor. (Tit. 24. pr., and note.) The price must be fixed, but might be left to be fixed by another person (1), but if no price was fixed the contract was not technically one of locatio-conductio, but was an inominate contract. The price must be in money, and so if one man lets his ox in exchange for the hirer in turn letting his ox to the first letter, this is not locatio-conductio, but an inominate contract. (2.) Emphyteusis, which resembles sale in regard to the largeness of the interest passed by it, and locatio-conductio inasmuch as the property still remains in the creator of the emphyteusis, was declared to be a separate form of contract by Zeno. In the absence of special agreement to the contrary, the risk in emphyteusis of a total loss fell on the owner, the risk of a partial loss fell on the occupier. (3.) If a man gives his gold to a goldsmith to have rings made of it for a fixed price, this is locatio-conductio; but if the rings are to be made of the gold of the goldsmith, it is a sale. (4.) The hirer has to bestow on the thing hired the care of a bonus paterfamilias, but fortuitous loss falls on the owner, that is, the letter (5); a distinction being thus established between the contract of locatio-conductio and that of sale, where the risk of fortuitous loss is not with the dominus, the seller, but with the buyer who still remained possessor in the eyes of the law. The duties of the letter were, 1, to give the hirer the free use of the thing; 2, to guarantee him against eviction; 3, to reimburse him for necessary or useful expenses. The duties of the hirer were, 1, to give the care of a bonus paterfamilias to the custody of the thing; 2, to give the thing up when the term of hiring was at an end; and 3, to pay the agreed price of hiring. (Tit. 24. pr.)

The contract was terminated, 1, by the death of a person who had contracted to let out his personal services or who specially was to do a thing; but it was not terminated in other cases by the death of the locator or conductor, the contract passing to the heirs of each (6); 2, by the sale of the thing, the conductor having a right to damages against the locator for being turned out, but having no title to hold against a purchaser; 3, by rent being two years in arrear; or by gross misuse on the part of the conductor; 4, by the locator having indispensable need of it; and, 5, by the conductor being prevented from getting benefit from it, as by armed force. (6, note.)

The hirer had the actio conducti; the letter had, 1, the actio locati, and, 2, a real action, actio Serviana, by which he was enabled to seize on the farming instruments of the hirer of land if rent was not paid; and, 3, could apply for the interdictum Salvianum, by which he got possession of things pledged for the rent of land. (Tit. 24. pr.)

iii. PARTNERSHIP.—The third kind of consensual contracts, partnership, may be considered under the following heads:—

1. The objects of the partnership.—Partnership might be (a) universorum bonorum (κοινοπραξία), of everything belonging or accruing
to each partner in any way, and goods belonging to the partners at
the time of the contract passed to all without delivery; (b) universorum
qua ex quastu veniunt, of things acquired in the course of business,
but not of inheritances, legacies, &c.; (c) negotiationis allicujus;
(d) vectigalis, for farming the public revenues; (e) rei unius. (Tit. 25.
pr., note.)

2. The shares of the partners.—In the absence of special agree-
ment each partner has an equal share in the profit and loss. (1.) But
they may agree that one-third of the profits and one-third of the loss
shall belong to one partner—or one may have the profit after a balance
has been struck and not be responsible for loss—or one may contribute
money and another only services; but a leonine partnership, by
which one partner took all the profit, was not permitted. (2.) If a
share of gain is assigned to one partner, he has, in the absence of
special agreement, to take an equal share of loss. (8.)

8. The dissolution of the partnership.—A partnership was dis-
solved (a) ex personis, when one partner was dead or incapacitated.
As to death, it may be remarked that the death of one of many
partners dissolved the whole partnership, but that a societas vectigalis
passed to the heirs. (5, note.) Incapacity might under Justinian be
caused by publicatio or confiscation, when the fiscus was looked on as
the successor; and this was one of the consequences of the maxima
or media capitis deminutio. (8, note.) (b) Ex rebus, when the
purpose of the partnership has been accomplished, or the condition to
which it was made subject, for partnership might be made condition-
ally, has been fulfilled (4 note), or when the subject matter of the
partnership has ceased to exist, as in the case of a cessio bonorum,
when the goods of the insolvent were all lost to him. (7.) But the
outgoing partner might form a new partnership with his old partners,
and as partnership, being a contract jus gentium, could be formed
with a peregrinus, a new partnership might be formed even with a
person who, having undergone the media capitis deminutio, had lost
his civitas. The minima capitis deminutio did not dissolve a partner-
ship, and a person arrogated or emancipated was still a partner. (8.)
(c) Ex voluntate, when one partner wished to retire; but if, when the
partnership is universorum bonorum, he renounces from a desire to
profit exclusively by some gain, as an inheritance accruing to himself,
he is compelled to share this gain with his partners. (4.) (d) Ex
actione, when one partner compelled a dissolution by action. (e) Tem-
pore, by the time during which the partnership was to last having expired.

4. The powers and duties of the partners.—Each partner was the
mandatory of the others, but, for anything beyond mere ordinary
administration, required an express mandatum. Properly, only the
particular partner who was party to a contract could sue or be sued
by third parties, but the prætor, if necessary, allowed actions to be
brought by or against the other partners. Each partner had a bona
fidei action pro socio against the others to recover his just expenses
and make them answerable for his losses or their negligence. (2, note.) Each partner was bound to take as much care of goods belonging to the partnership as he did of his own, and to this extent he was answerable, not only for dolus, but culpa. (9.)

There was such a fraternitas between partners, that while on the one hand a partner could not in an actio pro socio be condemned beyond his means (beneficium competentiae), yet condemnation in this action carried infamy with it. If a partner committed a delict against his partners, they had the appropriate actio ex delicto against him, and a partition of the partnership property could be enforced by an actio communis dividendo. (9, note.)

iv. MANDATE.—The fourth of the consensual contracts is mandate, by which one person charges another to do something: originally, one friend (the mandator) charges another friend, in whom he has confidence (the mandatarius), to do something for him, and as a pledge places his hand in his friend's (manus datio). The relations thus created were afterwards enforced by the bona fidei actions mandati directa, by which the mandator compelled the mandatarius to account to him, and mandati contraria, by which the mandatarius compelled the mandator to reimburse him for expenses and losses. (Tit. 26. pr., note.) The original character of the contract was traceable in mandate always remaining a gratuitous contract (18), and the mandatarius who was adjudged in an action to have failed to discharge his duty was stamped with infamy. (Tit. 26. pr., note.)

Gradually the scope of mandate was much enlarged by the pretor allowing third parties with whom the mandatarius had contracted to sue or be sued by the mandator, in the form of actiones utiles. There were still some acts, such as making a testament, or entering on an inheritance, which every man must do for himself; but, in general terms, it may be said, that a law of agency was thus created, as these actions could be brought without the concurrence of the agent or procurator, and thus the principal and third parties were placed in direct relations. (Tit. 26. pr., note.)

Forms of mandate.—Mandate may assume five forms, according to the persons interested in the contract. It may be made (a) for the benefit of the mandator only, as when he charges the mandatarius to buy an estate for him. (1.) (b) For the benefit of the mandator and the mandatarius, as, 1, when the mandator guarantees a loan which the mandatarius makes with interest to a third party, but for the benefit of the mandator; or, 2, when the mandator, being already a fidejussor, gives the mandatarius, who is about to sue him as such, a mandate to sue the principal at the risk of the mandator (here both gain, or rather, before Justinian introduced the beneficium ordinis, they gained, the mandator by having the principal sued first, and the mandatarius by having two persons to sue, one after the other); or 3, when the debtor gives the creditor a mandate to stipulate for something owed to the mandator by a third party. (Here again both benefit; the
mandator gets his debt collected for him, and the mandatarius has two persons to sue.) (2.) (c) For the benefit of a third person, as a mandate to manage the affairs of Titius. (d) For the benefit of the mandator and a third person, as when the mandatarius is charged to buy an estate for Titius and the mandator jointly. (e) For the benefit of the mandatarius and a third person, as when the mandator charges the mandatarius to lend money at interest to Titius, an opportunity of lending money at interest being here, as above in (b 1), treated as a benefit to the lender. (5.) A mandate for the benefit of the mandatarius only, as to invest his money in the purchase of an estate, is merely a piece of advice, and cannot be reckoned a mandate at all, unless the mandator meant to say that if his advice was followed, he, and not the mandatarius, was to take the risk. (6.) A mandate may be made conditionally, or to have effect from a particular time. (12.)

Mandate used as a mode of Suretyship.—A mandate was almost the same as fidejussio as a means of creating suretyship, and was subject to the same general rules as to the inability of women, under the senatusconsultum Velleitanum, to enter into it for this purpose, and as to the benefits of discussion (ordinis), i.e. that the principal should be sued first, under Justinian, and of division, that is, that the liabilities of co-sureties should be divided among them, under Hadrian's rescript, and, to some extent, of the cession of actions. But the mandator and fidejussor differed in some respects. 1. The mandator was considered sometimes more responsible. It was, for instance, doubted by the jurists whether, if an adolescent who had borrowed under a guarantee was restitutus in integrum, the creditor or the fidejussor was to suffer the loss, but it was considered clear that the mandator rather than the creditor was to suffer. 2. Before the time of Justinian, who placed them on an equality, the fidejussor was released by the principal being sued—not so the mandator, as his contract was a separate one. 8. The fidejussor could not demand that the actions against the debtor and the co-sureties should be ceded to him after a litis contestatio in a suit by the creditor against the fidejussor; but the mandator was not affected by a litis contestatio or judgment in an action against the debtor. 4. The mandator was released if the creditor had wilfully abandoned any of the remedies the mandator could call on him to cede, while the fidejussor could only call on the creditor to cede such as he had to cede. (6, note.)

Duties and powers of the Mandatarius.—No one need accept a mandate, but, if accepted, it must be executed, unless renounced soon enough for the mandator to carry out his purpose himself or through another. Otherwise the mandatarius will be liable to an actio mandati, unless some such reason as a sudden illness or enmity has prevented him from renouncing or renouncing soon enough. (11.) If the mandator revokes before execution, the mandate is at an end. (9.) A mandate is also extinguished, if, before it is executed, either the mandator or mandatarius dies, but the mandatarius has an actio mandati.
if he executes the mandate when the mandator is really, but not to his knowledge, dead; just as a payment to a steward, enfranchised or ceasing to have power to act as steward, is good against his master if the person paying the money does not know that the steward is not still a slave or has ceased to have power to act as steward. (10.) A mandate contra bonos mores, as to commit theft, is not obligatory; the mandatarius may have to pay a penalty in such a case, but he has no remedy against the person who charges him to commit the theft. (7.) The mandatarius must not exceed the limits of his mandate. If a mandator charges the mandatarius to spend 100 aurei, the mandatarius may spend less, but not more; and he can make the mandator responsible up to 100 aurei, though not for the excess. (8.) In the execution of the mandate, the mandatarius was bound to exercise the diligence of a bonus paterfamilias. (11, note.)

Gratuitous character of the Contract.—A mandate is always gratuitous; and a contract which, if gratuitous, would be a mandate, will, if not gratuitous, almost always take the form of locatio-conductio, and so vice versa, if a person gives out his materials to be done something with, but does not fix the price, an actio mandati may be brought. But although the mandate was gratuitous, yet an honorary payment (honorarium) might be arranged for and given, as to doctors, &c., and although the payment could not be enforced by an action, yet the magistrate in the exercise of his extraordinary jurisdiction would regulate it and see it was paid. (13.)

Obligations quasi ex Contractu.—We now come to cases where an obligation exists, not arising from a contract, but from such a state of things that one man is bound to another as if there was a contract. These obligations, moreover, resemble not only obligations generally, but those arising from some particular form of contract. The first three of the examples that follow, for instance, closely approach obligations arising from a mandate. The next two closely approach obligations arising from a societas. The last closely approaches the obligation arising from mutuum. (Tit. 27. pr. 6.)

The following are the examples (which are merely examples) given in the Institutes.

1. If one man manages the affairs of another who is absent, without being charged to do so, there is no contract between them, but, in order that the affairs of absent people might not be neglected, the law treated the parties as if a mandate had been given, the person whose affairs had been managed having an actio negotiorum gestorum against the gestor to make him account, and the gestor having an actio contraria against him, but (in distinction to the case of a mandate) only for what he has usefully expended, not for all his expenses. The gestor has to show the diligence of a bonus paterfamilias. (1.)

2. Tutors and, 3, curators are bound to the pupil or adolescent, who have a direct action to make them account, and are subject to a contrary action for losses and all expenses. (2.)
4. If two persons, not being partners, have a thing in common, and one has received the fruits or borne necessary or useful expenses, he can be sued or sue as if the other had been a partner (8); and 5, the same may be said of two co-heirs, who have a right to apply to have the inheritance divided. (4.)

6. The heir, though not bound by a contract to the legatee, is under an obligation to him, quasi ex contractu, to carry out the dispositions of the testator, and the legatee had an actio ex testamento to make him do this; having also, if a particular thing was so given as a legacy as to give the legatee the right to bring a vindicatio, the choice between the real and the personal action. (5.)

7. A person to whom money not due is paid by mistake, is not bound by a contract, for payment is generally rather the fulfilment than the origin of a contract, but he is bound to repay it by an obligation quasi ex contractu. (6.)

In order that the person paying might be able to recover, three conditions must be fulfilled: (a) the payment must be really not due; a person could not recover if what he paid was due, although by a merely natural obligation, or if he paid sooner than necessary what he must some day pay; but he might recover what he paid under a conditional undertaking before the event happened; (b) he must have paid under a mistake arising from ignorance of fact or, perhaps, of law; for if he paid knowingly he was treated as having made a gift. (6.) In one case, money paid when not due could not be recovered; viz., when he who paid was liable, on denying liability, to pay double the amount claimed, as he would be if he denied that a judgment pronounced against him had been pronounced, or in actions under the lex Aquilia, or, before Justinian, in cases of legacies given per damnationem. Justinian put all legacies and fideicommissa on the same footing in this respect, but only in favour of certain legatees, such as churches, asylums, monasteries, and so forth. If a person in such cases chose to pay the simple sum claimed, he could not recover it, as he was taken to have paid it to obtain security from the penalty. (7.)

The person who had paid money by mistake was much in the position of a person who had made a mutuum, and the condictio indebiti, by which he recovered, closely resembled the actio ex mutuo. But the solutio indebiti extended to many other things than the payment of money. It comprehended anything done or given over by mistake, and the analogy to the mutuum ceased to be apparent. (6, note.)

ACQUISITION OF OBLIGATIONS THROUGH OTHERS.—Fathers and masters acquire obligations, i.e. are creditors, and can bring actions, through sons in potestate (subject to the changes made by Justinian as to the peculium, the father, however, having alone the right to bring the action when he had the usufruct) and slaves. (Tit. 28. pr.) In the cases of slaves, or of persons supposed to be slaves, of whom there is bona fide possession or a usufruct, the master acquires the obligations as to all that arises from their labours or from something belonging
to the master. In the case of slaves of whom the master has the use, the master acquires the obligations as to all that arises from their labours expended on the master's property. (1, 2.) The slave held in common acquires, in the absence of something to show the contrary, for his masters in proportion to their interest in him. (8) The institutes do not notice the acquisition of obligations through procurators.

Dissolution of Obligations.—The last Title of this book treats of the dissolution of obligations, and the case of obligations being dissolved ipso jure must be distinguished from that of the right to sue on an obligation being met by an exception, a subject reserved for the 4th Book. There are three modes of the dissolution of contracts noticed in the Institutes: 1. Payment; 2. Novation; 3. Use of a form of dissolution corresponding to the form of the obligation. (Tit. 29.)

i. Payment.—Solutio, a term applicable generally to every mode of loosening the tie of the obligation, is specially applied to payment in its widest sense, i.e. executing the contract. There are as to this three questions to be answered: 1. Who may pay? Either the debtor himself may pay, or any third person with or without the debtor's knowledge, or even against his will, may pay for him. If the debtor pays, the fidejussor is released, and if the fidejussor pays and does not require the actions to be ceded to him, the principal is released. 2. To whom might the payment be made? To the creditor himself, his authorised agent, to the tutor, curator, or authorised pupil. 3. What might be given in payment? Not only the thing itself, but, with the consent of the creditor, something else in lieu of it. (Tit. 29. pr.)

ii. Novation.—Novation is the dissolution of one obligation by the formation of another. Any contract, civil or natural, could be extinguished by a new contract, operating either civilly or naturally, being formed; the new contract being one either litteris, or (so generally as to be spoken of as the one recognised mode) verbis. The new contract must be different from the old, and might be different in three ways: 1. The terms might be altered; 2. A new debtor might be introduced, and even if the new debtor is unable, as e.g. an unauthorised pupil, to contract, still, though the new contract, except as a natural obligation, is void, yet the first is extinguished; but it would be otherwise if the new contract had been made with an unauthorised slave, for then there would be no new contract at all. The new debtor might be substituted even without the consent of the old debtor; this new debtor was termed expromissor, in the strict sense of that word. If the old debtor substituted another person as the new debtor in his own place, this was termed delegatio. A new creditor might also be introduced. 3. If the parties remained the same, then, if the preceding contract was not a stipulation, the forming the same contract by stipulation operated as a novation of the first contract; but if the preceding contract is a stipulation, something new must be introduced; conditions of time or fidejussores, for example, must be added or taken away. If the second contract is made conditionally, the first is not extinguished until the
second becomes operative by the condition having been fulfilled. (3, and note.)

Justinian enacted that no contract should be extinguished by a new one being formed, unless the parties clearly expressed their intention that this should be the effect of the new contract. (3.)

Both the litis contestatio and a judgment produced a novatio, but the effect was not exactly the same as in novatio proper, as the beneficial accessories of the old contract, such as pledges and interest, were continued. (3, note.)

iii. Form of Dissolution corresponding to the Forms of the Obligation.—If payment was not made, nor novation made by a new stipulation, and the parties had made a contract of nexum, or verbis, or litteris, a form (imaginaria solutio) had to be gone through to get rid of the contract, corresponding to the form in which the obligation had been contracted. A nexum was dissolved by the debtor striking the scale with a piece of money and giving it to the creditor as representing the debt; and this form was used to remit payment of a legacy per damnationem, or of money due on a judgment, or of anything certain, pondere, numero mensurave. (Tit. 29. pr. note.) A contract verbis was dissolved by acceptilatio, i.e. by the creditor saying Habeo to the debtor’s question Habeas acceptum? (1.) A contract litteris was dissolved by the debtor making the expensilatio of an imaginary payment in his books.

A contract re was dissolved by the thing being returned, and one made consensu was dissolved by consent, if each party could be put in his former position. (4.)

If a contract had been made in some other way than verbis, and the parties subsequently went through an acceptilatio, this operated as giving an exception preventing the creditor from suing. But in order that the preceding obligation might be extinguished, and not merely an exception allowed, there was invented what was termed the Aquilian stipulation. The terms of the former contract were thrown into the form of a stipulation, which extinguished the old contract by novation, and then this new stipulation was dissolved by acceptilatio. (2.) Acceptilatio may be applied to a part of a debt as well as to the whole. (1.)

There were also the following modes in which an obligation might be dissolved besides the three above mentioned: 1. The obligation becoming impossible to execute, as if the thing perished. 2. Confusio, i.e. the persona of the creditor and the debtor becoming merged, as if the debtor became heir to the creditor. 3. Compensatio, or set-off, in the sense that it was taken notice of in bona fide actions without an exception. (4, note.)
BOOK IV.

DELICTS.

We now proceed to notice obligations arising \textit{ex delicto}, or \textit{quasi ex delicto}.

DELICTS.—Obligations arising from delicts—i.e. violations of the rights of property, or of any of the other rights \textit{in rem}, such as liberty, security, or reputation—arise from the thing done (\textit{ex re}), without necessary reference to an evil intent, and the kinds of delicts recognised by the law are four:—\textit{Furtum, rapina, damni injuria, injuria}. (Bk. iv. Tit. 1. pr.)

\textit{Furtum}.—Theft is the fraudulent dealing with a moveable thing, including things moved from the soil, or with its use or its possession. (1.) By fraudulent is meant 'with the intention of committing a theft,' and among \textit{impuberes} it was only a person \textit{pubertati proximus} who was held old enough to have such an intention. (18.) If a borrower converts the thing borrowed to a purpose other than that for which it was lent, he does not commit a theft, if he honestly thinks the owner would permit it (7), or, whether he thinks so or not, if the owner would, as a matter of fact, have permitted it. (8.) But a person tempting a slave to bring him the property of his master, and then receiving the things by direction of the master to whom the slave has revealed the facts, is guilty both of theft and of corrupting a slave. (8.) There is theft of the use of a thing, as when a creditor or a depositary uses for his own purposes the thing committed to him as a pledge or in deposit, or a borrower uses a thing for a purpose other than that for which it is lent, e.g. borrows a horse for a ride, and takes it into battle. (6.) There is theft of the possession, as if a debtor takes from the creditor the thing he has pledged to him. Free persons, as, e.g., children \textit{in potestate}, are among the things that may come within the law of theft. (10.) A person who assists in a theft, as by placing a ladder by which the thief mounts, is liable to an action of theft, but not so if he only counsels the theft. (11.) If persons in the power of another steal from that person, they cannot be sued for theft by that person, but the thing is \textit{furtiva}, and cannot be acquired by usucapion, and a person assisting them is liable to an action of theft. (12.)

In case of theft the owner of the thing could sue for the thing, if in the possession of the thief, by the ordinary means, \textit{vindicatio}, or an action \textit{ad exhibendum}, and, if the thing was no longer in the possession of the thief, he could recover the value of the thing stolen and interest by a \textit{condictio furtiva}, or he might, if he pleased, bring this action
although the thing was in the thief's possession. But, besides these actions, he had an actio furti, an action to recover a penalty for the wrong done him; but this, though it could be brought by the heirs of the owner, could not be brought against those of the thief. (19, and note.) It could, as we have just seen, be brought against the accomplices of the thief. (11.)

Two questions arise as to this action. 1. What was the amount of the penalty? 2. Who could bring the action?

1. The amount of the penalty varied according as the theft was manifest or not manifest. A manifest theft is one in which the thief is detected in the act, or in the place of the theft, or with the thing on him before he reaches his destination. The penalty for a manifest theft, which had been under the Twelve Tables for a slave death, and for a freeman being given over as a slave to the person injured, was fixed by the praetors at four times the value of the thing stolen. The penalty for non-manifest theft was twice the value. Any accidental circumstance that, at the time of the theft, gave a special value to the thing, was reckoned in the value, the quadruple or double of which was to be given. (8, 5.) In the older law there had been other variations of theft, or concealing stolen property, to which actions had been attached, with varying penalties, under the heads of furtum conceptum, oblatum, prohibitum, and non exhibitum. (4.)

2. The person or persons who were interested in the thing not being lost could bring the actio furti. In the case of a thing subjected to a usufruct, both the dominus and the usufructuary had such an interest, and both could bring the action. (18, note.) The creditor, from whom a thing given in pledge is stolen, even if the debtor is the thief, may bring it, because to have the thing pledged in possession is a gain, although the debtor may be able to pay. (14.) The bona fide purchaser, too, has the action, although he is not the dominus. (15.) The conductor operis, the tailor or fuller who has clothes to mend or clean, can bring the action, if he is solvent, and the owner cannot; for as he has his remedy against the tailor, the owner has not an interest: but if the tailor is insolvent the owner can bring the action. (15.) The same rule applied before Justinian to the borrower under a commodatum, but under Justinian the lender had his choice. If he chose to bring the action against the thief, the borrower was freed from responsibility. If knowing of the theft, he chose to sue the borrower, then the borrower had the action against the thief so far as he paid, but the lender had not, whether the borrower was solvent or not. If the lender, ignorant of the theft, brought an action against the borrower, he might, on knowing the facts, desist from that action, and sue the thief, and then the borrower was free, whatever the result of the action against the thief might be. (16.) A depositary, not being answerable for culpa levis, had no interest sufficient to support the action, and the owner only could bring it. (17.) A mere interest in a thing not delivered being safe, such as that of a person to whom a thing was due under a stipulation,
or that of a creditor in anything belonging to his debtor, was not sufficient to support the action. (18, note.) A separate action against each offender could be brought for the full penalty. (17, note.)

BONA VI RAPTA.—The praetor instituted an action to meet the case of goods being taken by violence, the plaintiff being allowed to recover, if he brought his action within a year, the thing or its value, and also three times its value as a penalty; or, if he brought his action after a year, the thing, or its value, only. It was necessary that the act should be committed dolo malo, and not through an honest mistake, but the value of the thing was immaterial, and one person acting alone could commit the act; nor did it make any difference whether the robber was or was not taken while committing the robbery, but the action, being partly penal, could not be brought against the heirs of the wrongdoer. (Tit. 2. pr., 1.) It was not necessary that the thing taken should have been among the goods of the plaintiff. If it was taken from among his goods, that was enough; and so even the depositary might bring this action, as could all those who could bring an actio furti. (8.) The actio vi bonorum raptorum only applied in case moveables were taken, but a constitution of Valentinian, Theodosius, and Arcadius provided that if moveables were taken, or immoveables seized on by force, the wrongdoer, if he was the owner, lost the property in the thing; if he was not the owner, he had to give up the thing and to pay its value by way of penalty. (1, note.)

LEX AQUILLIA.—The lex Aquilia consisted of three heads, the second of which had reference to acceptilatio, and it is only the first and third which bear on the subject of delicts. (Tit. 4. pr.)

1. The first head gave an action damnii injuriae to the owner of a slave or any quadruped reekoned among cattle, i.e. horses, asses, swine, &c., but not dogs or wild animals (1), killed without right, but without reference to the intent of the wrongdoer. Was the person killing the slave in fault? was the question asked. A soldier throwing a javelin in a place appropriated to military exercises, and accidentally killing a slave, would not be liable, but if he was in any other place he would be. (4.) A person cutting down a tree near a public path would be liable if he did not give warning, but not if he gave warning, supposing the tree fell on and killed a slave. If the tree was in the middle of a field, he would not be in fault, and therefore not liable, even though he gave no warning. (5.) Neglect or unskilful treatment on the part of a physician, leading to the death of a slave, would make the physician liable (6, 7), and a muleteer, killing a slave by his mules running away, would be liable if a stronger man could have held them in. (8.)

The penalty was the greatest value of the slave or animal killed at any time within a year, not the actual value at the time of death, and, as the action was thus penal, it did not lie against the heirs of the wrongdoer. Interpretation of the law decided that in the greatest value was to be included all consequential loss, as if the slave, had he lived, could have entered on an inheritance for the owner; or if a son or pair of slaves
or animals was spoiled by one perishing (10), and if the defendant denied his liability, the penalty was doubled. The owner, besides the action under the lex Aquilia, might also bring a criminal charge against the person who killed a slave. (11.)

2. The third head provided for every kind of damage (damnum) done wrongfully to a slave, or any four-footed beast, including dogs and wild animals, or to goods, as by mixing anything that spoils wine or oil. (18.) But the penalty under this head was the greatest value of the thing, not within a year, but within thirty days.

For a direct action to lie under either head of the lex Aquilia the injury must be done bodily by the wrongdoer to the body of the slave or thing injured. If it was not done bodily by the wrongdoer, if he only did something by which the body of the slave or thing was injured, as if he shut up a slave or animal, and let death come from starvation, then the praetor gave an actio utilis under the lex Aquilia. If the injury was done to the owner, not by the body of the wrongdoer, nor to the body of the slave or animal, as, e.g., if a person loosed the fetters of a slave to allow him to escape, the lex Aquilia did not apply at all, and the owner must have recourse to an actio in factum, by which he would obtain compensation according to the value of the thing to him, if there had been dolus or culpa lata, or the ordinary value if not. (16, note.)

The utilis actio, under the lex Aquilia, was also given to persons having an interest less than ownership in the slave or animal, as to a possessor or a usufructuary. (16, note.)

The whole penalty could be recovered from each offender, if there was more than one. If the person injured could also bring, and brought, an action, under a contract, for the injury, he could afterwards bring an action under the lex Aquilia to recover the excess which that law would give him as a penalty beyond what he could recover on his contract. (16, note.)

Besides damnum factum the praetor took cognisance of damnum in-fectum, threatened damage, and forced the owner of the property from which damage was apprehended to give security against possible loss. (16, note.)

Injuria.—This term, which may be applied to any wrongful act, or to any judgment given against law, has the special meaning of an outrage or affront, and it is in this sense that it is here used. (Tit. 4, pr.) It is the insult that is the gist of the offence. Examples of an injury in this sense are striking any one, publicly insulting him, falsely pretending that he is the insulter's debtor, libelling him, soliciting chastity, &c. (11.) The poterfamilias, as himself insulted, might bring an action if any of those in his power was insulted; and often several persons might have the right of action at the same time; as, if a married woman was insulted, while she and her husband were both in potestate, she, her own father, her husband, and her husband's father all had a right of action, and, as the penalty was in proportion to the gravity of the insult, and this partly depended on the rank of the person insulted, the son, if of
higher rank than his father, might obtain more by bringing the action, or having it brought in his name. (8.) It was only if the insult was *atrox*, very grave, as e.g. a severe flogging, that an injury to a slave was considered an injury to the master. (8.) If the slave, in such a case, belonged to several masters, the insult was taken to be done in proportion, not to their interests in the slave, but to their rank (4), and, except the contrary appeared, the insult was taken to be to the owner, not to the usufructuary, of a slave. (5.) If it is a freeman in the employ of another, who is injured, he alone can bring the action, unless the injury to him was caused simply for the purpose of insulting the employer. (6.) The old penalty was a limb for a limb, but the preceptor substituted the penalty of allowing the parties injured to fix the damages, subject to reduction by the judge. Regard was had to the rank of the person insulted, and to the class to which, in case it was to a slave that the injury was done, the slave belonged. (7.)

*Atrox injuria.*—Besides *injurya* simple, we have to consider *atrox injuria*, or aggravated insult; the aggravation arising from the nature of the insult, the place where it was done, the rank or office of the insulted, or the part of the body affected, e.g. the eye. (9.) The consequences of the *injury* being *atrox* were two. 1. Persons, who could not otherwise, might bring the action, as (a) the owners of slaves; (b) freedmen against a patron; (c) an emancipated son against his father. 2. The damage was fixed by the preceptor, and the judge could not reduce it. (9.)

A criminal charge might also be brought for injuries, and persons of very high rank might bring such a charge by a procurator. (10.) Not only the actual wrongdoer, but any contriver of the injury, was liable to the *actio injuriarum*. (11.) But if the person injured showed no indignation at the time, or, though showing indignation, took no steps to obtain reparation within a year, he could not afterwards bring the action. (12.) Unless the stage of the *litis contestatio* had been reached, the action did not pass to the heirs of the person injured. (12. note.)

OBLIGATIONS QUASI EX DELICTO.—The remaining head of obligations is that of obligations arising from acts which, though not technically coming under the recognised heads of delicts, gave rise under the preceptors to similar actions, i.e. to penal actions *in factum* not passing against the heirs.

The instances given are, (a) when a judge has made a cause his own, i.e. has given a wrong sentence through favour or corruption or merely ignorance of law (e.g. has condemned a defendant in a sum different from that fixed in the formula), he is liable to an amount to be fixed by the judge. (Tit. 5. pr.) (b) When anything has been thrown or poured down from an apartment, the occupier of the apartment is liable to an action that any one might bring (actio popularis) for double the damage. If a freeman is killed thereby, there is a penalty of 50 aurei. If a freeman is only hurt thereby, compensation is given; his medical expenses and loss of employment being considered. A person keeping anything suspended where there was a public way, likely to fall or do damage,
was liable to a penalty of 10 aurei. It made no difference whether the occupier was occupying by one title or another. (1.) But if the occupier was a filiusfamilias, the father was not liable; nor was he if the judex who made a cause his own was a filiusfamilias. (2.) (c) The master of a ship, of an inn, or a stable, was liable to an action for double the value for any damage, fraud, or loss caused by fraud or theft on the part of his servants in his ship, inn, or stable.

ACTIONS.

We now come to the last division of the Institutes, which treats of Actions, and, subordinately, of Exceptions and Interdicts.

The mode in which the subject of actions (Tit. 6–12) is treated is this: The Sixth Title discusses the different kinds of actions. The Seventh and Eighth discuss actions to enforce obligations arising from contracts with, or delicts committed by, persons alieni juris, and the Ninth treats of injuries done by animals. Then in the Tenth the subject of bringing or defending actions through other persons, and in the Eleventh that of the securities to be given by the parties, are discussed; and lastly, in the Twelfth, the subject of the duration of the right to bring an action, and the question whether actions passed or did not pass to or against heirs, are treated of.

A summary is given, in the note to the introductory paragraph of Tit. 6, of the main divisions of actions under the formulary system.

The first division of actions noticed in the Sixth Title is that of actions in rem and actions in personam. But it is mixed up with the second division according as actions came from the old civil law or were created by the pretor. The general word for a real action was vindicatio, but this word was used in a special sense, as a civil, i.e. non-pratorian, action for a corporeal thing. The general word for a personal action was condiciio, but the word was used in a special sense, as a personal action, stricti juris, excluding bona fide actions, actions ex delicto, and actions in factum (see note to introductory paragraph). (15.) Generally speaking, if a man claimed a thing as his own, he could not bring a personal action for the thing, but odio furum a plaintiff could, although he had a real action, bring a condiciio if a thing was stolen. (14.)

The civil real actions noticed are five. 1. Vindicatio, in the special sense of a claim for a corporeal thing. 2. Confessoria; 3. Negatoria, actions to obtain or protect the enjoyment of servitudes. 4. Causa liberalis, an actio prajudicialis, to determine whether a person was or was not a freeman. 5. Petito hereditatis. There are also five kinds of pratorian real actions noticed: actio Publiciana, quasi Publiciana, Pauriana, Serviana, and quasi Serviana, and two pratorian kinds of actiones prajudiciales are also noticed. The subject of personal actions is treated of in this part of the Title only by giving three examples of personal actions created by the pretor, de pecunia constituta, de peculio, de jure-jurando. Further, there are certain actions which are said to be mixta, i.e. partly real and partly personal.
i. Civil Real Actions.—1. *Vindicatio*, under which head may be noticed the characteristic of real actions, that the *intentio* ran, *Si part rem ex jure Quiritium Titii esse*, if it appears that Titius has a right against all the world, without the name of any alleged violator of that right being mentioned. (1.) 2. *Actio confessoria*, brought to enforce a servitude contested or impeded, and brought indifferently whether the claimant was or was not in quasi-possession of the servitude. (2.) 3. *Actio negatoria*, brought by the owner of a thing to regain an alleged right of exercising a servitude over that thing, although the owner was in possession, whereas, as a rule, real actions could not be brought by a possessor. The possessor of a servitude had a concurrent remedy in a prohibitory interdict, so far as concerned the *actio confessoria*, and in a possession interdict so far as concerned the *actio negatoria*. (2.) 4. *Actio prajudicialis*, a preliminary action to ascertain a fact, was an *actio in rem*, but only one such action, that to determine whether a man was or was not free, was *civilis*. This action, known as *causa liberalis*, was originally carried on by a person who, as *assertor libertatis*, claimed a slave as against a master, and liberty might be thrice asserted in this way, if on the first two occasions a decision was given for the master. Justinian allowed the slave himself to claim his liberty, and made the first decision final. (18.) 5. *Petitio hereditatis*, or a claim for an inheritance. This (contrary to what was the case with other actions in rem) was a *bona fideis action*: Justinian decided that *dolus malus* could be taken into consideration in it without any exception being pleaded. It had some affinity to a personal action, as (a) it could only be brought against two classes of persons, those possessing an inheritance *pro herede*, and those possessing *pro possessor* (i.e. avowedly without title), and (b) the plaintiff could recover by it moneys derived by the possessor from the inheritance, and could enforce by it debts due to the inheritance from debtors claiming to be heirs. (28, note.)

ii. Pretorian Real Actions.—Five instances are given, the first three being fictitious actions, *in jus concepte*, the two last being *in factum*. 1. *Actio Publiciana*, given to protect a person who, while the time of usucapion is running, loses the thing out of his possession, and to recover it is allowed to feign that his title by usucapion is complete. (4.) 2. *Actio in rem rescissoria*, given to protect a person against whom the time of usucapion has run, while he was unable through absence or other legitimate cause to attend to his affairs, or if the possessor in whose favour the term was running was absent, and so the usucapion could not while running have been stopped by legal means. The pretor allowed the owner in such a case to rescind the usucapion and to claim the thing by feigning that the usucapion had not been perfected. (5.) 3. *Actio Pauliana*, given to rescind alienation of goods in fraud of creditors. (6.) 4. *Actio Serviana*, by which possession was obtained of the effects of a farmer, looked on as mortgaged in law, to recover the payment of rent. 5. *Actio quasi Serviana*, by which creditors generally, and not landlords only, obtained things
mortgaged or pledged to them. (7.) Two instances are also given of pre-judicial actions created by the pretor: that to decide whether a person is ingenuus or libertus, and that to decide whether a person is the son of his reputed father. (18.)

PERSONAL ACTIONS.—Three instances are given of personal actions created by the pretor: 1. De constituta pecunia, given to enforce a pact for the payment of a sum already due. Such a pact was advantageous to the creditor if the thing due was owed by another person, or if the antecedent obligation was a natural one, or if the time during which an action on this antecedent obligation might be brought was on the point of expiring; and this action was by Justinian made in all cases perpetual and allowed to be brought whatever was the nature of the thing promised, those qualities having previously belonged only to the actio receptitia, an action specially given to enforce an undertaking by an argentarius to pay what he owed. (8, 9.) 2. De peculio, given to make patresfamiliae or patresfamiliarum liable to the extent of the peculium of their sons in potestate and slaves, for the engagements of those sons and slaves. (10.) And, 3. De jurejurando, given to ascertain whether a party to a suit had, when challenged to do so, sworn that the facts on which he rested his claim or defence were true. (11.)

MIXED ACTIONS.—The actions familiae eriscundae, communis dividundo, and finium regundorum are said to be mixed, i.e. both real and personal, because although they were otherwise personal actions in form, yet by the addition of an adjudicatio things were adjudged to belong to the different parties. (20.)

Before proceeding to notice the division of actions according to the latitude given to the judge, the Institutes notice two subsidiary divisions.

i. PENAL ACTIONS (many of which actions, as de albo corrupto, de parente aut patrono in jus vocato, and de in jus vocato vi exemplo, were created by the pretor) (12) as distinguished from actions brought to get the thing only (rei persecutoriae) and those in which both these objects were united (mixture).—As a rule, all actions in rem or ex contractu were only rei persecutoriae, except that when an actio deiecti was brought against a person, or against his heir if personally guilty of dolus malus, to whom things had been entrusted under the pressure of sudden calamity, such as fire or shipwreck, when the value of the things and also as much again was recoverable, and so the action was mixture. (17.) Actions arising from a delict always carried with them a penalty, and were simply penal in the case of theft, for then the value of the thing was recoverable by a separate action, or were mixture, as in actions vi bonorum raptorum, and under the lex Aquilia, and for legacies given but not duly paid to holy places, the value of the thing, and something more by way of penalty, being recoverable by such actions. (18, 19.)

ii. ACTIONS DIFFERING ACCORDING TO THE AMOUNT OF THE CONDEMNATION.—This goes very nearly over the same ground as the
previous division. i. Actions *rei persecutoriae*, to get the thing due, were *in simplum*. (22.) ii. Actions *(a)* for non-manifest theft, *(b)* for *dammum injuria* under the Aquilian law, *(c)* for deposit when the deposit was denied, if it had been made under pressure of calamity, *(d)* for corrupting a slave, and *(e)* for not paying a legacy given to a holy place, were *in duplum*. (23.) iii. An action given against a person who asked more than due, so that the officials of the court got a larger fee, was *in triplum* of the loss sustained by the payment of this fee, the amount improperly expended being, however, included in the *condemnatio in triplum*. (24.) iv. Actions *(a)* for manifest theft; *(b)* actions *quod metus causa*; *(c)* actions for money paid to hire a man to bring a vexatious suit, or to induce a man to desist from a vexatious suit which he threatens to bring; and *(d)* actions brought against officers of the court guilty of unjust exaction, were *in quadruplum*. (25.) Two observations, however, have to be made. Firstly, of those actions which are said above to be given *in duplum*, that under the *lex Aquilia* and that for deposit under pressure were *in duplum* only if the defendant denied his liability; and in the case of legacies given to holy places, if the defendant denies or will not pay until the magistrate makes an order that the action shall be brought. (26.) Secondly, the *actio quod metus causa*, given to a person who had been threatened or coerced into doing anything, was *in quadruplum* only if the defendant would not obey the preliminary order of the judge *(arbitrium)* and restore the thing. (27.)

We now come to the division of actions according to the latitude of the judge. According to this division, actions are *bonae fidei*, *stricti juris*, or *arbitrariae*.

1. Actions *bonae fidei*.—In certain pretorian actions, principally those arising out of bilateral contracts, the words *ex bona fide* or some equivalent words were added to *quicquid oportet in the intentio*, which was always uncertain, and then the judge had to take all equitable considerations into view in determining the liability of the defendant. The judge in *bonae fidei* actions took notice of *dolus malus* without an *exceptio doli mali*; noticed customs and usages; took into account counter claims arising out of the same set of circumstances (30); provided for future liabilities arising; and gave interest for the time the thing had been due. (28, note.) A list of actions *bonae fidei* is given (28, 29) : 1, *Emptii and venditi*; 2, *locati and conducti*; 3, *negotiorum gestorum*; 4, *mandati*; 5, *depositi*; 6, *pro socio*; 7, *tutela*; 8, *commodati*; 9, *pignoratica*; 10, *familiae erciscundae*; 11, *communi dividundo*; 12, *de astantu*; 13, *ex permutatione*; 14, *hereditatis petitio*; 15, *ex stipulatu in exactione dotis*.

This last-mentioned action replaced a *bonae fidei* action called *rei usoria*, under which the husband had certain advantages when sued by his wife for the restitution of her *dos*. If the wife had stipulated for the restoration of the *dos* to her, she could bring an action on the stipulation which, being *stricti juris*, did not afford the husband those
advantages, the principal of which were, (a) that he had three years to make restitution of things *qua numero, pondere mensuravse constant*; (b) he had the *beneficiurn competitum*; (c) he could deduct the useful as well as the necessary expenses he had been put to in the management of the dotal property (87); (d) the wife could not transmit the action to her heir; (e) she could not ask for her *dos*, and also for any benefit by her husband's testament. Justinian amalgamated the two actions, calling the new action *ex stipulatu*, although in fact no stipulation might have been made. But he made it *bona fidei*, and the husband under it had a year for the restoration of all moveables, and he had the *beneficiurn competcium*, and could deduct necessary though not useful expenses; but he could recover the *impensa utiles* by a separate action. Justinian, on the other hand, gave the wife a tacit *jus hypothecae* on all the husband's effects for her *dos*, but this was only available when she herself sued for her *dos*. (29, note.)

2. Actiones stricti juris, i.e. real actions and *condictiones*.—In these actions, *dolus malus* or counter claim could only be taken notice of, if pleaded by an exception, and interest, except by express agreement, only ran from the *litis contestatio*. (28, note.)

3. Actiones arbitrarie.—In these actions the judge made a preliminary order on the defendant to do something, as to restore or exhibit a thing, or to pay a sum. If this order was not obeyed, then the defendant was to pay a sum fixed in the *condemnatio* so as to meet all the circumstances of the case. If the defendant had the thing in his possession, and had fraudulently put it out of his power to restore the thing, the plaintiff fixed on oath the amount justly due to him, and the *manus militaris* was employed by the direction of the judge to compel him to give it up. All real actions were *arbitrarie*, and the following personal actions: (a) *quod metus causa*; (b) *de dolo malo*; (c) *ad exhibendum*; (d) *de eo quod certo loco promissum est*. (81.)

The action *de dolo malo*, given when there was no other means of avoiding the consequences of *dolus malus*, was in *simpulum*, carried infamy with the *condemnatio*, and had to be brought within a year. The *actio de eo quod certo loco* was an action brought by a creditor against a debtor who, having promised and failed to pay in a particular place, was not to be found, and so could not be sued there, and the judge allowed the creditor in this case to sue elsewhere without risk of *plus-petito*. But the debtor had this advantage; he was given the option of paying or giving security for paying what was due in the right place under an *arbitrium*, and then, if he did not obey the *arbitrium*, he was condemned in an amount in which the benefit it would have been to him to pay in the place named was taken into consideration. (81, note.)

It was the business of the judge to make the *condemnatio* in the formulory system for a sum certain, and under the *judicia extraordinaria* for a thing certain or a sum certain. (82.) And this leads us to
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consider three special matters which affected the result of the action.

1. PLUS-PETITIO.—Under the formulary system, if the plaintiff asked in the intentio of an actio stricti juris for a thing certain, and asked for more than he was entitled to, he could not succeed in the action at all, and the claimant being barred in most personal actions by the novation operated by the litis contestatio, he had no further remedy, unless the prætor chose to give him a restitutio in integrum, which was granted as a matter of course to plaintiffs under 25 years, but to persons over that age only if the mistake had been such as a most careful man might have made: as if a legatee had asked for his whole legacy, and then codicils had been discovered by which he lost part or had to share with others. A plaintiff might ask too much in four ways: 1, re, in regard to the thing asked for, as if when ten aurei were due he asked for twenty, or if when part was due he asked for the whole; 2, tempore, in regard to time, as if he asked before the day of payment, or before the fulfilment of a condition; 3, loco, in regard to place, as if a creditor sues at Rome for what is due at Ephesus, thus depriving the debtor of any advantages he might have from goods being cheaper or interest lower at Ephesus. But if the debtor absented himself from the place named, the creditor had the actio arbitratia de eo quod certo loco mentioned above; 4, causa, in regard to the circumstances of the contract, as if, when the debtor promised to give either one thing or another, the creditor sued depriving him of the choice. It made no difference, even if the thing he asked for was of less value than the other thing. (83.)

If too much was stated in the demonstratio, the plaintiff was not prejudiced, and if too much was fixed in the condemnatio, the defendant could get the formula rectified. (88, note.)

Under the later emperors, the effects of a plus-petitio, i.e. any excess in the libellus conventionis, were changed, the plaintiff being no longer shut out from his legal remedy, but being punished for his mistake. If the plus-petitio was tempore, the plaintiff was, under a constitution of Zeno, obliged to wait double the time he ought to have waited, and to reimburse the defendant all expenses for his loss through the action having been improperly brought. If the plus-petitio was in any other way, Justinian made the plaintiff pay three times the amount of loss sustained by the defendant through the action having been improperly brought. (89.)

If the plaintiff claimed in the intentio less than was due, he could under the formulary system bring another action for the surplus when another prætor came into office. Zeno allowed the judex to add the surplus in condemning the defendant. (84.) If the plaintiff asked for one thing when another was due, he could, under the formulary system, bring another actio for the right thing, and under Justinian he could have the mistake corrected. (85.)

In certain actions which may be made a sixth division of actions,
the defendant was condemned in less than was due to him. 1. In the *actio de peculio a patri familias* could only be condemned in the amount of the *peculium* of his son or slave. (86.) 2. In certain actions the defendant had the *beneficium competente*, i.e. he was only condemned in so far as he could pay without being reduced to destitution. The instances given are, (a) the husband in a suit brought by his wife to get back her *dos* (87); (b) an ascendant sued by a descendant; (c) a patron sued by a *libertus*; (d) one partner sued by another; (e) a donor sued for his gift (88); (f) a debtor who has made a *cessio bonorum* sued by his creditors after he has subsequently acquired property. (40.) We may add a brother sued by a brother, and all cases, except delicts, when one of two married persons is sued by the other. In all these cases, if the debtor could subsequently pay in full without being reduced to destitution, he had to do so; and in the estimation of what he could pay, his assets only, without deduction for debts, were looked to, except in the one case of the donor, who might deduct his debts.

**Compensatio.** — In *bonae fidei* actions, the judge, without any exception being pleaded, set off any debt due from the defendant to the plaintiff from the same set of circumstances (*ex eadem re*). In actions *stricti juris*, the plaintiff could be repelled by an *exceptio doli mali*, if he asked for what was due without having taken into consideration what he owed. It is uncertain whether the exception stopped the action altogether, or whether the plaintiff only recovered any surplus due to him. An *argentarius* who sued a customer without giving credit for what was due of the same kind, as money or wine (*in eadem re*), was guilty of a *plus-petitio* under the formulary system, and failed altogether in his action. A *bonorum empor* had also, in suing a debtor of the insolvent, to deduct what was due from the insolvent to that debtor; but as the *deductio* was inserted in the *condemnation*, not, as compensation in the case of the *argentarius*, in the *intentio*, the risk of *plus-petitio* was not run. *Deductio* varied also from *compensation*, as it included debts of things of different kinds and debts not yet due. Except, perhaps, in this case of the *argentarius*, the two debts did not extinguish each other, until Justinian made them so operate, *ipso jure*, and under Justinian it no longer made any difference whether the two debts were due from the same set of circumstances, or whether things of the same kind were payable, but the defendant’s claim was to be a *causa liquida*, i.e. clearly ascertainable. (89, and note.) Justinian allowed no set-off to an action of deposit. (90.)

The subject next treated is that of the responsibility of *domini* and *patresfamiliorum* for the contracts or delicts of those in their power. What is said is, however, chiefly devoted to the contracts and delicts of slaves; what is to be said as to slaves being, with some slight exceptions, applicable to sons in *potestate*. (Tit. 7. pr.)

1. **Contracts of Persons Alieni Juris.** — If the slave was merely the instrument of the master, merely received, e.g., pieces of money made in payment, this was not a contract of a person *alieni juris* at
all. (1, note.) The cases in which the slave did contract may be grouped under four heads.

1. The slave contracts under the directions of the master.—Here the pretor gives an action quod jussu against the master for the whole of the debt. (1)

2. The slave contracts as a magister navis or institor.—The master sets the slave up as the master of a vessel, or the keeper of a shop, or the conductor of any business. The master thus authorises the slave to do all things necessary for his master. Here the pretor gives an actio exercitoria or institoria against the master for the whole of the debt. (2)

3. The slave trades with his peculium to the knowledge of the master. If debts are to be satisfied and the master is a creditor of the slave, the peculium and its proceeds are to be divided proportionately between him and the other creditors. The master makes the division, and if he does not make it fairly, any creditor prejudiced has an actio tributoria against him. (3)

4. The slave contracts without the direction or authorisation of the master.—Here an action is given against the master, not for the whole debt, but 1, so far as he has profited by what the slave has expended, and, 2, to the extent of the slave's peculium. The action is de peculio et in rem verso, and the condemnation is double; the judge first taking into account the profitable outlay, and then the peculium: but from the peculium is first deducted what the slave owes the master or any one in his power: unless, indeed, he owes it to a vicarius, who is part of the peculium, for deduction would then be useless. (4)

The actio exercitoria or institoria must always be better for the creditor than that de peculio et in rem verso; for in the former action the master is bound for the whole debt. But the actio tributoria may be sometimes more favourable than that de peculio, sometimes less so to the creditor, and he must judge which he will bring. In the actio tributoria the creditor gains by there being no deduction made from the peculium of that which is due to the master. On the other hand, the actio de peculio affects the whole peculium, while the actio tributoria only affects that part of it engaged in trade. (5)

What is said of the slave may be nearly, but not quite, said of the son in power. There are three points of difference to be noticed. 1. A father was bound to the extent of the son's peculium by the son's becoming a fidejussor. 2. The filiusfamilias could be sued civilly, and if he was condemned to pay, an actio judicati could be brought against the father to the extent of the son's peculium. There was no corresponding liability in either of these cases as to the slave. (6, note.) 3. By the senatusconsultum Macedonianum, prohibiting money to be lent to children or grandchildren of either sex in potestate, an action was refused for money so lent against the child, either while in potestate or become sui juris, and against the paterfamilias. If there was any doubt as to the facts, the action was permitted, and the senatus-consultum allowed on the ground of an exception. (7)
The actions above mentioned, *quod jussu, exercitioria*, and *de peculio, &c.*, were not properly separate actions. They were rather modifications of the pretorian actions under which, according to the nature of the contract, the master was sued. In process of time the pretors permitted not only pretorian actions, but condicions, to be brought against the master or father, where, had he contracted himself, a condition would have been the appropriate remedy. (8.)

ii. Delects of persons alieni juris.—A master could be sued under the pretorian or civil law, according to the origin of the *actio* (Tit. 8. pr.), for the delects (*noxia*) of the slave, but he had the choice of paying the penalty, or giving up the wrongdoer (*noxa*) (1), to the persons injured (Tit. 8. pr., 2), before or after the *litis contestatio* (the action being *arbitraria*, i.e. to give the slave up or pay) (Tit. 8. pr.); and the slave, if given up, became the property of the person injured, unless he could procure money to pay the penalty, and then he became free, even if his new master would have preferred to keep him. (3.) The action always followed the person of the delinquent, and was brought against his master for the time being, or against the slave if he was manumitted; and so if a freeman became a slave after having committed a delict, the action was against his master. (5.) The master had no action against his slave for a delict, nor the slave any action against his master for injury, nor did any right of action arise subsequently, though the slave was transferred to another master or became free; and if a slave who had committed a delict became the property of the person injured, the right of action was extinguished. (6.) In old times children in *potestate* might be abandoned like slaves if they committed delects. In later times this was considered barbarous. The son could be sued for the delict, and then an action *judicati* brought against the father to the extent of the son's *peculium*. (7.)

_Pauperies._—By the Twelve Tables when an animal (*quadrupes, extended by interpretation to all animals*) of vicious habits did harm (*pauperies*), the owner might, instead of paying for the damage, deliver up the animal. (Tit. 9. pr.) If an animal of fierce nature, such as a bear, was kept where there was a public way, got loose, and did injury, then, if it was a freeman that was injured, the amount of the condemnation was left to the discretion of the judge; if a slave or anything else was injured, the condemnation was for double the damage done. (1.)

A delict might consist really of two offences, and then a separate action lay for each; or it might come under two heads of delict, and then, although an action lay under each head, the plaintiff could only recover in the second anything which under that action happened to be recoverable beyond what he had recovered in the first. (1, note.)

The discussion of the heads of actions is now interrupted to notice two points of procedure.

_Representation in Suits._—Under the old law one man could not sue in the name of another. To this rule there were exceptions
in the cases of, 1, an *actio popularis*; 2, an *assertio libertatis*; 3, actions brought by tutors for their pupils. 4. The *lex Hostilia* permitted an *actio furti* to be brought in the names of (a) persons in captivity; (b) persons absent on the service of the State; (c) those in the *tutela* of such persons. (Tit. 10. pr.) Subsequently this rule was relaxed, and a person was allowed to appear in a suit; as (1) a *cognitor*; (2) a *procurator*. The cognitor had to be appointed formally and in the presence of the adversary. When sentence was given, the *actio judicati* lay against, not the cognitor, but the party to the suit. The procurator, whose introduction was of a later date, was appointed by simple mandate and without communication with the adversary, and originally acted in his own name, giving security that the party in the suit for whom he was acting would ratify what he did, and, if he was acting for the defendant, that the sentence should be carried out. A person desirous of representing another might be admitted to act as *negotiorum gestor*, although he could not show his mandate, if he gave security. The *actio judicati* was given for or against the procurator. At a later period, if the mandate was clearly proved, the procurator was considered to represent his principal; and this was extended to the case of a *negotiorum gestor*, who, acting at first without authority, afterwards showed that his principal ratified his action. The *actio judicati* was then given for or against the principal, and the procurator was in the position of the cognitor (Tit. 10. pr., note), only that the mode of his appointment was not necessarily formal or made in the presence of the adversary. (1.) The tutor or curator represented the pupil or adolescent, to, or against, whom the *actio judicati* was given, unless the tutor or curator had intervened unnecessarily, and then it was given to or against him. (2.)

**Giving Security.**—There were certain securities exacted from the parties to suits or their representatives. Considerable changes in this respect were made by Justinian. We have to consider, 1, whether the action was real or personal; 2, whether the party appeared personally or by a representative; 3, the law before and after Justinian. (Tit. 11. pr.)

i. Before Justinian. (A) The action is in *rem*.

(a) The plaintiff had to give no security. The procurator of the plaintiff, while still looked on as a simple mandatary, had to give security, *rem ratam dominum* (the party was termed *dominus litis*) *habitum*um, i.e., that the plaintiff would not bring another action in his own name. The *cognitor* and the *procurator*, when the *procurator* came to be looked on as a mere representative, had to give no security. The tutor or curator had to give security, *rem ratam dominum habitum*; but this security was, as regards these persons, often dispensed with, when they were plaintiffs. (Tit. 11. pr.)

(b) The defendant had to give the *cautio judicatum solvi*, that he would either restore the thing or pay its value (*litis aestimatio*). If he did not give this security, the plaintiff, if willing to give it, was put by
an interdict in possession of the thing. The *judicatum solvi* contained three clauses: 1, *de re judicata*, that the thing should be given up or its value paid; 2, *de re defendenda*, that the defendant would properly defend the action, and appear and receive the sentence of the judge; 3, *de dolo malo*, that there should be no *dolus malus*, e.g. the thing should not be restored in a deteriorated condition. The defendant as well as his surety gave the *cautio judicatum solvi* in order that the plaintiff might have the easy remedy of suing on a stipulation. Naturally, as the defendant had to give this *cautio*, his representative had. (Tit. 11. pr.)

(B) *The action is in personam.*

(a) As to the plaintiff the rules are the same as when the action is *in rem.*

(b) The defendant, appearing personally, had not, unless in some exceptional cases, to give the *cautio judicatum solvi*. If he appeared by a *cognitor*, the defendant had to give the *judicatum solvi* on behalf of the *cognitor*. If he appeared by a procurator, the procurator, while still a mandatary, had himself to give the *judicatum solvi*. (1.)

ii. *Under Justinian.*—There was, under Justinian, no difference whether the action was real or personal. The plaintiff appearing personally had to give no security. The defendant appearing personally had not, in either a real or a personal action, to give the *judicatum solvi*; but, in both, he had to engage that he would appear and receive the sentence of the judge. If, however, he was a *vir illustres*, it was enough that he engaged to do this by oath, *cautio juratoria*, or even by a simple promise. (2.)

If the plaintiff appeared by a procurator, whose mandate was registered officially, or given by the plaintiff personally before the judge, the procurator had to give no security. If the plaintiff appeared by a procurator not so appointed, the procurator had to give security *rem ratam dominum habiturum*; and this rule applied to tutors and curators. (3.)

If the defendant appeared by a procurator, whom he appointed personally before the judge, the procurator had not to give security, but the defendant had to bind himself, on behalf of the procurator, to all the three clauses of the *judicatum solvi*. If he appeared by a procurator not appointed before the judge, both the procurator and the defendant, as *fidejussor* of the procurator, had to give the *judicatum solvi*, with all its three clauses made binding on each. The defendant further, whether the procurator was appointed before the judge or not, had, as a guarantee for the *judicatum solvi*, to subject all his property to a hypothec. This obligation passed to his heirs, and he had also to give security that he himself would appear personally to receive the sentence of the judge. (4.)

If the defendant did not appear, but some one volunteered to defend the action for him, this was allowed, if this voluntary *defensor* gave security *judicatum solvi*. (5.)
BOOK IV.

The subject of actions is resumed, and concluded, by noticing two more distinctions.

1. Actiones perpetuae, temporales.—Actions differed in the time during which they could be brought. Actions arising from the law, or a senatusconsultum, or constitutions, were perpetuae, i.e. could be brought without limit of time, until Theodosius II. imposed a general limit of thirty years on all actions real or personal, a limit subsequently, in some few exceptional instances, as in that of actions on hypothec, extended to forty years. Praetorian actions were annual, i.e. must be brought before the close of an annus utilis from the time when they could first have been brought. To this, however, there were so many exceptions that we may say that praetorian actions also were perpetuae, except when they were penal (the actio furti manifesti being, however, perpetual), or when they were for the value of the thing, but were in opposition to, not in extension of, the civil law, like the actio in rem rescissoria. (Tit. 12. pr.)

2. Actions passing to or against the Heir.—It is only penal actions that are to be noticed, as all other actions passed to and against the heir. Penal actions do not pass against the heirs of the wrong-doer, except to make them account for any benefit they may have derived from the delict. But penal actions do pass to the heir of the person injured, except in such cases as that of injuriarum (personal insult). After the litis contestatio, however, all penal actions pass both to and against the heir. (1.)

Finally, it may be remarked that all actions are absolutionis, that is, if, after the proceedings have commenced, the formula has been given, or an equivalent stage reached, the defendant satisfies the plaintiff, the judge must absolve the defendant, and need not go on in any case to give sentence. (2.)

Exceptions.—If the plaintiff’s action is well founded, but there is any reason why it is unjust that it should be effective against the defendant, he can avoid its effect by the introduction of an exception, allowed by some particular law, or by the prætor (Tit. 18. 7), into the formula while the formulary system lasted. In actions bona fide it was not necessary that the exception should be pleaded, as the judex took cognisance of all matters that would form the groundwork of an exception. In other actions, actiones stricti juris, in factum, arbitraria, including actions in rem (Tit. 18. 4), and penal, the exception had to be pleaded, and the defendant had to prove it, just as the plaintiff had to prove his case. Under Justinian an exception meant any defense other than a denial of the subsistence of the alleged right of action. (Tit. 18. pr. note.)

The following instances of exceptions are given, and are all supposed to be pleaded to an action ex stipulatu. 1. Error, a mistake not as to the subject of the stipulation, but as to some fact which was not known to the defendant, and which, if known, would have prevented his promising; 2, metus causa, a general exception, fear caused by
any one; 8, doli mali, the bad faith of the plaintiff himself, either when the obligation was formed or subsequently; 4, in factum, that is, the pretor merely stated a circumstance which, if established, was to bar the action of such exceptions. (1.) The following examples of exceptions in factum are given:—(a) Pacunia non numerata, when a person agreeing to lend money, and stipulating for its repayment, does not really pay it. Here the plaintiff had to prove that he had really paid the money, but the exception could only be pleaded within five years before Justinian, and two years under Justinian (2); (b) pacti conventi, when the plaintiff has agreed not to demand payment, but the contract, as being verbis or re, could still be sued on (8); (c) juris-jurandi, when, the plaintiff having challenged the defendant, and the defendant having denied his liability, the plaintiff went on with the action. (4.) The exceptio doli mali covered all cases of exceptions in factum, and might be pleaded in lieu of them, except that, as its being found true carried infamy with it, the magistrate would not allow it to be employed when the plaintiff was a patron or ascendant (1, note); 5, rei judicatae, that judgment had already been given in the matter, it being necessary that there should have been in the former action the same subject matter of litigation, the same quantity, the same right, the same ground of action, the same parties. If the former action was a judicium legitimum in personam with an intentio juris civilis, the right of action was extinguished, and no exception was necessary. If it was a judicium legitimum in rem, or in factum, or was a judicium imperio continens, the right of action not being extinguished by novation, the exceptio rei judicatae was necessary to stop the second action. Under Justinian the exception was in every case necessary. Gaius also mentions the exceptio rei in judicium deducta, i.e. that the case was already before the tribunal, the time within which sentence was obliged to be given not having elapsed. (5, note.)

Exceptiones perpetua, temporaria, peremptoria, dilatoria.—Exceptions were either perpetua, i.e. could be used by the defendant without restriction of time, or temporaria, i.e. were subject to such a restriction; and they were peremptoria, i.e. put an end to the litigation, or dilatoria, i.e. only stopped it for a time. (8.) Perpetual exceptions were always peremptory; as instances are given the exceptions doli mali, metus causa, and pacti conventi, if the agreement has been that no demand shall be at any time made. Temporary exceptions were always dilatory. As an instance is given that of pacti conventi, when the agreement has been that no demand shall be made during a given time, e.g. five years. If he sued before the five years had elapsed, the plaintiff might be repelled by an exceptio. Previously, if the plaintiff was thus repelled, he was guilty of plus-petitio in regard of time, and could take no further proceedings. Under a constitution of Zeno, the plaintiff suing prematurely had to wait twice as long as he ought to have waited, and he must reimburse the defendant for all losses sustained through the demand being premature. (10.) As
another instance, Gaius gives the *exceptio litis dividua* given to repel a plaintiff suing under the same praetorship for another part of a thing (10, note), for one part of which he had already sued. Some dilatory exceptions have regard, not to the thing sued for, but to the person, as when objection was taken to a procurator, that he or she was a soldier or a woman, as neither could act as procurator, or that he was an improper person, as having been stamped with infamy; but Justinian did away with exceptions on this last ground. (11.)

*Prescriptions.*—Gaius notices prescriptions after noticing exceptions, i.e. limitations of the action entered on behalf of the plaintiff, as, for example, to confine the action to so much of the plaintiff's right as had produced an existing liability, or for the defendant, as the *praescriptio longi temporis*; but prescriptions for the defendant had already, in the time of Gaius, been classed among exceptions. (11, note.)

*Replications.*—There might be an exception to an exception, i.e. there might be grounds on which the exception, although founded on fact, could not be allowed to operate, as if an agreement had been made not to sue, and then this agreement had been rescinded. In this case a replication that the agreement had been rescinded would be inserted, to do away with the effect of the *exceptio pacti conveniti* (Tit. 14. pr.), and so there might be a *duplicatio* (1) to a *replicatio*, and there might be even, if necessary, a *triplicatio* (2).

Exceptions may be divided into *rei cohaerentes*, affecting the rights to claim, as the *exceptio doli mali*, or the *exceptio pacti conveniti*, when it was a general pact not to sue; and *persona cohaerentes*, protecting the debtor personally, as the *exceptio pacti conveniti*, when it was a pact not to sue the particular debtor. As a general rule, the *fideiussores* of the defendant could use all the exceptions the defendant could use; but this was not universally true of *exceptiones cohaerentes persona*. For a debtor who had made a *cessio bonorum* was protected from the actions of his creditors by the exception *nisi cesserit bonis*, which was *persona cohaerens*; but his *fideiussores* could not use this exception, as the very object of their suretyship was to guard against the debtor not being able to pay. (4, note.)

*Interdicts.*—We now come to what became a preliminary step under the pretorian system to the commencement of one kind of actions, those that regarded possession and quasi-possession, i.e. the possession of servitudes. (Tit. 15. pr.) The praetor issued an interdict or decree regulating possession, and then, if the facts on which the applicant relied were contested by the other party, the praetor threw the decree into the shape of an action to be decided according to the real facts. Probably the praetor interfered by interdict to protect and determine possession before he gave actions to try the right to possession, and not improbably the interests arising out of the possession of the *ager publicus* may have first suggested the pretorian intervention by interdicts. Gradually the action was regarded as the point of real importance, although, as the granting of the action depended on the rules as to interdicts, the study
of these rules preserved its importance. By the time of Justinian interdicts had become wholly obsolete, and all questions as to possession were determined by actions without recourse being had to the preliminary step of interdicts.

The interdict was issued by the magisterial authority of the pretor, and interdicts always bore traces of their origin in two ways. 1. First issued as special edicts to meet special cases, they were afterwards issued under standing regulations incorporated in the pretorian edict, but they were always, perhaps, theoretically grounded on infractions of public order, and the time in which some possessory interdicts had to be applied for (one year) connects them with the law of delicts. 2. They were all, directly or indirectly, connected with possession, with keeping things as they ought to be. (Tit. 15. pr., note.)

They were of three main kinds:—(a) Prohibitory, (b) Restitutory, and (c) Exhibitory. By the first the pretor ordered something not to be done which infringed the use of something public, as a road, or of something which, for the sake of public order, he protected, as the right of possession of individuals. By the second the pretor ordered things to be put into the state they were in before something wrong had been done, as, e.g., buildings to be demolished, which impeded the use of a public river or its banks; or possession to be given or restored to the right person. By the third the pretor ordered the thing or person, if it was a person that formed the subject of contest, to be produced by the person who had got hold of it, so that the claimant might not be prejudiced by the thing being concealed. (1.)

Gaius understood interdicere as 'to prohibit,' and says that prohibitory interdicts alone ought strictly to be called interdicts, and interdicts of the other kinds ought to be called decreta. Justinian says, all may be called interdicts, as he considers interdicere to mean to pronounce between two parties, inter duos. (Tit. 15. pr. note.)

If the interdict was prohibitory, the parties in the time of Gaius bound themselves by a wager, in a sum to be paid by the losing party in the action. In the case of interdicts restitutory or exhibitory, this had become obsolete; instead, an actio arbitraría was given, and the judex issued his preliminary order against the party concerned, and, in the event of its not being obeyed, gave a condemnatio quanti ea res erat. (8. note.)

Those interdicts, which distinctly referred to the possessory rights of private persons, were given to acquire, to retain, or to recover possession, those to retain possession being prohibitory, and those to acquire or to restore being restitutory. (2.)

1. Adipiscenda possessionis causa.—The chief interdict under this head was that known as quorum bonorum, given to secure the possession of an inheritance as a universitas to those whom the pretor, contrary to the rules of civil law, treated as having a right to an inheritance. It was given against two classes of persons: (a) persons possessing pro herede, i.e. thinking themselves to be the real heirs; (b) persons pos-
possessing pro possessore (praedones), i.e. persons merely possessing without any claim of title. It was given against both classes, even if the term of usucapion had run in their favour, and also against them if they had through their own dolus malus ceased to possess. (8.)

This interdict was never given except to a person getting possession for the first time, so that restitutas, the word in the formula, must be used (as well as the term restitutary applied to interdicts) in a very wide sense. (8.)

Under this head was also given the interdictum Salvianum, by which an owner of a rural estate got possession of the goods of the occupier (and probably even if they had passed into third hands) in case of non-payment of rent. This interdict was a step historically to the actio Serviana. (8.)

2. Retinenda possessionis causa.—The two main interdicts under this head were those uti possidetis and utrubi possidetis, the former applying to inmoveables and the latter to moveables. The object of these interdicts was to determine which of two disputants as to ownership was entitled to the possession, and to have this point determined in his favour was of great advantage to a disputant, as he remained in possession if his adversary failed to show he was the real owner. The interdict uti possidetis had to be applied for within a year after the possession had been in any way threatened. Previously to Justinian the interdict utrubi possidetis was given to that disputant who himself, or by any one through whom he claimed, had been in possession during the greater part of the preceding year. Under Justinian possession was confirmed to the person in possession at the time of the bittis contestatio, provided (which had always been a condition as to both interdicts) that he had not obtained his possession as against his adversary vi, clam, or precario, the last term meaning by permission, and at the will, of the adversary. (4.)

Only persons having civilis possessio or naturalis possessio, with the animus of ownership, could obtain these interdicts. Persons simply in possessione, detaining the thing without the animus possidendi, could not obtain them, but the person on behalf of whom such persons were in possessione, possessed through them: thus the owner possessed through the tenant, or the depositor through the depositary, or the lender through the borrower. Without the animus there can be no interdictory possession, but if a person has the animus he need not always have the corporeal detention, as, for example, if a man uses in the season an alpine pasture and leaves it when the season is over with the intention of returning to it, he still possesses it. (5.)

3. Reciperanda possessionis causa.—The main interdict under this head was that unde vi. Here, there having been an illegal use of violence, the wrongdoer had to restore possession, although the person to whom he restored it had himself got it from him vi, clam, or precario. In the days of the Republic there had been a distinction according to the kind of violence used. If the violence had been ordinary (quotidiana),
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the possession would only be restored if it had not been obtained by the applicant *vi, clam, or precario*, and the application must be made within a year. If the violence had been *armata*, the possession was restored, although obtained *vi, clam, or precario*, and there was no limit as to the time for asking for the interdict. This distinction, however, had become obsolete before the time when the formula of the interdict was shaped as it is found in the Digest.

The interdict *unde vi* only applied to immovable. But by a constitution of A.D. 389 it was provided that any one who seized on anything with violence should lose the ownership if it was his, or give it up, and also pay its value, if it was not. This constitution applied to moveables as well as immovable. (6.)

Previously to this constitution, possession of moveables had been recovered by the interdict *utrubli, and both this and the interdict *uti possidetis* may be looked on as means of recovering as well as of retaining possession. But the employment of the interdict *unde vi* had, as compared with that *uti possidetis*, the following advantages: (a) it could be used when a third person was in possession; (b) it gave the *fructus* from the time of ejectment, not that of the commencement of proceedings; (c) it was given although the possession had been obtained as against the adversary *vi, clam, or precario*; (d) it included moveables on the estate. (6, note.)

**Simple, double Interdicts.**—The interdicts *uti possidetis* and *utrubli* may be said to be double, i.e. each party is at once plaintiff and defendant, as opposed to other interdicts, where one party claims and the other defends. (7.)

Two points with regard to the proceedings in actions remain to be noticed: 1, the checks on reckless litigation; 2, the duty of the judge.

1. **Checks on Reckless Litigation.**—A summary is given under Tit. 16. pr. of the checks in the time of Gaius on reckless bringing or defending actions. Under Justinian, both parties were obliged to swear, the plaintiff *de columnia*, that he was not bringing an action vexatiously or without cause, the defendant that it was from a belief in the justness of his cause that he resisted the demand of the plaintiff; and the advocates of both parties had also to take an oath. The plaintiff was liable to pay damages and costs. (Tit. 16. 1.)

The defendant was restrained (a) by the action sometimes being *in duplum* (the Institutes add *in triplum*, but no instances are known) when there was a denial on the part of the defendant, as in cases of *damni injuria* and legacies left to holy places; (b) by the action being *ab initio* for more than the single value, as in the case of theft (1); (c) by infamy, which attends condemnation in an action *tutela, mandati*, or *depositi* if direct, and *pro socio* (which is direct for both parties), and which attends not only *condennatio*, but an agreement to commit the offence, in actions *furti, vi honororum raptorum, injuriarum*, and *de dolo*. (2.)
The first step in an action was the vocatio in jus, the summons to the defendant to appear before the magistrate. Children, however, cannot summon ascendants, nor freedmen patrons or the children or ascendants of patrons, without having first received the permission of the pretor. If they act without this permission, they are liable to a fine of fifty solidi. (8.)

2. The Office of the Judge.—The Institutes first lay down the general duty of the judge, which is to judge according to the law, the constitutions, and customary usage. (Tit. 17. pr.) If the judge gave a sentence wrong on the face of it, or fixed the condemnation below what the pretor had fixed it, the sentence was void and no appeal was necessary. If the judge was supposed to be wrong otherwise, notice of appeal had to be given within two days (or, if the defendant had appeared by a procurator, three days), enlarged by Justinian to ten days. The Emperor was the final judge of appeal, but Hadrian made the decisions of the Senate final, and Constantine those of the pretorian prefect.

Secondly, the Institutes point out what judgment ought to be given in certain actions:

(a) In a nocoal action the judge ought to state the condemnation by ordering a sum to be paid, or the noxa abandoned. (1.)

(b) In a real action, if he determines against the claimant, he ought to absolve the possessor; if against the possessor, he ought to order the thing and its fruits to be given up, and, after the time of Hadrian, all the fruits consumed had to be accounted for, whether the possession was bona fide or mala fide, if the thing possessed was an inheritance. Before Hadrian as to inheritance, and before and after his time as to single objects, the rule was that a bona fide possessor had to account for fruits after the bringing of the action, the mala fide possessor for all. If the possessor showed that he could not give up the possession at once, he obtained a delay on giving security to give up within a time allowed him. (2, and note.)

(c) In an action ad exhbendum the defendant must exhibit the thing, his title to it, and everything derived from it, as e.g. the fruits, since the bringing of the action; nor will usucapion accomplished subsequently avail him. If he states that he cannot exhibit at once, he can obtain a delay on giving security, but if he neither exhibits nor gives security, he is to be condemned in an amount representing the interest of the plaintiff in having the thing exhibited at once. (8.)

(d, e, f) In the actions familia, erciscunda, commun divi- dundo, and finium regundorum, the judge ought, if he gives to one more than to another, and one thus receives more than another, to make this favoured person pay a pecuniary equivalent. (4, 5, 6.) In the action finium regundorum, a person ought to be condemned who has destroyed boundary marks, or opposed, in defiance of the judge’s order, the measurement of the land. (6.)
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In all these three actions anything adjudged becomes at once the property of the person to whom it is adjudged. (7.)

Crimes.—The subject of public prosecutions being altogether outside the general subject of the Institutes, which treat of private law (Tit. 18. pr.), may be omitted here. A sketch of Roman criminal law is given in the last section of the Introduction.
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