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D. Justiniani Institutionum Libri Quatuor.

THE FOUR BOOKS OF JUSTINIAN'S INSTITUTIONS,
Translated into English,
With Notes,
By George Harris, LL.D.


London:
Printed by J. Purser; for M. Withers, at the Seven Stars, in Fleet-Street.
MDCCCLXI.
TO
THE RIGHT HONORABLE

Sir George Lee, Knt. LL.D.

Official Principal of the Arches Court of Canterbury;
Master, Keeper, or Commisary of the Prerogative Court of Canterbury;
Dean or Commisary of the Deaneries of the Arches London, Shoreham, and Croydon;
Treasurer to her Royal Highness the Princess Dowager of Wales;
And one of his Majesty's most honorable Privy Council.

SIR,

HAVING endeavored to give the true meaning of the original in the following version of Justinian's Institutions, I venture, SIR,
DEDICATION.

to beg your protection of this work, declaring, that I ask it not from any imagination, that the English part is worthy of your patronage; but solely from a reliance upon your known disposition to encourage every attempt, which carries an appearance of being useful. For I have not the vanity to think, that the translation is perfect, or that the notes, altho' chiefly collected from authors of character, may not appear in some places redundant, and in others defective; and yet I affect not to say, but that I have used my utmost diligence. but, when the suggestions of friends and a greater experience shall have informed me of my mistakes, it shall then be my endeavor to correct what is wrong and add what is wanting. And, as I have the honor to attend those courts, in which you so eminently preside, I may hope to avail myself of the many opportunities of instruction, which must continually offer themselves;
DEDICATION.

During my attendance upon a judge, who, whilst he is distinguished by genius and revered for impartiality, is remarkable for a superior skill in the law, and the quickest as well as the clearest discernment in the most intricate points of evidence.

These, Sir, are the qualifications, with which you administer justice, and gain the daily admiration of the most experienced in the law. But the benefits, conferred by you, are not confined to individuals; your conduct as a Lord Commissioner of the Admiralty, and the satisfaction it gave the public, are sufficiently known. But the Senate, and that high board, his Majesty’s Privy Council, (to which your merits and your virtues, which I may justly call Hereditary, have most deservedly summoned you,) afford a much larger scope for the exertion of great talents: nor
is Britain more indebted to you for assistance in her domestic councils, than in her foreign negotiations. Even Prussia, by having made no public reply, has confessed the force of those arguments, in which you had so large a share; and I have the satisfaction to add, that the people in general know the worth of their Advocate and have a due sense of his services; which they attribute, with one common voice, to his knowledge as a Civilian, to his experience as a Senator, to his abilities as a Statesman; but, above all, to his integrity in every station, as a man of the strictest honor.

That

* See the Report, dated 18 Jan. 1753, which was sent in answer to Monsieur Michell's memorial, called an Exposition of the motives, which have determined the King of Prussia to lay an attachment upon the capital funds, which his Prussian Majesty had promised to reimburse to the subjects of Great Britain, in virtue of the Peace-treaties of Breslau and Dresden; and to procure to his subjects an indemnity for the losses, which they have sustained by the depredations and violences of the English privateers.
DEDICATION.

That you may therefore, Sir, long continue to adorn and support that profession, of which you are in every respect the chief; —— that you may long enjoy those honors, which your merit has obtained; —— and that you may have health to execute the highest offices, which the future necessities of the state may oblige you to accept; are the sincere and fervent wishes of Your most obedient and devoted servant,

Doctors Commons,  
Feb. 25, 1756.

Geo. Harris.
Advertisement.

This translation of the Institutions of the civil law into English is principally intended, as an introduction to Vinny's Edition, and is published on a presumption, that most young persons are best acquainted with their own language; and that the Elements of a science can never be made too easy to the learner.

As to the few notes, which are added to this version, they are chiefly relative to the law of England: but the translator thinks it incumbent upon him to declare, that he does not print them from any opinion of his ability for such an undertaking, but merely thro' an humble hope, that, imperfect as they are, they may raise the curiosity of the young reader to search more deeply, and excite him to unite the study of the laws of his own country, (of which every Englishman ought to have a general knowledge,) with the study of the civil law, which is universally allowed to be the Master-work of human policy.
A BRIEF ACCOUNT OF
The rise and progress of the Roman Law.

The Roman state was at first governed solely by the authority of Romulus; but, when the people were increased, he divided them into thirty Curiae, which he constantly assembled for the confirmation of his laws: and this practice of consulting the people was afterwards followed by the Roman kings, all whose laws were collected by Sextus Papirius, and called jus Papirianum, from the name of their compiler. But, after the expulsion of Tarquin and the establishment of the republic, the greatest part of those Regal laws soon became obsolete; and those, which still remained in force, related chiefly to the priesthood. It thus happened, that the Romans for many years labored under great uncertainty in respect to law in general; for, from the commencement of the confular state to the time of establishing the xii tables, they were not governed by any regular system. But at length, the people growing uneasy at the arbitrary power of their magistrates, it was resolved, after much opposition from the patricians, that some certain rule of government should be fixed upon: and, to effect this purpose, a decemvirate was first appointed, composed solely of senators, who, partly from the laws of Greece and partly from their own.

Curiae.] vid. Pomponium, f. i. t. 2. De origine juris.

Jus Papirianum.] "Is liber appellatur " jux civile Papirianum, non quia Papirius " de fuo quicquam adjunct, sed quod leges " fine ordine latas in unum composuit." vid. " f. i. t. 2. l. 2. This body of law is not now extant, nor any part of it, except a short extract of 8 or 10 lines, which may be read in the 3d book of Macrobius's Saturnalia: cap. ii.

From the commencement of the confular state.] The confular state was established in the year U. C. 245, and the laws of the xii tables were not perfected, till the year 364.
own laws still subsisting, framed ten tables, which, in the year of Rome 303, were submitted to the inspection of the people, and highly approved of. These however were still thought to be deficient; and therefore in the year following, when a new decemvirate was appointed, which consisted of seven patricians and three plebeians, they added two tables to the former ten: and now the whole was regarded but as one body of law, and intituled, by way of eminence, the twelve tables. But, although these new collected laws were most deservedly in the highest esteem, yet their number was soon found insufficient to extend to all matters of controversy, their conciseness was often the occasion of obscurity, and their extraordinary severity called aloud for mitigation. It therefore became a consequence, that the twelve tables continually received some explanation, addition, or alteration,

Were submitted to the inspection of the people.  1 Tum legibus condendis opera danatur, ingentique hominum expectatio nec propofitis decem tabulis, populum ad concionem advocaverunt; et, quod bo-num, faultum, felixque reipublicae, ipsis liberisque eorum effe, ire et legere leges propofitas juftere; &c, quantum decem hominum ingenii provideri potuerit, omnibus, summis, infimisque jura aequa fì plus pollere multorum ingenia conflituat. Verfarent in animis feorum unamquamque rem; agitarent deinde fermonibus; atque in medium, quid in quae re plus, minus effe, conferrent. Eas leges habere turum populum Romanum, quas confen-fias omnium non jubiffe latas magis, quam tulisse, videri posse.” Liv. i. iii. cap. 33. 34.

And their extraordinary severity.  1 One of the laws, here hinted at, is the following: ASt, si plures erunt rei, tertii ndinis partis secanto; si pluris minue secuerint, fe fraudae esto; si volent uii Tiberim peregre vendundo. Grav. op. p. 284. i.e. “If a debtor is insolvent to several creditors, let his body be cut in pieces on the third market-day. It may be cut into more or fewer pieces with impunity; or, if his creditors consent to it, let him be sold to foreigners beyond the Tyber.” Hook’s Roman hist. vol. i. p. 316.

Such is the scene, in which this law has been generally understood by both antients and moderns. But it has lately received quite a new construction, very much to the honor of antient Rome, from two authors, not least distinguished for their abilities in literature than their knowledge in the civil law, who from many authorities interpret the word fecans, as implying simply a division, and the word partis, as denoting the parts of the debtor’s estate, and not the parts of his body; so that they understand the expression partis fecans, not as a direction, that the body of an insolvent debtor shall be cut into pieces, but as if it meant, that his estate and services should be divided among his creditors in proportion to their respective claims. vid. Bynkerhook’s works, vol. i. obf. 1. and Dr. Taylor’s commentary, De inspe debito diffendo.

But the reader is left to frame his own judgment of this interpretation, when he has read the apology for this law, which Aulus Gellius has given us in the person of Cæcius; and also the opinion of Tertullian, who was a lawyer by profession. “Nihil profecto [says Cæcius] immutius, nihil immanius, nisi, ut re ipfa apparat, eo conficio tanta immannitas poene denunciata est, ne ad eam unquam perveniretur: addicis namque nunc et vinciri multis videmus; difficile esse antiquitus neminem, equidem neque legi neque audivi.” Aulus Gell. lib. xx. cap. 1. Grav. lib. viii. cap. 72.

And Tertullian writes as follows. “Sed et, judicat in partes fecari a creditoribus, leges erant; confenfit tamen publico cru-delitas poleta erafa est.” Apolog. cap. 4.
alteration, by virtue of a new *law*, a senatorial *decree*, or a *plebiscite*. And here it will be proper to observe, how they differ: a *plebiscite* was an ordinariness of the plebeians or commonality, which had the force of a law, without the authority of the senate; and a *senatus-consultum*, or senatorial decree, was an order made by the senators assembled for that purpose; but to constitute a *law*, properly so called, it was necessary, that it should first be proposed by some magistrate of the senate, and afterwards be confirmed by the people in general. Recourse was also had to the interpretation and decisions of the learned, which were so universally approved of, that, altho' they were unwritten, they became a new species of law, and were called *auctoritas prudentum* and *jus civile*. It must here be observed, that, soon after the establishment of the twelve tables, the learned of that time composed certain solemn forms, called *actions of law*, by which the processes of all courts and several other acts, as adoption, emancipation, &c. were regulated. These forms were for above a century kept secret from the public, being in the hands only of the priests and magistrates; but about the year U. C. 448 they were collected and published by one *Flavius*, a scribe; and, from him, called the *Flavian law*; for which acceptable present the people in general shewed many instances of their gratitude. But, as this collection was soon found to be defective, another was afterwards published by *Sextus Aelius*, who made a large addition of many new forms, which passed under the title of *jus Aelianum*, from the name of the compiler.

In


Tully, in his oration for *Murana*, is remarkably severe upon these forms, and treats both them and their abettors with that just contempt, which they most certainly deserve. "Primum dignitas in tam tenui scientia qua potest esse? res enim sunt parvae; prope in singulis literis atque in terpunctionibus occupate, &c. &c. &c." Pro *Murana*, cap. 6. Epist. ad Att. lib. vi. ep. 1. De oratore, lib. i. cap. 41.

But, notwithstanding this, the use of particular forms was very strictly adhered to, till the reign of *Constantine* the emperor, who, to his great honor, put an end to these subtilities. His refraction to *Marcellinus* is in these words: "Juris formulae, acceptione syl- laborum insidiantes, cunctorum aedibus, radicitus amputentur." Cod. 2. t. 58.
In process of time there also arose another species of law, called the praetorian edicts; which, altho’ they ordinarily expired with the annual office of the prætor, who enacted them, and extended no farther than his jurisdiction, were yet of great force and authority: and many of them were so truly valuable for their justice and equity, that they have been perpetuated as laws.

These were the several principal parts of the Roman law, during the free state of the commonwealth; but, after the re-establishment of monarchy in the person of Augustus, the law received two additional parts; the imperial constitutions and the answers of the lawyers.

The constitutions soon became numerous, but were not framed into a body, till the reign of Constantine the great; when Gregorius and Hermogenes, both lawyers of eminence, collected in two codes the constitutions of the pagan emperors, from the reign of Adrian to that of Dioclesian inclusive: but these collections were not made by virtue of any public authority, and are not now extant.

Another code was afterwards published by order of the emperor Theodosius the younger, which contained the constitutions of all the christian emperors, down to his own time; and this was generally received both in the eastern and western empires.

But these three codes were still far from being perfect; for the constitutions, contained in them, were often found to be contradictory; and they wanted, but too plainly, that regulation, which they afterwards underwent through the care of Justinian; who in the year of Christ 528 ordered the compilation of a new code, which was performed and published the year following by Tribonian and others; the three former codes being suppressed by the express ordinance of the emperor. When this

Gregorius and Hermogenes.] vid. Gotha-

By the express ordinance. ] “Hunc igitur
codicem in aeternum valuiturum judicio tui
culminis intimare perfeximus, ut sciant
omnes tam litigatores quam disertissimi ad-

vocati, nullatenus eis licere de caetero con-
stitutiones ex veteribus tribus codicibus, vel
ex iis, quæ novellæ constitutiones ad pra-
sens tempus vocabantur, in cognitional-
bus recitare certaminibus, fed folium, ei-
dem nostro codici infertis, constitutionibus
nee esse eff uti; falsi crimi subdendis bis,
quies contra hoc facere aui fuerint, &c.”

De Justiniane codice confirmando.
this work was thus expeditiously finished, the emperor next extended his care to the *Roman* law in general, in order to render it both concise and perfect. The answers and other writings of the antient lawyers had long since acquired the full force of a *law*, and were now so numerous as to consist of near two thousand volumes; from which, by command of *Justinian*, the best and most equitable opinions were chosen; and being first corrected, where correction was necessary, were afterwards divided into fifty books, called *digests* or *pandects*; and, that they might be the more firmly established, the emperor not only prohibited the use of all other law-books, but also forbade, that any comment should be written upon these his new digested laws, or that any transcript should be made of them with abbreviations. But, during the time of compiling the *digests*, it was thought expedient by *Justinian*, for the benefit of students, that an abridgment should be made of the whole *Roman* law; and work was soon performed in obedience to his order, and confirmed with the *digests*, under the title of *institutions*.

The

Near two thousand volumes.] "Pro tea vero, maximum opus aggregantes, ipse vetustatis studiose opera, jam pene confusa et disoluta, edem viro excelso (Triboniano) permisimus tam colligere quam certo moderamine tradere. Sed cum omnia percontabantur, a praefato viro excelso fuggetum, duo pene illia librorum esse conscripta, quae necesse efficit omnia et legere et periculare; quod conspectu fulgor, et summati trinitatis favore, confectum est, secundum nostra mandata, que ab initio ad memoratum virum excelsum fecimus, et in quinquaginta libros omne, quod utilissimum erat, collectum est; et omnes ambiguitates decifiri, nullo fidelisci recti; nomenque libris impro

suimus digestorum seu pandectarum." Cod. 1. t. 17. l. 2. De vet. jur. enul.

Prohibited the use of all other law-books.] "Hanc istam leges et adorate et observate, omnibus antiquioribus quiecentibus, neque vestrum audeat vel comparare eas prioribus, vel, si quis diisonans in utroque est, requirique; quia omne, quod hic posuit est, hoc unicum et solum obser

vari censernus; nec in judicio nec in alio cernamine, ubi leges necesse fuit, ex aliis libris, nisi ab institutionibus, notri et digestis, et constitutionibus a nobis com

poitis, aliquid vel recitare vel ostendere conetur; nisi temperatur velit faltutatis criminibus subjicius una cum judece, qui eorum audientiam patiatur, pœnis gravissimis la

borare." Cod. 1. t. 17. l. 2. § 19.

"Hoc autem tempore videtur et in praefenti sanctire, ut nemo neque eorum, qui in praefenti juris peritiam habeat, neque, qui postea fierent, audeat commentarios his legibus adnecere; nisi velit eas in Græcam vocem transmutare sub eodem ordine eademque consequen
tia, sub quâ et voce Romana postea sunt: hoc quod Graeci xalgre medie dicunt, &c." Cod. 1. t. 17. l. 2. § 21.

With abbreviations.] "Eadem autem poenam fallutatis constitutur et adverrus eos, qui in postera leges nostras, per sigilorum obscuritates, auti fuerint confri
bere; omnia enim, id est, et nomina pru

dentum, et titulos, et librorum numeros, per consequentias literarum volumus, non per sigla, manifesta." Cod. 1. t. 17. l. 2. § 22.

Confirmed with the *Digests.*] "Leges autem nostras, que in his codicibus, id est, institutionum seu elementorum et di-
The emperor afterwards, upon mature deliberation, suppressed the first edition of his code, and published a second, which he intitled *Codex repetitiæ praediuminis*, having omitted several useless laws, and inserted others, which were judged serviceable to the state.

The *Justinian-law* now consisted of three parts, the *institutions*, the *digests*, and the *second code*. But the emperor, after the publication of the *second code*, continued from time to time to enact diverse new constitutions or *novels*, and also several *edicts*, all which were collected after his decease, and became a fourth part of the law.

The 13 *edicts* of *Justinian* and most of the *novels* were originally conceived in the *Greek* tongue; and so great was the decline of the *Roman language* at *Constantinople* within forty years after the death of this emperor, that his laws in general were not otherwise intelligible to the major part of the people, than by the assistance of a *Greek version*: but notwithstanding this disadvantage, they still subsisted in force, till the publication of the *Basilica*, by which the east was governed, till the dissolution of the empire.

The

*Gettorum, posuimus, suum obtinere robur ex tertio nostro felicissimo sanctissimo con- fulatu praestantis duodecimae indictionis, tertio calendas januarias, in omnem ævum valituras, &c.* Cod. t. 17. l. 2. § 23.

Suppressed the first edition of his code.]

*Nemini in potestatem concedimus, vel ex decisionibus nostris, vel ex aliis constituuntibus, quas antea fecimus, vel ex prima Justiniane codicis editione, aliquid recitaret; sed quod in praestanti purgato et renovato codice nostro scriptum inventur, hoc tantummodo in omnibus rebus atque jure civili et obtinet et recitetur: cujus scripturam, ad simulatimem nostrarum institutionum et digestorum, fine ualla signorum et dubitata conscribi jussimus." De emen-
datione cod. § 5.*

*Basilica.* "Verfionibus juris Justinianei.

*Græcis, et novellis eadem lingua scriptis, in foris scholiisque utiabantur, donec, de eo in compendium mittendo, festoculo nono cogitandi incipierent imperatores Byzantini. Ex his primum Basilii Macedo anno 848 ediderat pædagogorum resonab, quod conditionem libertatis titulus quadrageintam. Deinde Leo flores, patri Basilii succedens, collectionem illam paternam perfecit, eamque subtitulo *Basilicorum* promulgavit, anno Christi 886. Denique subsecuens Leonem Constantinus, cognomento Porphyrogene-
ta, paternum opus sub incendio revocavit, et libros illos *Basilicorum* publicavit subiniti-
um seculi decimi. Et hi quidem sunt libri illi *Basilicorum*, ex Graeco institutionum, pandectarum, codicis versione, Justinianii novellis et edictis tredecim, nec non ex ju is-consultorum quorumdam orientalium paratitibus, aliisque libris, quin et patriarchis et concilii conscribi; ita tamen ut multa omnia videamus, quæ fortasse tum ab usu receperat, multit etiam leges in compendium contractas, multa denique ex posteriorum principum legibus et constitutio-
tionibus addita animadvertamus. Opus itud in sextaginta libros diviuitum, praec. paucat, quæ nonum integra reperiri potu

The dissolution of the empire.]

*Constantiopolis* was taken by the Turks, and a period was put to the eastern empire in the year of Christ, 1453.
The laws published by Justinian were still less successful in the west; where, even in the life-time of the emperor, they were not received universally; and, after the Lombard invasion, they became so totally neglected, that both the code and the pandects were lost, till the 12th century; when it is said, that the pandects were accidently recovered at Amalphi, and the code at Ravenna. But, as if fortune would make an atonement for her former severity, they have since been the study of the wisest men, and revered, as law, by the politest nations.

After the Lombard invasion.] The Lombards entered Italy under Alboinus about the year of Christ 568, in the reign of Justinian the second, successor to Justinian.

At Amalphi.] “Eo tempore, (anno Dom. 1130) injustis perturbationibus comitiis, la-
ceratae ecclesiæ fallit pontifex Petrus
Leonis, Anacletus secundus nuncupatus ab
sua factione; cujus dux erat Rogerius Apul-
lieæ ac Siciliaæ comes, Regis nomine a fal-
so pontifice donatus. Advererus Anaclet-
tum creatus rite ac solenniter fuerat In-
nocentius secundus, cui favebat imperator
Lotharius Saxo, summa virtute atque pru-
dentia princeps; quo bellum gerente ad-
vererus Rogerium, Amalphi, urbe Salerno
proxima, (quam perperam aliqui locant in
Apulia, Malpribam cum Amalphi confun-
dentes,) inopinato reperti fuerunt digesto-
rum libris; quos Pisanii, qui clade Lahar-
rium contra Rogerium advererrant, præ-
mio bene navatæ operæ fibi exorarunt.

Pisii vero post longam obdicionem a Ca-
ponio militæ duce firenuo expugnatis,
PRO OEO M I U M
DE Confirmatione Institutionum.

In nomine Domini nostri JESU CHRISTI.

Imperator, Cæsar FLAVIUS JUSTINIANUS, Alemanicus, Gothicus, Francicus, Germanicus, Anticus, Alanicus, Vandalicus, Africanus, Pius, Felix, Inclyitus, Victor ac Triumphator, semper Augustus, cupidææ legum juventuti S.

De usu armorum et legum.

While the imperial dignity should be supported by arms, and guarded by laws, that the people, in time of peace as well as war, may be secured from dangers and rightly governed: for a Roman Emperor ought not only to be victorious over his enemies in the field, but should also take every legal course to clear the state from all those members, whose crafts and iniquities are subversive of the law. Be it the care therefore of him, upon whom government devolves, to be renowned for a most religious observance of law and justice, as well as for his triumphs.

De bellis et legibus Justiniani.

§ I. Quorum utramque viam cum summis vigiliis, summaque providentia, annuente Deo, perfecimus: et bellicos quidem sudores nostros bar-
baricæ gentes, sub juga nostra redactæ, cognoscunt: et tam Africa, quam aliae innumeræ provinciæ, post tanta temporum spatio, nostris victorius a cælesti numine praëstitis, iterum ditioni Romaniæ nostræque additæ imperio, protéfunditur. Omnes vero populi legibus tam a nobis promulgatis, quam compositis, reguntur.

§ 1. By our incessant labors, and the assistance of divine providence, we have acquired the double fame of a lawgiver and a conqueror; for the barbarian nations have proved us in battle and submitted to our yoke; even Africa and many other provinces, after so long an interval, are again added to the Roman empire; and yet this vast people, and our whole dominions, are governed either by laws enacted by ourselves; or laws, which, tho' framed by others, have by our sovereign authority been better regulated.

Post tanta temporum spatio.] Africa had then been 95 years in the possession of the Vandals.
Cod. i. i. 27. l. 1. d. eff. PP. 59.

De compositione Codicis et Pandectarum.

§ II. Et cum sacratissimas constitutiones, antea confusæ, in luculentam ereximus confonantiam, tunc nostram extendimus curam ad immensa veteris prudentiae volumina; et opus desperatum, quæ per medium profundum eunte, cælesti favore jam adimplevimus.

§ 2. When we had ranged the imperial constitutions in a regular order, and made those, which were before confused and contradictory, to agree perfectly with each other, we then extended our care to the numerous volumes of the ancient law, and have now completed, thro' the favor of heaven, a work, which exceeded even our hope, and was attended with the greatest difficulties.

De tempore, auctoritatis, fine et utilitate compositionis Institutionum.

§ III. Cumque hoc, Deo propitio, peractum est, Triboniano, vire magnifico, magistro, et exquisitore sacri palatii nostræ, et exconsule, nec non Theophilo et Dorotheo, viris illustribus, antecelloribus, (quorum omni solertia, et legum scientiam, et circa nostras jussiones fidem, jam ex multis rerum argumentis acceperimus,) convocatis, mandavimus specialiter, ut ipsi nostra auctoritate, nostrisque suationibus, Institutiones componerent; ut licet vobis præm legum cunabula non ab antiquis fabulis dicere, sed ab imperiali splendori appetere: et tam aures, quam animi vestri, nihil inutile, nihilque perperam posita, sed quod in ipsis rerum obtinet argumentis, accipiant: et quod priore tempore viæ post quadriennium prioribus contingebat, ut tunc constitutiones imperatorias legerent, hoc vos a primordio ingrediamini, digni tanto honore, tantaque reperti felicitate, ut et initium vobis, et finis legum eruditionis, a voce principali procedat.

§ 3. As soon as this our undertaking was accomplished, we summoned Tribonian, our chancellor, with Theophilus and Dorotheus, men of known learning and tried fidelity, whom we joined by our authority to compose the following Institutions, to the intent, that the rudiments of law might be more effectually learned, by the sole
De Confirmatione Institutionum.

means of our imperial authority; and that your minds for the future should not be
burdened with obsolete and unprofitable doctrines, but instructed only in those laws,
which are allowed of and practiced: and, whereas it was formerly necessary, that all
students should go through a course of study, at least for the space of four years, prepar-
atory to their reading the constitutions, they may now, (having been thought worthy
of our princely care, to which they are indebted for the beginning and end of their
studies,) apply themselves immediately to the imperial ordinances.

Nec non Theophilo.] There is great reason for us to think, that the Theophilus, here mention-
ed, is the same Theophilus, who wrote the Greek

Divisio Institutionum.

§ IV. Igitur post libros quinquaginta Digestorum, seu Pandectarum,
(in quibus omne jus antiquum collectum est, quod per eundem virum
excellum Tribonianum, nec non ceteros viros illustres et facundissimos,
confecimus,) in quatuor libros easdem Institutiones partiri jussimus, ut sint
totius legumæ scientiae prima elementa.

§ 4. When therefore, by the assent of Tribonian and other illustrious persons,
we had digested the whole ancient law into fifty books, called Digests or Pandects,
it was our pleasure, that the Institutions should be divided into four books, which
might serve as the first elements, introductory to the science of the law.

Quid in Institutionibus contineatur.

§ V. In quibus breviter expositum est, et quod ante oboutinebat, et quod
postea, desuetudine inumbratum, imperialis remedio illuminatum est.

§ 5. And, in these, we have briefly set forth the old laws, which formerly ob-
tained, and these also, which for a time have lain dormant, but are now revived by
our princely care.

Ex quibus libris composita sunt Institutiones, atque earum
recognitio, et confirmatio.

§ VI. Quas, ex omnibus antiquorum Institutionibus, et praecipe ex
commentariis Caii nostrorum, tam institutionum, quam rerum quotidianarum,
aliique multis commentariis compositus, cum tres viri prudentes prædicti
nobis obtulerunt, et legimus, et recognovimus, et plenissimum nostrarum
constitutionum robur eis accommodavimus.

§ 6. The four books of our Institutions were compiled by Tribonian, Theophilus,
and Dorotheus, from all the institutions of the ancient law, but chiefly from the com-
mentaries, institutions, and other writings of Caius. As soon as these our Institu-
tions were finished and presented to us, we read and diligently examined their con-
tents; and, in testimony of our approbation, we have now given them a constitu-
tional authority.

Adhortatio ad studium juris.

§ VII. Summa itaque ope, et alacri studio, has leges nostras accipite:
et vosmetipsum sic eruditos offendite, ut spes vos pulcherrima soveat, tota
A 2

legitimo
legitimo operè perfecto, posse etiam nostram rempublicam, in partibus ejus vobis credendis, gubernari.

D. CP. XI. Kalend. Decemb. D. JUSTINIANO
PP. A. III. COS.

§ 7. Receive therefore our laws, and so profit by them, that, when the course of your studies is completely finished, you may with reason expect to bear a part in the government, and be enabled to exercise those offices, which are committed to your charge.

Given at Constantinople on the eleventh day before the calends of December, in the third consulate of the emperor JUSTINIAN, always August.

XI. Kalendas decemb.] i.e. on the 21st day of November, in the year of Christ 533.

INSTI-
INSTITUTIONUM, SEU ELEMENTORUM, D. JUSTINIANI LIBER PRIMUS.

Titulus Primus.
De Justitia et Jure.
D. i. T. i.

Definitio justitiae.

J ustitia est constans et perpetua voluntas jus suum cuique tribuendi.

Justice is the constant and perpetual desire of giving to every man that, which is due to him.

Definitio jurisprudentiae.

§ I. Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.

§ 1. Jurisprudence is the knowledge of things divine and human, and the exact discernment of what is just and unjust.

De juris methodo.

§ II. His igitur generaliter cognitis, et incipientibus nobis exponere jura populi Romani, ita videntur poe sae dismodissime, si primo levi ac simplici via, post deinde diligentissima atque exactissima interpretatione, singula tradantur; aliqui, si statim ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneraverimus, duorum alterum, aut defertorem studiorum efficiemus, aut cum magno labore, sace etiam cum diffidentia, (quae plerumque juvenes avertit,) ferius ad id perducemus.
Perducemus, ad quod, leviore via ductus, sine magno labore et sine ulla diffidentia, maturius perduci potuisset.

§ 2. These definitions being premised, we shall now proceed. But it seems right to begin our Institutions in the most plain and simple manner, although afterwards we intend to treat every particular with the utmost exactness: for, if at first we overload the mind of the student with a variety of things, we may cause him either wholly to abandon his studies, or bring him late, through a series of labors, to that knowledge, which he might otherwise have attained with ease and expedition.

Juris præcepta.

§ III. Juris præcepta sunt: honeste vivere, alterum non lædere, suum cuique tribuere.

§ 3. The precepts of the law are these: to live honestly, not to hurt any man, and to give to every one that, which is his due.

De jure publico et privato.

§ IV. Hujus studii duæ sunt positiones, publicum et privatum. Publicum justus, quod ad statum Rei Romanae spectat. Privatum est, quod ad singulorum utilitatem pertinet. Dicendum est igitur de jure privato, quod tripertitum est: collectum enim est ex naturalibus præceptis, aut gentium, aut civilibus.

§ 4. The law is divided into public and private. Public law regards the state of the commonwealth; but private law, of which we shall here treat, concerns the interest of individuals, and is tripartite, being collected from natural precepts, from the law of nations, and from the civil law of any particular city or state.

Titulus Secundus.

De Jure naturali, gentium, et civili.

De jure naturali.

Juris naturale est, quod natura omnium animalium docuit: nam jus istud non humani generis proprium est, sed omnium animalium, quae in coelo, quae in terra, quae in mari, nascentur. Hinc descendit maris atque feminae conjunctio, quam nos matrimonium appellamus. Hinc liberorum procreatio, hinc educatio. Videimus enim, cetera quoque animalia istius juris peritia censeret.

The law of nature is not a law to man only, but likewise to all other animals, whether they are produced on the earth, in the air, or in the waters. From hence proceeds the conjunction of male and female, which we among our own species style matrimony; from hence arises the procreation of children, and our care in bringing them up. We perceive also, that the rest of the animal creation are regarded, as having a knowledge of this law, by which they are actuated.

Censeret.
Lib. I. Tit. II.

Cesari.] Id est, admirationi no ueste, ut Budaeu exponet. [vid. Roberi Stephanii Thesaur. et Bajfili Fabri Thesaur. verb. Cesari.] sed Theophilus hunc locum inter virit: θερμός γας, ο μονο εδιδικειος, αλλα και τα λοιπα ζενα

in tuis timori tueor ton tôn em δελφίνεμαμα. Quasi hic dictum sit, non hominem modo, sed cetera quoque animalia adscribi et referri vix recereri inter ea, quae nature legem observant, ejusque motu impelluntur. Mynnger.

Distinctione juris gentium et civilis, a definitione et etymologia.

§ I. Jus autem civile a jure gentium distinguitur, quod omnes populi, qui legibus et moribus reguntur, partim suum proprio, partim communi omnium hominum, jure utuntur: nam quod quisque populus sibi jure constuitit, id ipsius proprium civitatis est, vocaturque jure civile, quasa jure proprium ipsius civitatis. Quod vero naturalis ratio inter omnes homines constituit, id apud omnes gentes peraeque custoditur, vocaturque jure gentium, quas quo jure omnes gentes utuntur: et populus itaque Romanus partim suum proprio, partim communi omnium hominum, jure utitur. Quae singula, qualia sint, suis locis proponemus.

§ 1. Civil law is distinguished from the law of nations, because every community has partly its own particular laws, and partly the general laws, which are common to all mankind. That law, which a people enact for the government of itself, is called the civil law of that people. But that law, which natural reason appoints for all mankind, is called the law of nations, because all nations make use of it. The people of Rome are governed partly by their own laws, and partly by the laws, which are common to all men. But we propose to treat separately of these laws in their proper places.

Ab appellatione et effectibus.


§ 2. All civil laws take their denomination from that city, in which they are established: it would therefore not be erroneous to call the laws of Solon or Draco those of Athens: and thus the law, which the Roman people make use of, is styled the civil law of the Romans, or of the Quirites; for the Romans are also called Quirites from Quirinus. Whenever we mention the words civil law, without addition, we emphatically denote our own law; thus the Greeks, when they say the poet, mean Homer, and the Romans Virgil. The law of nations is common to mankind.
mankind in general, and all nations have framed laws thro' human necessity; for wars arose, and the consequences were captivity and servitude; both which are contrary to the law of nature; for by that law all men are free. But almost all contracts were at first introduced by the law of nations, as for instance, buying, selling, letting, bearing, society, a deposit, a mutuum, and others without number.

[mutum.] The word mutuum denotes a contract, by which one man gives to another a thing, which consists in weight (as bullion) in number (as money) in measure (as wine) upon condition, that the donee shall return another thing of the same quantity, nature and value, upon demand. This contract is not without its convenience; for lending without interest is in many cases a more useful charity, than an absolute gift. vid. lib. 5. Inst. t. 15.

Divisio juris in scriptum et non scriptum; et subdivisio juris scripti.

§ III. Confat autem jus nostrum, quo utimur, aut scripto, aut fine scripto: ut apud Graecos τῶν νομῶν ὁ μετ' ἔγγραφος, ὁ δὲ ἔγγραφος. Scriptum autem juxta lex, plebiscitum, senatus-consilium, principium placita, magistratum edicta, responś praedestinut.

§ 3. The Roman law is divided, like the Grecian, into written and unwritten. The written is six-fold, and comprehends the laws, the plebiscites, the decrees of the senate, the constitutions of princes, the edicts of magistrates, and the answers of the judges of the law.

Confat autem.] The laws of England are also divided into written, and unwritten. The written laws consist of the statutes, which in their original formation are reduced into writing, and confirmed by the king, lords, and commons. The unwritten laws include the common law, and all particular customs; they are called unwritten, because they had not their origin in writing, and have acquired their binding force by a long and immemorial usage. But it must be observed, that the common law, although it was not originally conceived in writing, and is therefore properly defined to be lex non scripta, has nevertheless all its monuments and memorials in writing, by which it is transferred with certainty from one age to another, and without which it would soon lose all kind of authority. See Hale's Hist. of the Laws, cap. 2.

De lege et plebiscito.

§ IV. Lex eft, quod populus Romanus, senatorio magistratu interrogante, (veluti confule,) constituebat. Plebiscitum eft, quod plebs, plebeio magistratu interrogante, (veluti tribuno,) constituebat. Plebs autem a populo differt, quo species a genere; nam appellatione populi universi cives significatur, connumeratis etiam patricii et senatoribus. Plebis autem appellations, fine patricii et senatoribus, alia cives signiificantur. Sed et plebiscita, lege Hortenfia lata, non minus valere, quam leges, ceperunt.

§ 4. A law is what the Roman people enacted at the request of a senatorial magistrate; as for instance, at the request of a consul. A plebiscite is what the commonalty enacted, when requested by a plebeian magistrate, as by a tribune. The word commonly differs from people, as a species from its genus; for all the citizens, including patricians and senators, are comprehended under the term people. The term commonly includes all the citizens, except patricians and senators. The plebiscites, by the Hortenfian law, began to have the same force, as the laws themselves.

Lege Hortenfia lata.] The law Hortenfia was made by Hortenfius, the dictator, in the year U. C. 467. But it appears to have been only decreed in confirmation of the law Horatia, which was enacted in the 304th year of Rome, when Horatius and Valerius were consuls.

De
De senatus-consulto.

§ 5. Senatus-consultum est, quod senatus jubes atque constituit: nam, cum auctus effet populus Romanus in eum modum, ut difficile esset, in unum eum convocari legis sanciendae causa, aequum visum est, senatum vice populi consulti.

§ 5. A senatorial decree is what the senate commands and appoints: for, when the people of Rome were increased to a degree, which made it difficult for them to assemble for the enacting of laws, it seemed best right, that the senate should be consulted instead of the whole body of the people.

Cum auctus effet populus.] The senatus-consultum obtained the force of laws under the emperor Tiberius, who, pretending that the Body of the people was too numerous to be assembled in one place, referred the whole legislative power of the commonalty to the senate.

De constitutione.

§ VI. Sed et, quod principi placuit, legis habet vigorem: cum lege regia, que de ejus imperio lata est, populus ei, et in eum, omne imperium suum et potestatem concedat. Quodcumque ergo imperator per epistolam constituit, vel cognoscens decrevit, vel edicto praecepit, legem esse constat. Hae sunt, quae constitutiones appellantur. Plane ex his quaedam sunt personales, quae nec ad exemplum trahuntur, quoniam non hoc princeps vult: nam quod aliqui ob meritum indulgunt, vel si quam poenam irrogavint, vel si cui fine exemplo subvenit, personam non tranfgreditur. Aliae autem, cum generalis sint, omnes procul-dubio tenent.

§ 6. The constitution of the prince hath also the force of a law; for the people by a law, called lex regia, make a concession to him of their whole power. Therefore whatever the emperor ordains by rescript, decree, or edict, it is a law. These acts are called constitutions. Of these, some are personal, and are not to be drawn into precedent; for, if the prince indulged any particular man upon account of his merit, or inflicted any extraordinary punishment on a criminal, or granted him some unprecedented indulgence, these acts extend not to others in the like circumstances. But other constitutions are general, and undoubtedly bind all people.

Lex regia.] There has been much controversy concerning this law; vid. Grev. de Rom. imp. lib. sing. c. 24. et Hopp. in inf. 1. 5. 1. But the following seems at least to be a probable conjecture. The senate and people conferred various honors upon Augustus at different times: in the year of Rome 724, they made him tribune for life; in 727, they exempted him from the coercion of the laws; in 731, he was created perpetual confid; and, in the year 735, a power was given him either of amending or making whatever laws he thought proper. These and other decrees, made in favor of Augustus, were afterwards generally renewed at the commencement of the reign of every new emperor, as appears plainly from Tacitus, t;um senatus annis principibus solita Veipsiano decrevit. Tacit. Hist. 11. 3. Thus, in time, all the several decrees of the senate, by being frequently renewed together, became as it were one law, and were called lex imperii, or regia; and they probably gained this title in imitation of the antient lex regia, by which the first Romans conferred the supreme power upon Romulus in the infancy of their state. Liv. lib. 34. c. 6. Elementa jur. per Robert Eden, pag. 17.
Lib. I. Tit. II.

De jure honorario.

§ VII. Praetorum quoque edicta non modicam obtinent juris auctoritatem. Hoc etiam jus honorarium solumus appellare: quod, qui honores gerunt, (id est, magistratus,) auctoritatem huic juri dederunt. Proponebant et aediles curules edictum de quibusdam causis; quod et ipsum juris honorarium portio est.

§ 7. The edicts of the praetors are also of great authority. These edicts are called the honorary law, because these, who bear honors in the state, have given them their sanction. The curule aediles also, upon certain occasions, published their edicts, which became a part of the jus honorarium.

De responsis prudentium.

§ VIII. Responfa prudentum sunt sententiae et opiniones eorum, quibus permission erat de jure respondere: nam antiquitas constitutum erat, ut essent, qui juras publicae interpretenet, quibus a Caesar juri respondendidatum esset, qui juris-confulti appellabantur: quorum omnium sententiae et opiniones eam auctoritatem tenebant, ut judicii recedere a responsis eorum non liceret, ut esset constitutum.

§ 8. The answers of the lawyers are the opinions of those, who were authorized to give their answers concerning matters of law. For antiently there were persons, who publicly interpreted the law; and to these the emperors gave a licence for that purpose. They were called juris-confulti, and their opinions obtained so great an authority, that it was not in the power of a judge to recede from them.

Responfa prudentum.] All those, whose particular application and abilities had rendered them learned in the law, undertook to give answers to all questions, which were proposed to them. But these answers were of no weight in the time of the republic, nor even under Augustus, who impowered the lawyers to give their opinions by a general commission, which yet did not procure them any great authority. Ff. 1. t. 2. de orig. jure. But their opinions afterwards grew into considerable credit in the reign of Tiberius, who prohibited any person from presuming to give an opinion in matters of law, without a special licence. But still the answers of the lawyers had not the force of laws; for Tiberius, in his licences, laid not any injunction upon his judges to regard these answers. It is therefore highly probable, that the answers of the lawyers were first considered as law, under Valentinian the third, because he confirmed the writings of Gaius, Ulpian, Paul, Papinian, and others nominally, and forbade the judges to swerve from the opinions of these lawyers in points of law: and, because many inconveniences arose from the various opinions, which even these lawyers gave upon the same question, the emperor ordained, that the judges should be governed by a majority, and that, in case of an equality, they should follow the opinion of those, to whom Papinian adhered. Unde diversae sententiae proferuntur, potius numerus vincat auctorem: vel, si numerus equalis sit, ejus partes praeceperit auctoritas, in qua excellentis ingenii viri Papinianus eminens. Cod. 1. Thed. t. 4. l. un. De responsis prudentum.

De jure non scripto.

§ IX. Sine scripto jus venit, quod usus approbat; nam diurni mores, confenfut utentium comprobati, legem imitantur.

§ 9. The unwritten law is that, which usage has approved: for all customs, which are established by the consent of those, who use them, obtain the force of a law.

Ratio
Lib. I. Tit. II.

Ratio superioris divisionis.

§ X. Et non ineleganter in duas species jus civile distributum esse videtur; nam origo ejus ab institutis duarum civitatum, Athenarum scilicet et Lacedemoniorum, fluxisse videtur. In his enim civilatibus ita agi solitum erat, ut Lacedaemonii quidem ea, quæ pro legibus observabant, memoriae mandarent: Athenienis vero ea, quæ in legibus scripta comprehendissent, custodirent.

§ 10. The division of the law, into written and unwritten, seems to have taken rise from the peculiar customs of the Athenians and Lacedemonians. For the Lacedemonians trusted chiefly to memory, for the preservation of their laws; but the laws of the Athenians were committed to writing.

Divisio juris in immutabile et mutable.

§ XI. Sed naturalia quidem jura, quæ apud omnes gentes persæque observantur, divina quadam providentia constituta, semper firma atque immutabília permanet. Ea vero, quæ ipsa sibi quæque civitas constituit, sese mutari solent, vel tacito consentu populi, vel alia postea lege lata.

§ 11. The laws of nature, which are observed by all nations, inasmuch as they are the appointment of divine providence, remain constantly fixed and immutable. But those laws, which every city has enacted for the government of itself, suffer frequent changes, either by tacit consent, or by some subsequent law, repealing a former.

De objectis juris.

§ XII. Omne autem jus, quo utimur, vel ad personas pertinet, vel ad res, vel ad actiones. Et prius de personis videamus: nam parum est jus nóssæ, si personæ, quorum causa constitutum est, ignorantur.

§ 12. The laws, which we make use of, have relation either to persons, things, or actions. We must therefore first treat of persons; for it would be to little purpose to aim at knowledge in the law, while we are ignorant of persons, on whose sole account the law was constituted.

Titulus Tertius.

De Jure Personarum.

D. I. T. 5.

Prima divisio personarum.

Summa itaque divisio de jure personarum hæc est: quod omnes homines aut liberi sunt, aut servi.
The first general division of persons, in respect to their rights, is into freemen and slaves.

Hominis aut liberis, aut servis.] Tenure in villenage was formerly a common tenure in England; and tho' he held by it, were called villeins, from the word "villa," a farm. They were obliged to perform the most servile offices, and their condition did not differ from that of slaves; for both they and their children were the absolute property of their lords, who might leafe them out to others for years, or for life, or make an absolute sale of them.

Of villeins there were two sorts, viz. villeins regardant to a manor, and villeins in grossi.

Villeins regardant, or "vilis adscripti," were bound to the lord as members, belonging and annexed to the manor, of which their lord was the owner. Villeins in grossi were such, who were not appendent to any manor, or lands, but belonged solely to the person of their lord, and his heirs. And note, a villein might become a villein in grossi by prescription, by being granted away, or by confession.

Tenures in villenage were wholly taken away by a statute in the 12th Year of Charles the second, by which all tenures were turned into free and common cagge: but it is observable, that long before this act, in which no notice is taken of villeins in grossi, there were very few villeins in England; for the last cafe concerning villenage to be found in any of the law books is that of Cruick in the 10th year of Queen Elizabeth. Dyer 266. b. pl. 11.

And it is remarkable, that Sir Thomas Smith, who was one of the principal secretaries of state, first to King Edward the sixth, and afterwards to Queen Elizabeth, observes in his republic, "That he never knew of any villeins in grossi in his time; and that villeins appendent to manors were but very few in number: that, since England had received the christian religion, men began to be affected in their conciences at holding their brethren in servitude; that it must be there is work to be done, and that temporal men were glad to manumit all their villeins.

But he adds,—"That the holy fathers themselves did not manumit their own slaves; and that the bishops behaved like the other ecclesiastics; but at last some bishops infranchised their villeins for money, and others on account of popular outcry; and that at length the monasteries, falling into lay hands, were the occasion, that almost all the villeins in the kingdom are now manumitted." Smith's republic. c. 10.

But it must not here be omitted, that even now, upon a pretension of accessibility, the English permit slavery in the plantations; and this may lend the reader to inquire, whether a Negro, brought into England, where slaves are certainly not necessary, shall still continue to be a slave, and be recoverable at law, if he quits the service of his master? As to this question, it seems to be a settled point, that an action of trover will not lie for a Negro, because the owner has not an absolute property in his Negro, so as to kill him. Sail. 666. Lord Raymond, 1274. Smith v. Gould. There hath also been much doubt, as to an action of trespass; but the more prevalent opinion is, that a general action of trespass will not lie, yet a special action, per quod servitium amnis, may legally be maintained, if brought by the master; so that, if property in a Negro can be fully performed, he will not be able to maintain his liberty by baptism, or residence in England. 5. Mod. 182. Chamberlin v. Harvey.

But how much more noble and enlarged is the opinion of Montesquieu, in his Esprit des loix, who denies, with great force of argument, that slavery can anywhere be necessary; and endeavours to convince us by a fine irony, that it can never be justified.

"The most laborious works (says that great author) may be performed by freemen; and my reason for thinking so is, that, before christianity had abolished civil slavery in Europe, the working of mines was thought to be too hard a labor for any, except slaves or criminals: yet freemen are now employed in these very works, and are known to live happily; as in the mines of Harto in lower Saxony, and in those of Hungary. In short, no labor is so heavy, but it may be proportioned to the strength of the workman; and the violent faticues, which slaves are made to undergo, may be greatly eased by commodious machines, invented by art, and skillfully applied. The Turkish mines in the basin of Famous, the richer than those of Hungary, yet produced not so much, and for this plain reason, that the invention of the Turks extended no farther, than the strength of their slaves. I know not whether this article is dictated by my understanding, or my heart; but I am induced to think, that there is not a climate upon earth, where the most laborious services might not be performed by freemen."

"And were I to vindicate our right to make slaves of Negroes, these should be my arguments. "The Europeans, having extinguished the American, were forced to make slaves of the African, to clear such vast Tracts of land. "Sugar would be too dear, if the plants, which produce it, were not cultivated by slaves. "They are too black from head to foot, and so very flat-nosed, that it is impossible to pity them. "It is incredible, that God, who is a wise Being, should place a foul, and especially a good soul, in so black a body."

"It
LIB. I. TIT. III.

"It is also a manifold proof of their want of common sense, that they prefer a glass necklace to one made of gold, which is a metal of such great consequence among all polite nations.

"And, in fine, it is impossible to suppose those creatures to be men; for, in supposing them such, we must begin to suspect, that we ourselves are not Christians." Book 15. chap. 5. 8.

Definitio libertatis.

§ I. Et libertas quidem (ex qua etiam liberi vocantur) est naturalis facultas ejus, quo cuique facere libet, nisi quid vi aut jure prohibetur.

§ 1. Liberty, or freedom, from which we are denominated free, is that natural power, which we have of acting, as we please, if not hindered by force, or restrained by the law.

Definitio servitutis.

§ II. Servitus autem est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur.

§ 2. Slavery is that, by which one man is made subject to another, according to the law of nations, the contrary to natural right.

Servi et mancipii etymologia.

§ III. Servi autem ex eo appellati sunt, quod imperatores captivos vendere, ac per hoc servare, nec occidere solent; qui etiam mancipia dicerunt, eo, quod ab hostibus manu capiantur.

§ 3. Slaves are denominated servi, from the verb servare, to preserve: for it is the practice of our generals to sell their captives, being accustomed to preserve, and not to destroy them. Slaves are also called mancipia (a manu capere) in that they are taken by the hand of the enemy.

Imperatores captivos.] At this day, prisoners, taken in war between christian princes, are not sold, or even forced to work, but remain, till they are either exchanged or ransomed. Prisoners are also treated with the same lenity by mahometan princes, when they are at war among themselves. Molloy de jure mar. 419.

Nec occidere solent.] vid. Esprit des loix, lib. 15. cap. 2.

Quibus modis servi constituantur.

§ IV. Servi autem aut nascuntur, aut sunt. Nascuntur ex ancillis nostriis: sunt aut jure gentium, id est, ex captivitate; aut jure civili, cum liber homo, major viginti annis, ad pretium participandum esse venundari passus est.

§ 4. Slaves are either born such, or become so. They are born slaves, when they are the children of bond-women: and they become slaves, either by the law of nations, that is, by captivity, or by the civil law, which happens, when a free person, above the age of twenty, suffers himself to be sold, for the sake of sharing the price given for him.

Nascuntur ex ancillis.] "Eodem jure ex ancillis nativ servii sunt, quo fatas cedent folio; mater enim folo comparatur, vis patris fato." Cajetan.

Cum liber homo.] Altho' absolute slavery is now disused in Europe (except when it is inflicted upon criminals, as a punishment, or upon Turks, when they are prisoners in Roman catholic countries) yet a species of servitude is allowed among us, which is justifiable: thus an apprentice is bound for a certain time, and for particular purposes; and men of full age may also, by contract, bind themselves for a maintenance either for years, or for life. But such a
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contract, made by the ancestor, is merely personal, and can by no means oblige his posterity. It must be added, that a person, bound to another for a term, does not labor under any civil incapacity, but is entitled to all the legal privileges of other men; and, in this, his condition is widely different from that of an absolute slave.

De liberorum et servorum divisione.

§ V. In servorum conditione nulla est differentia; in liberis autem multae: aut enim sunt ingenui, aut libertini.

§ 5. In the condition of slaves there is no diversity; but among those, who are free, there are many: thus some are ingenui, others libertini.

In liberis autem. Persons in Great Britain are distinguished after the following manner.

The nobility, strictly taken, is what makes up the Peerage of Great Britain, and consists of lords spiritual and temporal, who have a seat and vote in parliament, and are divided into five ranks or degrees, 

viz. duke, marquis, earl, viscount, and baron. All, who are not peers of the kingdom, come under the general name of commoners, who may be distinguished into two classes: the first comprehends the gentry of all denominations, whether baronets, knights, esquires, or gentlemen. Baronets and knights are made by creation. The honor of baronet is hereditary, and descends to the male issue. That of a knight-batchelor is only personal, and dies with the person, upon whom the honor is conferred. The titles of esquire, and gentleman, are acquired either by birth, by profession, or by certain offices, which distinguish those, who have served them, and their descendants. Under the other classes may be comprehended the yeomanry, or freeholders, who have lands or tenements of their own to the value of at least forty shillings a year; and all citizens, tradesmen, and day-laborers. 

Titulus Quattuor.

De Ingenuis.


De ingenui definitione.

Ingenuus est, qui statim, ut natus est, liber est; five ex duobus ingenuis matrimonio editus est, five ex libertinis duobus, five ex altero libertin, et altero ingenuo. Sed et, quia ex mater nascitur libera, patre vero fervo, ingenuus nihilominus nascitur: quemadmodum, quia ex mater libera et incerto patre natus est: quoniam vulgo conceptus est. Sufficient autem, liberam fuisset matrem eo tempore, quo nascitur, licet ancilla conceperit: et, e contrario, si libera conceperit, deinde ancilla facta patrias, placuit eum, qui nascitur, liberum nascit: quia non debet calamitas matris ei nocere, qui in ventre est. Ex his illud quasitum est, si ancilla praemans manumissit, deinde ancilla postea facta pepererit, liberum an servum patria? Et Martianus probat, liberum nascit: sufficient enim ei, qui in utero est, liberam matrem vel medio tempore habuisse, ut liber nascatur; quod et verum est.

The term ingenuo denotes a person, who is free at the instant of his birth, by being born in matrimony of parents, who are both ingenui, or both libertini; or of parents, who differ in condition, the one being ingenuus, and the other a libertina.
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But, when the mother is free, alfo' the father is a slave, or even unknown, the child is ingenuous: and when the mother is free at the time of the birth of her infant, alfo' she was a bond-woman when she conceived it, yet such infant will be ingenuous. Also if a woman, who was free at the time of conception, is afterwards reduced to slavery and delivered of a child, her issue is, notwithstanding this, freeborn; for the misfortune of the mother ought by no means to prejudice her infant. It has been a question, whether the child of a woman, who is made free during pregnancy, but becomes bond before delivery, would be free born? Martianus proves, that the child of such woman would be free: for, in his opinion, it is sufficient, if the mother hath been free at any time between conception and delivery; and this opinion is strictly true.

Ex mater libera.] It is a general maxim in the civil law, "that a child, born in lawful wedlock, shall follow the condition of his father:" Cum legitima nuptiae facta sunt [fays Calvin liberi patrem sequuntur. ff. 1, 5, 19.

But, where there is no lawful marriage, the children then follow the condition of their mother; and this happens, according to the Roman law, not only when slaves intermarry, but even when a free-man marries a bond-woman; for such marriages are only called contractus: it therefore follows a fortiori, that, if a free-man des-marches a bond-woman, their issue will be bond. Liberis ex coitu matris filiis, qui volgo gestati aliumque uterum, mater conditionem sequuntur, quia patrem non habent. Liberis ex contractibus, non inter alterum liberum, alterum serviorem, in eadem conditione sunt, quia jus civile ad eos non pertinent. vid. gloss. et DD. at 1, 19. ff. 1, 5.

But the rule of the law of England is still more general; for the maxim is, "that the children shall never follow the condition of their mother, but always that of their father." Lex Angliae [fays Fortescue] namque mater, fed olim servis patris, conditionem sui patrem partum judicat. Fortesc. de laud. II. Angl.

So that, if a villein in England had taken a free-woman to wife, their issue would have been villeins; and, if a neice had been married to a free-man, their children would have been free. Litt. ten. lib. II. feb. 187.

But the illegitimate issue of a villein and a free-woman, or of a villein and a neice, would have been free, altho' their issue in lawful marriage would have been bond. For, inasmuch as a baudard is not permitted by the law of England to follow the condition of his mother, and can not follow the condition of his father, who is unknown to the law, he is therefore feigned to be nullus filius; and, in favor of liberty, is presumed to have been born free.

De erronea ingenui manumissione.

§ I. Cum autem ingenuus aliquis natus fit, non officit ei, in servitute suisse, et postea manumissum esse: sapisimine enim constitutum est, naturalibus non officere manumissionem.

§ I. When any man is by birth ingenuous, it will not injure him to have been in servitude, and to have been afterwards manumitted: for there are diverse constitutions, by which it is enacted, that manumission shall not prejudice free birth.

Sapisimine enim.] For, if manumission was permitted to operate, the person manumitted must become a libertin, which would be injurious to a man, who was free by birth, and manumitted thro' ignorance and mistake. Cad. 7. t. 16. l. 21.

Titulus Quintus.

De Libertinis.

Definitio et origo libertinarum et manumissionis.

Libertini sunt, qui ex justa servitute manumissi sunt. Manumissio autem est de manu datis: nam, quandio aliquis in servitute eft,
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manui et potestati suppositus est: et manumissus liberatur a domini potestate: quæ res a jure gentium originem fumpit: utpote cum jure naturali omnes liberi nafcerentur: nec effet nota manumissio, cum servitus effet incognita. Sed, postquam jure gentium servitus ingenuitatem invasit, secutum est beneficium manumissionis: et, cum uno communi nomine omnes homines appellarentur, jure gentium tria hominum genera esse coeperunt: liberi; et his contrarium, servi; et tertium genus, libertini; qui desierant esse servi.

Libertines, or free-men, are those, who have been manumitted from just servitude. Manumission implies the giving of liberty; for whoever is in servitude, is subject to the bond and power of another; but whoever is manumitted, is free from both.

Manumission took its rise from the law of nations; for all men by the law of nature are born in freedom; nor was manumission beared of, while servitude was unknown. But, when servitude, under sanction of the law of nations, invaded liberty, the benefit of manumission became then a consequence. For all men at first were denominated by one common appellation, still, by the law of nations, they began to be divided into three classes, viz. into liberi, or those, who are born free; into servi, or those, who are in slavery; and into libertini, who are those, who have ceased to be slaves, by having freedom conferred upon them.

**Quibus modis manumittatur.**

§ I. Multis autem modis manumissio procedit: aut enim ex sacris constitutionibus in sacrosanctis ecclesiis, aut vindicta, aut inter amicos, aut per epistolam, aut per testamentum, aut per aliam quamlibet ultimam voluntatem. Sed et alios multis modis libertas servorum competere potest, qui tam ex veteribus, quam ex nostris constitutionibus, introduci sunt.

§ 1. Manumission is effected by various ways; either in the face of the church, according to the imperial constitutions, or by the vindicta, or in the presence of friends, or by letter, or by testament, or by any other last will. Liberty may also be properly conferred upon a slave by diverse other methods, some of which were introduced by the constitutions of former emperors, and others by our own.

Multis autem modis.] Liberty could antiently be conferred, but three ways: viz. by testament, by the cenfus, and by the vindicta or licitor's rod: and this is evident from the following passage in Tull: Si neque cenfus, neque vindicta, neque testamento liber factus ess, non ess liber. In top.

A man was said to be liber cenfus, when his name was registered in the cenfor's roll with the approbation of his master at the public cenfus. But the method of acquiring liberty by the vindicta was more solemn and formal. For it was necessary, that the master, placing his hand upon the head of the slave, should say in the presence of the prætor, bonus bonam liberum esse volo, to which the prætor always replied, dicat cum liberum esse non Quietus. Then the licitor, or secrænt, receiving the vindicta, or rod, from the prætor, struck the new freed-man several blows with it upon the head, face, and back, after which his name was registered in the roll of freed-men, and his head being close shaved, a cap was given him, as a token of liberty.

The various other forms of manumitting, introduced by the imperial constitutions, are almost all of a public nature; and even manumission among friends, or by letter, could not be effected without the presence of five witnesse. Cod. 7. t. 6. de lat. lib. toll.

With respect to villeins in England, it appears from the following law, enacted by William the foift, in what manner they were antiently infranchised. Si quis veluti servum suum liberum faeceret, tradat cum vice-comiti per manum spectam suam comitem, quum illum clamare debet a juro servitutis fuerit per manumissionem, et ostendat si liberas eis et portas, et tradat illi liberam arma, fasilect, lanceam et gladius; deininde liber homin effecturus. "If any person is willing to infranchise his slave, let him, with his right hand, deliver the slave
Ubi et quando manumitti potest.

§ II. Servi vero a dominis semper manumitti solent, adeo ut vel in transitu manumittantur; veluti cum praetor, aut praeses, aut proconsul, in balneum, vel in theatrum eunt.

§ 2. Slaves may be manumitted by their masters at any time, even whilst the praetor, the governor of a province, or the proconsul is going to the baths, or to the theatre.

De libertinorum divisione sublati.

§ III. Libertinorum autem status tripertitus antea fuerat: nam, qui manumittentur, modo majorem et juftam libertatem confequentur, et siebant cives Romani; modo minorem, et Latini ex lege Junia Norbana siebant; modo inferiorum, et siebant ex lege Aelio Sentio Dedititii: fed quoniam Dedititoriis quidem peffima conditio jam ex multis tempore purificationes et restitutions.
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ribus in desuetudinem abierat; Latinorum vero nomen non frequentabatur; ideoque nostra pietas, omnia augere et in meliorem statum reducere desiderans, duabus constitutionibus hoc emendavit, et in pristinum statum reduxit: quia et a primis urbis Romae cunabulis una atque simplex libertas competebat, id est, eadem, quam habebat manumissor; nisi quod, sicelicet, libertinus sit, qui manumittitur, licet manumissor ingenuus sit: et Dedititiis quidem per constitutionem nostram expulimus, quam promulgavimus inter nostras decisiones; per quas, fuggerente nobis Triboniano viro excelso quaestore nostro, antiqui juris altercationes placavimus. Latinos autem ionianos, et omnem, quae circa eos fuerat, observantiam, aliam constitutionem, per ejusdem quaestoris suggestionem, coreximus, quae inter imperiales radit fationes: et omnes libertos, (nullo, nec aetatis manumissiti, nec domini manumissentis, nec in manumissionis modo, determinate habito, sicut ante observabatur,) civitate Romana decoravimus, multos modis additis, per quos posse libertas servis cum civitate Romana, qua sola est in praesenti, praestari.

§ 3. The libertini were formerly distinguished by a threefold division. Those who were manumitted, sometimes obtained what was called the greater liberty, and thus became Roman citizens; sometimes they obtained only the lesser liberty, and became Latins, according to the law Junia Norbana; and sometimes they obtained only the inferior liberty, and became Dedititi, by the law Ælia Sentia. But, the condition of the Dedititi differing but little from slavery, the inferior liberty has been long since dispised; neither has the name of Latins been frequent. It therefore being our ardent desire to extend our bounty, and to reduce all things into a better state, we have amended our laws by two constitutions, and re-established the ancient usage; for antiently liberty was simple and undivided; that is, it was conferred upon the slave, as his manumittor possessed it; admitting this single difference, that the person manumitted became only a libertinus, albo his manumittor was ingenuous.

We have entirely abolished the name of Dedititi by a constitution published among our citizens, by which, at the instance of Tribonian, our quaestor, we have suppressed all disputes concerning the antient law. We have also, at the suggestion of the same illustrious person, altered the condition of the Latins, and corrected the laws, which were related to them, by another constitution, which eminently distinguishes itself among the imperial sanction: and we have made all the freed-men in general citizens of Rome, regarding neither the age of the person manumitted, nor of the manumittor, nor any of the forms of manumission, as they were antiently observed. We have also introduced many new methods, by which slaves may become Roman citizens; and the liberty of becoming such is that alone, which can now be conferred.

Latini ex lege Junia Norbana.] The law Junia Norbana was made Anno U. C. 771, in the confinlph of Justinianus Philomæus and Norbana Ballbus. It was enacted by this law, that all slaves, who were infranchised otherwise than by testament, the onus, or the vindicta, should not become Roman citizens, but have such privileges only, which the Latini enjoyed before the Italian, or social war. The condition of those, who obtained this lesser liberty, is thus described by Justinianus: ut libert utiam suam perpetuam, atta-

men sibi ultimo spiritum simul animam atque libertatem amissitam; et quaee servorum, sua bona corum, jure quodammodo pecuni, ex lege Junia Norbana manumis- fores detinebant. Inf. 3. t. 8. But it must be observed, that they were not prohibited from enjoying the freedom of Rome, if properly conferred.

Ex lege Ælia Sentia. Dedititi. By the law Ælia Sentia, which was enacted in the reign of Augustus, and in the consulat of Ælius and Sentius, all slaves, who had been condemned, as crimi-
Titulus Sextus.

Qui et ex quibus causis manumittere non possunt.


Prius caput legis Æliae Sentiae, de manumittente in fraudem creditorum.

NON tamen cuicumque volenti manumittere licet: nam is, qui in fraudem creditorum manumittit, nihil agit: quia lex Ælia Sentia impedit libertatem.

It is not in the power of every master to manumit at will: for when a man manumits with an intent to defraud his creditors, he is said to commit a nullity, the law Ælia Sentia impeding all liberty thus granted.

De servo instituto cum libertate.

§ 1. Licet autem domino, qui solvendo non est, in testamento servum suum cum libertate hæredem instituere, ut liber fiat, hæresque ei fœsus et necessarius, si modo ei nemo alius, ex eo testamento, hæres extiterit: aut quia nemo hæres scriptus fit, aut quia is, qui scriptus est, qualibet ex causa hæres ei non extiterit. Idque cadem legi Ælia Sentia proviœm est, et recte. Valde enim proficiendum erat, ut egentes homines, quibus alius hæres eisdem non esset, vel servum suum necessarium hæredem haberent, qui satisfacturus esset creditoribus: aut, hoc eo non faciente, creditorum res hæreditarias servi nomine vendant, ne injuria defunctus afficiatur.

§ 1. A master, who is insolvent, may appoint a slave to be his heir with liberty, that thus the slave may obtain his freedom, and become the only and necessary heir of the testator, on supposition that no other person is also heir by the same testament; and this may happen, either because no other person was instituted heir, or because the person, so instituted, is unwilling to act, as such. This privilege of masters was for wise and just reasons established by the above-named law Ælia Sentia; for it claimed a special provision, that indigent men, to whom no man would be a voluntary heir, might have a slave for a necessary heir to satisfy creditors; or otherwise, that the
creditors themselves should make sale of the hereditary effects of the master in the name of the slave, left the deceased should suffer ignominy.

Ne injury, hoc ita, ignominia; quamvis enim edita prætoris de insanibus non notur, operatur tam ex simulatio ejus, et facti infamiam non effugit is, cujus bona auctioni

De servo instituto sine libertate.

§ II. Idemque juris est, eti fine libertate servus haeres institutus est: quod nostra constitutio non solum in domino, qui solvendo non est, sed generaliter constituit, nova humanitas ratione; ut ex ipsa scriptura institutionis etiam libertas ei competere videatur: cum non sit verum, num, quem haeresem sibi elegit, si prætermiserit libertatis dationem, servum remanere voluisse, et neminem sibi haeredem fore.

§ 2. A slave also becomes free by being instituted an heir, albo no mention was made of liberty in the testament. For our imperial constitution regards not only masters, who are insolvent, but, by a new act of our humanity, it extends generally; so that the very institution of an heir implies the conferring of liberty. For it is hugely improbable, that a testator, albo be bathe omitted to mention liberty in his testament, would be willing, that he person, whom be bathe instituted, should remain in servitude, since a testator would thus defeat his own purpose, and be deft of an heir.

Quod nostra constitutio.] See Cod. 6. t.27. 1.5. De necessariis haeredibus institutis.

Quid sit in fraudem creditorum manumittere.

§ III. In fraudem autem creditorum manumittere videtur, qui vel jam eo tempore, quo manumitterit, solvendo non est; vel qui, datis libertatibus, desiturus est solvendo esse. Prevaluisse tamen videtur, nisi animum quaque fraudando manumissionem habuerit, non impediri libertatem, quamvis bona ejus creditoribus non sufficant: sese enim de facultatibus suis amplius, quam in his est, sperant homines. Itaque tunc intelligimus impediri libertatem, cum utroque modo fraudantur creditores; id est, et consilio manumittenti, et ipsa re; eo quod bona ejus non sunt suffecta creditoribus.

§ 3. A man may be said to manumit in order to defraud creditors, if he is insolvent at the time, when he manumits, or if he becomes insolvent by manumitting. It is however the prevailing opinion, that liberty, when granted, is not impeched, unless the manumitter had an intent to defraud, albo his goods are insufficient for the payment of his creditors; for men frequently imagine themselves to be in better circumstances, than they really are. We therefore understand liberty to be then only impeded, when creditors are doubly defrauded; that is, both by the intention of the manumitter, and in reality.

Alterum caput legis Aeliei Sentiae de minore viginti annis.

§ IV. Eadem lege Aelia Sentia, dominio minori viginti annis non aliter manumittere permittitur, quam si vindicia aput consilium, justa causa manumissionis approbata, fuerint manumissi.
§ 4. By the before-named law Ælia Sentia, a master, under the age of twenty years, can not manumit, unless a just cause is assigned, which must be approved of by a council, appointed for that purpose, at whose command liberty is conferred by the vindicta.

Non alter. This prohibition was in favor of minors; “ne, servorum fuorum delinimentis decepti, minores rebus suis squalientur; prae teret lex providere voluit, ne temere, et fine certo animi judicio, servi libertate et civitate donarentur.” ff. 40. 1. 4. et passim. Apud concilium. This council at Rome consisted of the praetor, five senators, and five equites or knights. In the provinces it consisted of the proconsul, and twenty recuperatores, i.e. magistrates of municipal towns, who were called recuperatores, quin jus sium per eos quiquaque recuperavat. Calvin.

Quæ sunt justæ causæ manumissionis.

§ V. Jutæ autem causæ manumissionis sunt; veluti si quis patrem aut matrem, filium filiamve, aut fratres, fororesve naturales, aut pædagogum, aut nutritem, aut educatorem, aut alumnun alumnamve, aut collectaneum manumittat; aut servum, procuratoris habendi gratia; aut ancillam, matrimonii habendi causa; dum tamen intra sex menses in uxorem ducatur, nisi justa causa impediat: et servus, qui manumittitur, procuratoris habendi gratia, non minor decem et septem annis manumittatur.

§ 5. A minor is deemed to assign a just reason for manumission, when he alleges any of the following, viz. that the person to be manumitted is his father or mother, his son or daughter, his brother or sister, his preceptor, his nurse, his foster child, or his foster brother; or when he alleges, that he would manumit his slave, in order to constitute him his praetor; or his bond-woman, with an intent to marry her, on condition, that the marriage is performed within six months. But a slave, who is to be constituted a praetor, can not be manumitted for that purpose, if he is under seventeen.

Jutæ autem. vid. ff. 40. 1. 2. ii. 9. 10. &c.,

De causâ semel probata.

§ VI. Semel autem causa approbata, five vera fit, five falsa, non retractatur.

§ 6. A reason, which has once been admitted in favor of liberty, whether true or false, can not afterwards be disallowed.

Abrogatio posterioris capitis legis Æliae Sentiae.

§ VII. Cum ergo certus modus manumittendi minoribus viginti annis dominis per legem Æliam Sentiam constitutus esset, eveniebat, ut, qui quatuordecim annos expleverat, licet testamentum facere, et in eodem haberem instituere, legataque reliquere, posset, tamen, si adhuc minor esset viginti annis, libertatem servo dare non posset; quod non erat ferendum: nam, cui totorum fuorum bonorum in testamento disposition data erat, quare non similiter ei, quemadmodum alias res, ita et de servis his in ultima voluntate disponere, quemadmodum voluerit, permittimus, ut et libertatem eis possit praestare? Sed cum libertas inæstimabilis res sit, et propter hoc...
hoc ante vigesimum ætatis annum antiquitas libertatem servo dare prohibebat; ideo nos, medium quodammodo viam elegentes, non aliter minori viginti annis libertatem in testamento dare servo suo concessimus, nisi septemdecimum annum impleverit, et octodecimum attigerit. Cum enim antiquitas hujusmodi ætatis et pro aliis profulare concesserit, cur non etiam suijudicij stabilitas ita eos adjuvare credatur, ut ad libertatem dandum servis suis possessionem pervenire?

§ 7. When certain bounds were prescribed by the law Ælia Sentia to all under twenty, with regard to manumission, it was observed, that any person, who was fourteen complete, might make a testament, institute an heir, and bequeath legacies, and yet that no person, under twenty, could confer liberty; which was not longer to be tolerated: for can any just cause be assigned, why a man, permitted to dispose of all his effects by testament, should be debarred from infranchising his slaves? But liberty being of inestimable value, and our ancient laws prohibiting any person to make a grant of it, who is under twenty years of age, We therefore make choice of a middle way, and permit all, who are in their eighteenth year, to confer liberty by testament. For since, by all former practice, persons at eighteen were permitted to plead for their clients, there is no reason, why the fame stability of judgment, which qualifies them to assist others, should not be of advantage to themselves, by enabling them to infranchise their own slaves.

TITULUS SEPTIMUS.

De lege Fufia Caninia tollenda.

C. vii. T. 3.

LEG.E Fufia Caninia, certus modus constitutus erat in servis testamento manumittendis; quam, quæ libera libenter impedirem et quodammodo invidam, tollendam esse censuimus: cum fatis fuerat inhumanum, vivos quidem licentiam habere totam suam familiaris libertatem donare, nisi aia causa impediat libertatem; morientibus autem hujusmodi licentiam adimere.

By the law Fufia Caninia, all masters were restrained from manumitting more, than a certain number, by testament; but we have thought proper to abrogate this law, as odious and destructive of liberty; judging it inhuman, that persons in health should have power to manumit a whole family, if no just cause impedes the manumission, and that those, who are dying, should be prohibited from doing the same thing by testament.
Titulus Octavus.

De his, qui sunt vel alieni juris sunt.

D. i. T. 6.

Altera divisi personarum.

Equitur de jure personas aliqua divisione; nam quaedam personae sunt juris sunt, quaedam alieni juris sunt, quaedam persona sunt juris sunt. Rursus earum, quae alieni juris sunt, aliae sunt in potestate parentum, aliae in potestate dominorum. Videamus itaque de his, quae alieno juris sunt; nam, si cognoverimus, quaeam itaque personae sunt, simul intelligemus, quae sunt juris sunt; ac prius inspiciamus de his, quae in potestate dominorum sunt.

We proceed to another division of persons, for some are independent, and some are subject to the power of others. Of those, who are subject to others, some are in the power of parents, others in the power of their masters. Let us then inquire, what persons are in submission to others; for, when we apprehend, who these persons are, we shall at the same time discover those, who are independent. Our first inquiry shall be concerning those, who are in the power of masters.

De jure gentium in servos.

§ I. In potestate itaque dominorum sunt servi, quae quidem potestas juris gentium est; nam apud omnes per quas gentes animadvertere possimus, dominis in servos vitæ necisque potestatem suisse: et, quodcumque per servum acquiritur, id domino acquiri.

§ 1. All slaves are in the power of their masters, which power is derived from the law of nations: for it is equally observable among all nations, that masters have always had the power of life and death over their slaves, and that whatsoever is acquired by the slave is acquired for the master.

Vitae necisque potestatem.] This power was abridged by the law Carullia de Sicariis, ann. U. "should not suffer death, unless upon cons. 673, and by the law Petronia de servis, in 813. "viciton of some capital crime before a master. It was afterwards entirely taken away by the "giodrata."

De jure civium Romanorum in servos.

§ II. Sed hoc tempore nullis hominibus, qui sub imperio nostro sunt, securi, sine causa legibus cognita, in servos suos supra modum sive ire. Nam, ex constitutio divi Antonini, qui sine causa servum suum occiderit, non minus puniri jubetur, quam si alienum servum occiderit. Sed et major. aperitas dominorum, quidem principis constitutione, coercetur: nam Antoninus, confutus a quibusdam praefidibus provinciarum de his servis, qui ad aedem sacrarum vel filiarem principum fugiunt, praecepit ut, si intolerabilis videatur sevita dominorum, cogantur servos suos bonis conditio

nibus.
nibus vendere, ut pretium dominis daretur; et recte: expediet enim rei
publicae, ne sua re quis male utatur. Cujus reipristi, ad Aelium Martianum
mifi, verba sunt hec. Dominorum quidem potestatem in sive illibatam esse
optet, nec cum quam bonum jus suum detrahi. Sed et dominorum inter-
esse, ne auxilia contra seviitam, vel fame, vel intolerabilem injuriam, de-
negetur ies, qui juslae depencantur. Ideo cognoscit de querelis eorum, qui
ex familia Jullii Sabini ad sacram flatuam confugerunt; et, si vel duris
habitos, quam aequum est, vel infami injustia affectus esse, cognoveris,
venire jube; ita ut in potestatem domini non revertantur: quod si mee con-
stitutioni fraudem fecerit, sitat, me boe admixtum adversus se severius exe-
cuturum.

§ 2. All persons, under our imperial government, are now prohibited to inflict any
extraordinary punishment upon their slaves, without a legal cause. For, by a constitu-
tion of Antoninus, it is enacted, that whoever kills his own slave, without a just
cause, is not to be punished with less rigor, than if he had killed a slave, who was the
property of another. The too great severity of masters is also restrained by another
constitutions, made by the same prince: for Antoninus, being consulted by certain go-
 vernors of provinces concerning these slaves, who take sanctuary either in temples, or
at the statues of the emperors, Ordained, that, if the severity of masters should ap-
pear at any time excessive, they might be compelled to make sale of their slaves upon
equitable terms, so that the full worth of such slaves might be given to their masters:
and this constitution seems just and reasonable, inasmuch as it is a maxim, expedient
for the commonwealth, "that no one should be permitted to misuse even his own pro-
erty." The rest of this emperor, sent to Aelius Martianus, is conceived in the
following words.—The power of masters over their slaves ought by no means
to be wrongfully diminished, neither ought any man to be deprived of his just
right. But it is for the interest of all matters, that relief against cruelties, the de-
nial of sustenance, or any other insufferable injury, should not be refused to those,
who justly implore it. Therefore take cognizance of all complaints, made by those
of the family of Jullius Sabinus, whose slaves took sanctuary at the sacred statue;
and, if you are made sensible of their having been more hardly treated than they
ought, or of their having suffered any great injury, order them to be forthwith
sold; and in such a manner, that they may never more be made subject to their
former master: and, if Jullius Sabinus endeavours by any fraud to evade our con-
stitution, be it known to him, that such his offenses shall be punished with the
utmost rigor.

Ad sacram flatuam.] It was antiently the poli-
cy of almost all kingdoms to allow of sanctuaries,
or places of refuge; and they are said to have
been permitted in England, almost as soon as
christianity was received. In the 8th year of
Henry the eighth, the following points (which will
give the reader some idea of the power of san-
ctuaries) were affirmed and resolved in the case
of Savage;—To wit; that in England, the pope
without the king could not make a sanctuary:
that sanctuaries must commence with a grant
from the king, and then be confirmed by the
pope; but that, if they began by a bull from the
pope, it would be insufficient, altho' they were
afterwards confirmed by the king. — that the
general words amicitia, praecinctus, clausura, in
such grants, whether papal, or regal, did only
include the church, cloyster, dormitory, and
church yard; but extended not to gardents,
barns, stables, and the like.— That sanctuaries
de juris communi was only for 40 days (which was a
privilege belonging to all parochial churches
and church-yards) and that sanctuary for life,
or as long as the person pleased, (which was a
usual privilege of religious houses,) depended up
on special grants; and that those grants, together
with customs and usage thereupon, were to be well
proved, or otherwise declared null and void, be-
in
Titulus Nonus.

De Patria Potestate.

C. viii. T. 47.

Summa tituli.

In potestate nostra sunt liberi nostri, quos ex justis nuptiis procreavimus.

The children, whom we have begotten in lawful wedlock, are under our power.

In potestate nostra.] The citizens of Rome had antiently the power of life and death, over their children. This despotic authority was established by Romulus, and afterwards confirmed by an expert law in the twelve tables.—Endo liberis in viis, necis, venandandique potestas patri efo.

But, as the Romans grew politer in their manners, this law of course became obsolete, and was re-
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Gratified by the opinions of lawyers, and diverse imperial constitutions, many years before the reign of Justinian.

Inaudita filium pater occidere non potest, sed accepi ex pupis profeclium præsidemus provinciæ debet. Ulp. de adulteris.

Si filius tuus in potestate tua est, rex acquisitis tibi alienare non potuit; quæm, si pietatem patri debitis non egregius, confugiter juris patriæ potestatis non prohiberis: accipere remedium ujurs et in pari centum actis profecerat; quemque profili provinciae oblatus, dicentur justissimæ, quam in quoque dicitururis. Cod. 8, t. 47.

Definitio nuptiarum.

§ I. Nuptiæ autem, sive matrimonium, est viri et mulieris conjunctio, individuum vitæ confectudinem continens.

§ 1. Matrimony is a social contract between a man and woman, obliging them to an inseparable cohabitation during life.

Qui habent in potestate.

§ II. Jus autem potestatis, quod in liberos habemus, proprium est civium Romanorum; nulli enim aliis 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 there is no other people, who have the same power over their children, which we have over ours.

Talœa in libera.] The power of parents, a kor, although it did not extend absolutely over the lives of their children, as heretofore.

Qui sunt in potestate.

§ III. 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 nepissis, seque in tua sunt potestate; et pronepos, et proproetis, et deinceptis ceteri. Qui autem ex filia tua nascuntur, in potestate tua non sunt; sed in patris eorum.

§ 3. The issue of yourself and your legal wife are immediately under your own power. Also the issue of a son and son's wife, that is, either grand-sons or grand-daughters by them, are equally in your power; and the same may be said of great-grand-children, &c. But children born of a daughter will not be in your power, but in the power of their own father, or father's father, &c.
Titulus Decimus.

De Nuptiis.


Qui possunt nuptias contrabere.

Justas autem nuptias inter se cives Romani contrahunt, qui secundum præcepta legum coeunt, masculi quidem puberes, fœminæ autem viri potentes; quin patres familiarium sint, quin filii familiarum; dum tamen, si filii familiarium sint, consensum habeant parentum, quorum in potestate sunt: nam, hoc fieri debere, et civilis et naturalis ratio suadet, in tantum, ut justus parentis præcedere debeat. Unde quæsitum est, an furiosi filia nubere, aut furiosi filius uxorem ducere, possit? Cumque super filio variabatur, nostra proceñit deciçiò, qua permissum est ad exemplum filiæ furiosi, filium quoque furiosi possit, et sine patris interventu, matrimonium fiti copulare, secundum datum ex nostra constitutione modum.

The citizens of Rome contract valid marriage, when they follow the precepts of the law; the males, when they arrive at puberty, and the females, when they attain to a marriageable age. The males, whether they are patres familiarium, fathers of a family, or filii familiarium, sons of a family; but, if they are the sons of a family, they must first obtain the consent of the parents, under whose power they are. For reason, both natural and civil, convinces us, that the consent of parents should precede marriage: and hence it became a question, whether the son of a madman could contract marriage? But, the opinions of lawyers being various, we published our decision, by which the son, as well as the daughter of a madman, is permitted to marry without the intervention of his father, provided always, that the rules set forth in our constitution, are observed.

Inter se cives Romani.] The words civis Romanus, or Roman citizens, comprehend all free-men in subjection to the empire.

In orbe Romano qui sunt, ex constitutis imperatoris Antonini civis Romanus est fuit.] De statu hominum, ff. 1. 5. 1. 17. Nov. 78. cap. 5.

Masculi quidem puberes.] Publicly is esteemed by the law of England, as well as by the civil law, to commence in males at fourteen complete, and in females at twelve. But in England persons may legally enter into matrimony before puberty: and a female, when she has completed her ninth year, is entitled to divorce, altho' her husband at his death was but seven, or even four years of age. Co. Litt. p. 31. a 33 a. 40. a. But, when there is a marriage before puberty, the woman may dissent from it, at twelve or after, and the man at fourteen or after; and there needs no new marriage, if they so agree; but disagree they can not by force the said ages, and then they may disagree, and marie against to others without any divorce; and, if they once after give consent, they can never disagree after. If a man of the age of fourteen marie a woman of the age of ten, or her age of twelve, he may as well disagree as the other, and he more, he were of the age of consent; because it contracts of marriage either both must be bound, or equal election of disagreement given to both; and so, and converso, if the woman be of the age of consent, and the man under. Co. Litt. p. 78. b. 79. a.

But, in contrastus De futuro, the law is totally different. For a contract de futuro is of no force, if both the parties are under the age of twenty-one; but if one of the parties is twenty-one complete, the contract will be binding to that party. Hult. a. Ward. Trin. 5. G. 2.

Sive patres familiarum.] Among the Romans, all, who were sine postulis, or independent, or no man's son, unmarried, or even not arrived at puberty,
ty, were denominated according to their sex, either patres familiarum, or matres familiarum. For, in these appellations, it was not intended, that the person only should be demonstrated, but also the right.

Civium Romanorum quidam sunt patres familium; quidam matres familiarum. Patres familiarum sunt, qui sunt sevel potestatis, sevel TABUBEBES; sevel implicuberes familiae, modo matres familiarum. 

Pater familias appellatur, qui in domo dominium habet; replevit hoc nomine appellatur, quanvis sitium non habeat. Non enim felam personam ejus, s quy et jus, demonstraturus. 

Confinum habeant parentum. The law of England requires the consent of parents, or guardians, to the marriage of their children, or wards, who are under the age of 21 years. See the canons of 1603, canon 62, 63, 100, 101, 102. But the penalty in consequence of the marriage of a minor without the consent of his parents, or guardians, was chiefly levied at the minister, who was liable to be suspended for three years; for although the consent of parents or guardians was required, previous to the marriage of minors, yet if the marriage had been celebrated by a priest without such consent, it was always held to be valid and binding; and from hence, some bad men among the clergy took occasion to do much mischief, by marrying all, who offered themselves; whose numbers daily increased, by the strictness of the ecclesiastical officers in granting licences, and the obedience of the clergy in general to the canons of the church.

It was therefore thought necessary, in the reign of King William the third, to enact, "that every person, who shall marry any person without banns or licence, or shall knowingly permit any other minister to marry any persons in any church or chapel to such person belonging, shall forfeit 100 pounds, one moiety to his majesty, and the other to the informer. And that every man to married shall forfeit 10 pounds, and that every sexton or parish clerk assisting shall forfeit 5 pounds."

And, in the 10th year of Q. Anne, it was farther enacted by statute: "that if a parson, vicar or "curate, is in prison, and the gaoler shall knowingly permit such clergyman to celebrate marriage before publication of banns, or licence obtained, he shall forfeit 100 pounds." 

But these laws, strict as they may appear, were yet found, by experience, to be ineffectual: for those of the clergy, who were capable of offending, had seldom any sort of preterment, so that suspension to them could be little or no punishment; and, when the statutes were enforced, it generally happened, that the protector was the greatest sufferer, thro' the poverty of the party prosecuted; so that the insufficiency of all these laws to effect the good purposes, for which they were intended, rendered it absolutely necessary to make a law, which, if I may be allowed the expression, should execute itself.

This law is the statute of the 26th of K. George the second, by which it is ordained, in imitation of the Roman law (and not in contradiction to any divine precept; see Milton's Tetraborn.) "that all marriages celebrated, without banns, or licence first had, shall be null and void, to all intents and purposes; and that the clergyman, who shall be proved to have solemnized any such marriage, shall be transported to some of his Majesty's plantations in America for 14 years." 26 Geo. 2.

For particulars the reader is referred to the act at large, which tends in general to settle property, and wipe disgrace from the nation.

Cumque super filio. As the children of a daughter are not under the power of her father, the consent of the father is, by the civil law, not so essential, but that it may be dispensed with upon extraordinary occasions; although regularly the precedent consent of the father, even of an emancipated daughter under the age of twenty-five years, was as necessary to confirm the marriage, as the consent of the father of the intended husband. c. 5. 14. 11. 18, 20.

Secundum datum.] The rules, if forth in the constitution, are, that at Rome the curators of the father must give the portion with the approbation of the praefect of the city; and that, in the provinces, the portion must be given with the approbation of the governors. C. 1. 4. 1. 28.

Quae uxor et duci possunt vel non. De cognatis, ac primum de parentibus et liberis.

§ I. Ergo non omnes nobis uxorces ducere licet: nam a quarundam nuptiis abstinendum est: inter eas enim personas, quae parentem libermo rumvse locum inter se obtinent, contrahit nuptias non possunt; veluti inter patrem et filiam, vel avum et neptem, vel matrem et filium, vel aviam et nepotem, et usque in infinitum: et, si tales personas inter se coierint, necarias atque inceptas nuptias contraxisse dicuntur: et haec adeo vera sunt, ut
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ut, quamvis per adoptionem parentum liberorumve loco sibi esse cœperint, non possunt inter se matrimonio jungi; in tantum, ut etiam, dissoluta adoptione, idem juris maneant. Itaque eam, quae tibi per adoptionem filia vel neptis esse cœperit, non poteris uxorem ducere, quamvis eam emancipaveris.

§ 1. We are not permitted to marry all women without distinction; for there are some, with whom marriage is forbidden. For matrimony must not be contracted between parents and their children, as between a father and daughter, a grandfather and his grand-daughter, a mother and her son, a grand-mother and her grand-son; and the same prohibition extends with respect to all ascendants and descendants in a right line in infinitum. And, if such persons cohabit together, they are said to have contracted a criminal and incestuous marriage; which is undoubtedly true; inasmuch as the place of parents and children by adoption, can by no means marry; and the same law remains in force, even after the adoption is dissolved. Whoever therefore hath once been either your adopted daughter or grand-daughter, the same cannot afterwards be taken by you to wife, alio modo, hath been emancipated.

De fratribus et sororibus.

§ 2. Inter eas quoque personas, quae ex transferendo gradu cognitionis junguntur, est quædam similitudinem observatio, sed non tanta. Sane enim inter fratrem sororemque nuptiae prohibite sunt, five ab eodem patre eademque matre nati fuerint, five ab altero eorum. Sed, si qua per adoptionem foror tibi esse cœperit, quamdiu quidem constat adoptio, fane inter te et eam nuptiae consistere non possunt; cum vero per emancipationem adoptio sit dissoluta, poteris eam uxorem ducere: sed et si tu emancipatus fueris, nihil est impedimento nuptiis. Et ideo constat, si quis generum adoptare velit, debere eum antea filiam suam emancipare: et si quis, velit nurem adoptare, debere eum antea filium suum emancipare.

Marriage is also prohibited between collaterals, but the prohibition is not so great an extent, as that, which relates to parents and their children. A brother and sister are forbidden to marry, whether they are the children of the same father and mother, or of either. And, if any person becomes your sister by adoption, as long as such adoption subsists, a marriage contracted between her and you can not be valid. But, when the adoption is destroyed by emancipation, she may then be taken to wife. Also if yourself are emancipated, there will not then remain any impediment, although your sister by adoption is not so. From hence it appears, that, if a man would adopt his son-in-law, he should first emancipate his daughter, and that, whoever would adopt his daughter-in-law, should previously emancipate his son.

Marriage in England is forbidden only between such persons, who are prohibited to marry by the levitical law, which is adjudged, in the collateral lines, to extend no farther than the third degree. But the prohibition is equally binding, whether the persons are related by affinity, or consanguinity. The levitical computation of degrees is the same as the computation in the civil law, by which there are counted as many degrees, as there are persons, the common flock not being reckoned. This was also the ancient manner of computing by the canon law, according to some authors, who suppose, that pope Alexander the second, perceiving dispenations to be greatly lucrative to the church, and being at the same time conscious, that it had universally obtained, that persons might marry in the fourth degree, began a new
new computation, according to which the can-
nonists have since reckoned all degrees, in the
equal transversal lines, from the common flock
on one side only: and, in the unequal transver-
sal lines, according to the distance of that per-
son, who is removed from the common flock.

It is evident from this alteration in, or revival
of, the canon laws, that not only first cousins but
also second, and third cousins, were prohibited
from matrimony; nor is it less evident, that so
extensive a prohibition must have caused frequent
dispensations.

But it was enacted by statute, in the reign of
Henry the eighth, that no prohibition (God's law
except) shall impede any marriage without the le-
vitical degrees. 32 Hen. 8. cap. 38.

*De fratris et fororis filia vel nepte.*

§ III. Fratris vero vel fororis filiam uxorem ducere non licet: sed nec
neptem fratris vel fororis quis ducere potest, quamvis quarto gradu sint:
cujus enim filiam ducere non licet, neque ejus neptem permittitur. Eius
vero mulieris, quam pater tuus adoptavit, filiam non videris prohiberi uxo-
rem ducere: quia neque naturali, neque civili, jure tibi conjungitur.

§ 3. It is unlawful to marry the daughter of a brother, or a sister; neither is it
lawful to marry the grand-daughter of a brother, or sister, albo' they are in the
fourth degree. For when we are prohibited to take the daughter of any person in
marriage, we are also prohibited to take his grand-daughter. But it appears not, that
there is any impediment against the marriage of a son with the daughter of her,
cubom bis father batb adopted; for they bear not to each other any relation either
natural or civil.

*De consobrinis.*

§ IV. Duorum autem fratrum vel fororum liberi, vel fratris et fororis,
conjungi possint.

§ 4. The children of two brothers, or two sisters, or of a brother and sister, may
legally be joined together in matrimony.

*De amita, matertera, amita magna, matertera magna.*

§ V. Item amitam, licet adoptivam, ducere uxorern non licet; item
nec materteram: quia parentum loco habentur. Qua ratione verum est,
magnam quoque amitam, et materteram magnam, prohiberi uxorern
ducere.

§ 5. A man is not permitted to marry his aunt on the father's side, albo' she is only
so by adoption; neither can a man marry his aunt on the mother's side; because they are
both esteemed to be the representatives of parents. And for the same reason no person
can contract matrimony with his great-aunt, either on his father's, or his mother's side.

Magnam quoque amitam.] By the law of
*England* it is otherwise; for upon a prohibition
for proceeding against a person in the ecclesiasti-
tical court, who had married the widow of his
great-uncle, it was determined by all the judges,
that such marriage, being in the fourth degree,
was not forbidden by the levitical law, and was
De affinisbus, et primum de privigna et nuru.

§ VI. Affinitatis quoque veneratione a quarundam nuptiis abstinere necesse est: ut ecce privignam aut nurum ducere non licet: quia utraque filia loco sunt: quod ita scilicet accipi debet, si fuit nurus aut privigna tua. Nam, si adhuc nurus tua est, id est, si adhuc nupta est filio tuo, aliaratione uxorem eam ducere non poteris: quia eadem duobus nupta esse non potest. Item si adhuc privigna tua est, id est, si mater ejus tibi nupta est, ideo eam uxorem ducere non poteris, quia duas uxorres eodem tempore habere non licet.

§ 6. We are under a necessity of abstaining from certain marriages, thro a veneration for affinity; for it is unlawful to marry a wife's daughter, or a son's wife, in that both are in the place of daughters: and this rule must be understood to relate not only to those, who actually are, but also to those, who have been, our daughters-in-law at any time. For marriage with a son's wife, whilst she continues to be his wife, is prohibited on another account, viz. because the same woman can not, at one and the same time, be the wife of two. And the marriage of a man with his wife's daughter, whilst her mother continues to be his wife, is also prohibited, because it is unlawful for one man to have two wives at the same time.

De socru et noverca.

§ VII. Socium quoque et novercam prohibitum est uxorem ducere: quia matris loco sunt: quod et ipsum, dissoluta demum affinitate, procedit: ahiquin, si adhuc noverca est, id est, si adhuc patri tuo nupta est, communem jure impeditur tibi nubere, quia eadem duobus nupta esse non potest. Item si adhuc socrus est, id est, si adhuc filia ejus tibi nupta est, ideo impedientur tibi nuptae, quia duas uxorres habere non potes.

§ 7. A man is forbidden to marry his wife's mother, and his father's wife, because they both hold the place of mothers: and this injunction must be observed, also the affinity is dissolved: for, omitting our veneration for affinity, a father's wife, whilst she continues to be so, is prohibited to marry, because no woman can have two husbands at the same time. A man is also restrained from marriage with his wife's mother, her daughter continuing to be his wife, because it is against the law to have two wives.

De comprivignis.

§ VIII. Mariti tamen filius ex alia uxor, et uxoris filia ex alio marito, vel contra, matrimonium recte contrahunt; licet habeant fratrem sororem 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, and, e contra, the daughter of an husband by a former wife and the son of a wife by a former husband may lawfully contract marriage, even tho' a brother, or sister, is born of such second marriage between their respective parents.

De quasi privigna, quasi nuru, et quasi noverca.

§ IX. Si uxor tua post divorcium ex alio filiam procreavit, haec non est quidem privigna tua: sed Julianus ab hujusmodi nuptiis abstineri debere ait:
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ait: nam conflat, nec sponsam filii nurum esse, nec patris sponsam nover-cum esse: rectius tamen et jure facturos eos, qui ab hujusmodi nuptiis abstinuerint.

§ 9. If a wife, after divorce, brings forth a daughter by a second husband, such daughter is not to be reckoned a daughter-in-law to the first husband. It is nevertheless the opinion of Julian, that we ought to abstain from such nuptials. It is also evident, that the efpouled wife of a son is not a daughter-in-law to his father; and that the efpouled wife of a father, is not a stepmother to his son: yet those, who abstain from such nuptials, demean themselves rightly.

Si uxor tua post divorcium. It will be sufficient in this place to observe, that divorces with us are either a menfa et thoro, or, a vinculo matrimonii. A divorce, a menfa et thoro, separates only from bed and board, but does not bastardize the children, who were begotten before such divorce; and personas so divorced may afterwards live together, if they mutually consent. But a divorce, a vinculo matrimonii, entirely dissolves the bond of marriage ab initio, so that the issue is bastardized, and the parties divorced are at liberty to marry. But, if either of the personas dies before the sentence of divorce is pronounced, the sentence ought not to be pronounced afterwards, and therefore the issue is esteemed legitimate. For a marriage even within the levitical degrees is voidable only, and not void, until sentence is given. Vaugh. 208. 220.

The causes of divorce a vinculo matrimonii are now three only, confanguinity, affinity, and impotence; for, by the late act of the 26th of Geo. the second, precontract has ceased to be of this number; and all divorces for other causes than these three, which are precedent to matrimony, are only a menfa et thoro, from bed and board: for a divorce on account of cruelty does not dissolve a marriage, but is only allowed for the safety of the woman against ill usage: and even in a case of adultery the sentence of an ecclesiastical court has no other effect than to separate the parties without affecting the bond of matrimony: but, in cases of adultery in the woman, it is common to obtain an act of parliament for the absolute dissolution of the marriage.

De servili cognatione.

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

§ 10. It is not to be doubted, but that servile cognation is an impediment to matrimony, as when a father and daughter, or a brother and sister, are manumitted.

Impedimento nuptiis.] Altho' the relation of father and daughter, brother and sister, &c. produced no ill effect among slaves, whilst they continued so, yet it became a bar to matrimony after their infranchishment.—Sempem enim in contrabundis matrimonii naturale jus et poter inspeditur.—And personas so nearly related, as father and daughter, brother and sister, &c. even in a state of slavery, were not permitted to cohabit together in contrabundi. Vinn.
§ XI. Sunt et aliae personae, quae propter diversas rationes nuptias contrahere prohibentur, quas in libris digestorum seu pandectarum, ex jure veteri collectarum, enumerari permнимus.

§ 11. There are, besides these already mentioned, many other persons, who, for diverse reasons, are prohibited to marry with each other; all whom we have caused to be enumerated in the digests, collected from the old law.

Sunt et aliae personae. Senatores were prohibited to marry with libertines; tutors and curators with their wards, &c. ff. 23. t. 2. l. 16. 42. 44. 57. 66. de ritu nupt.

De pænis injustiarum nuptiarum.

§ XII. Si advertus ea, quæ diximus, aliqui coierint, nec vir, nec uxor, nec nuptiae, nec matrimonium, nec dos intelligitur. Itaque ii, qui ex eo coitu nascuntur, in potestate patris non sunt: fed tales sunt (quantum ad patriam potestatem pertinet), quales sunt ii, quos mater vulgo concepit. Nam nec hi patrem habere intelliguntur, cum et iis pater incertus sit; unde solent spurii appellari, ἐπιταυτοῖς, et apatores, quasi fine patre filii. Sequitur ergo, ut, disjutimo tali coitu, nec dotis, nec donationis ex actioni locus sit. Qui autem prohibitias nuptias contrahunt, et alias poenas patiuntur, quæ facris constitutionibus continentur.

§ 12. If any persons presume to cohabit together in contempt of the rules, which we have here laid down, they shall not be deemed husband and wife, neither shall their marriage, or any portion given on account of such marriage, be valid: and the children, born in such cohabitation, shall not be under the power of their father. For, in respect to paternal power, they resemble the children of a common woman, who are looked upon as not having a father, because it is uncertain, who be is. They are therefore called in Latin spurii, and in Greek ἀπατῶρες; i.e. without a father: and from hence it follows, that, after the dissolution of any such marriage, no portion, or gift, propter nuptias, can legally be claimed. But these, who contrahi such prohibited matrimony, must undergo the farther punishments set forth in our constitutions.

Constitutionibus.] vid. Cod. 5. t. 5. l. 4. 6. cum autb: sequente, quæ multum irrogat pecuniariam, infamiam, et cum infamia poenam superi. Finn.

De legitimatione.

§ XIII. Aliquando autem eventit, ut liberi, qui identim, ut nati sunt, in potestate parentum non sunt, potestas redigantur in potestate patris: qualis est, qui dum naturalis fuerat, potestas curiae datus, potestati patris subjiciatur: nec non est, qui, a muliere libera procreates, cujus matrimonium minus legibus interdicto fuerat, sed ad quam pater confuetudinem habuerat, potestas, ex nostra constitutione dotalibus instrumentis compositis, in potestate patris efficietur. Quod et aliis liberis, qui ex codem matrimonio fuerint procreati, similiter nostra constitutione præbuit.

§ 13. It sometimes happens, that the children, who at the time of their birth were not under the power of their parents, are reduced under it afterwards. Thus a natural
Titulus Undecimus.

De Adoptionibus.


Continuatio.

Non solum autem naturales liberi, secundum ea, quae diximus, in potestate nostra sunt; verum etiam ii, quos adoptamus.

It appears from what has been already said, that all natural children are subject to paternal power. We must now add, that not only natural children are subject to it, but those also, whom we adopt.

Naturales liberi.] The word natural is here used for legitimate.

Divisio adoptionis.

§ I. Adoption autem duobus modis fit, aut principali rescripto, aut imperio magistratus. Imperatoris auctoritate adoptare, quis potest eos, eave, qui, quaeve, sui juris sunt, quae species adoptionis dicitur arrogatio. Imperio magistratus adoptamus eos eave, quaeve in potestate parentum sunt; five primum gradum liberorum oblineant, qualis est filius, filia; five inferiores, qualis est nepos, neptis, pronepos, proneptis.

§ 1. Adoption is made two ways, either by a rescript from the emperor, or by the authority of the magistrate. The imperial rescript impowers us to adopt persons of
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Actus sextus, quos sunt sui juris, i.e. independent and not under the power of parents, and this species of adoption is called arrogatio. But it is by the authority of the magistrate, that we adopt persons actually under the power of their parents, whether they are in the first degree, as sons and daughters, or in an inferior degree, as grandchildren, or great grandchildren.

Adoptio ante hon. It is certain, that adoption was never practiced in England. Sir Edward Coke writes thus concerning it. We remember not that we have read in any book of the legitimation of adoption of an heir, but only in Bradden, and that to no little purpose. But the future adoption is to make good assurance of the land by learned advice. The passage referred to in Bradden, is these words. Legitimationem etiam quandoque, quas pro adoptionem, et de confectione et voluntate parentum, ut si uxor aliquis de aliquo conceptus quam de suo sui, et, licet de hoc constituerit in velatoriam, si opinum in hominum suae futurum et adversarium sit filium, satis est legitimus; vel si expugna non adversarius, dum tamquam illum non amovet, foret vir ordine ignora- verit, vel jacor, vel dabis tem, talis legitimum ut bene judicabirur, sed quod nascetur de utero, dum tamatem profasisset, quod potuit ipsum genuisse. Brafil. lib. 2. cap. 29.

Qui possunt adoptare filium-familias, vel non.

§ 2. Sed hodie, ex nostra constitutione, cum filii-familias a patre naturali extraneo personae in adoptionem datur, jura patris naturalis minime dissolvuntur; nec quicumque ad pattern adoptionem transit, nec in potestate ejus est: licet ab intestato jura succedionis ei a nobis tributa sint. Si vero pater naturalis non extraneo, sed avo filii sui materno, vel si ipse pater naturalis fuerit emancipatus, etiam avo vel proavo simili modo paterno vel materno filium sum dererit in adoptionem, in hoc caussi, quia concurrunt in unam personam et naturalia et adoptionis jura, manet stabile jus patris adoptivi, et naturali vinculo copulatum, et legitimo adoptionis modo constitutum, ut et in familia et in potestate huysimodi patris adoptivi sit.

§ 2. But now, by our constitution, when the son of a family is given in adoption by his natural father to a stranger, the right of paternal power in the natural father is not dissolved, neither does any thing pass to the adoptive father, neither is the adopted son in his power, although such son is by us allowed to have the right of succession to his adoptive father, if he dies intestated. But if a natural father should give his son in adoption, not to a stranger, but to the maternal grandfather, he should give his son, begotten after emancipation, to his paternal or maternal grandfather, or great-grandfather, in this case, the rights of nature and adoption concurring, the power of the adoptive father is established both by natural ties and legal adoption, so that the adopted son would be both in the family, and under the power of his adoptive father.

Ex nostra constitutione.] Cod. 8. t. 47. l. pen. De adoptionibus. Before this constitution, adoption was dissolved by adoption, which frequently proved an injury, instead of a benefit, to those, who were adopted.

Non extraneo.] Extrantam autem personam intelligit Jutinianus omnem, qua extra lineam parentum fit: unde qui a patre aut avunculo adoptatus fuit, perinde baberi debent, ac si a quovis extraneo adoptati forent. Vinn. h.t.

De arrogatione impuberis.

§ III. Cum autem impubes per principale rescriptum arrogatur, causa cognita, arrogatio fieri permititur: et exquiritur causa arrogationis, an bona est, expeditiaque pupillae et cum quibusdam conditionibus arrogatio E 2
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fit; id est, ut caveat arrogator personæ publicæ, si intra pubertym pupil- lus decesserit, restituturum se bona illis, qui, si adoptio facta non esset, ad sucessionem ejus venturi essent. Item non aliter emancipare eum potest arrogator, nisi causa cognita, dignus emancipatione fuerit; et tunc sua bona ei reddat. Sed et, si decedens pater eum exhaereditaverit, vel vivus sine jufta causa emancipaverit, jubetur quartam partem ei bonorum suorum relinquere; videlicet, præter bona, quæ ad patrem adoptivum transtulit, et quorum commodum ei posita acquisivit.

§ 3. When any person, not arrived at puberty, is arrogated by the imperial rescript, the cause is first inquired into, that it may be known, whether the arrogation is justly founded, and expedient for the pupil: for such arrogation is always made on certain conditions; and the arrogator is obliged to give caution before a public notary, whereby binding himself, if the pupil should die within the age of puberty, to restore all the goods and effects of such pupil to those, who would have succeeded him, if no arrogation had been made. The arrogator is also prohibited to emancipate, unless he has given legal proof, that his arrogated son deserves emancipation; and even then he is bound to make full restitution of all things belonging to such son. Also if a father, upon his death-bed, hath disinfantit his arrogated son, or when in health hath emancipated him, without a just cause, then the father is commanded to leave the fourth part of all such goods to his son, besides what such son brought to him at the time of arrogation, and acquired for him afterwards.

Bonom.] With us the word "goods" does not comprehend those things, which are in the nature of freehold, or parcel of it; but denotes only chattels. But in the civil law the word be-

De ætate adoptantis et adoptati.

§ IV. Minorem natum majorem non posse adoptare placet: adoptio enim naturam imitatur; et pro monstro est, ut major sit filius, quam pa-
ter. Debet itaque is, qui ibi filium per adoptionem aut arrogationem fac-
it, plena puberty [id est, decem et octo annis] precedere.

§ 4. A junior is not permitted to adopt a senior; for adoption imitates nature; and it seems unnatural, that a son should be older than his father. He therefore, who would either adopt or arrogate, should be a senior to his adopted or arrogated son; by full puberty, that is, by eighteen years.

De adoptione in locum nepotis vel nepitis, vel deinceps.

§ V. Licet autem et in locum nepotis vel nepitis, pronepotis vel pro-
neptis, vel deinceps, adoptare, quamvis filium quis non habeat.

§ 5. It is lawful to adopt a person either as a grand-son or grand-daughter, great grand-son or great grand-daughter, or in a more distant degree, albo the adoptor bath no son.

De adoptione filii alieni in locum nepotis, et contra.

§ VI. Et tam filium alienum quis in locum nepotis adoptare potest, quam nepotem in locum filii.
§ 6. A man may adopt the son of another as his grand-son, and the grand-son of another as his son.

De adopzione in locum nepotis.

§ VII. Sed si quis nepotis loco adoptet, vel quasi ex filio, quem habet jam adoptatum, vel quasi ex illo, quem naturalem in sua potestate habet, eo cauē et filius consentire debet, nec ei invito suus hæres agnascatur. Sed, ex contrario, si avus ex filio nepotem det in adoptionem, non est necesse, filium consentire.

§ 7. If any man, who has already either a natural or an adopted son, is desirous to adopt another, as his grand-son, the consent of his son, whether natural or adopted, ought in this case to be first obtained, lest a suus hæres, or proper heir, should be intruded upon him. But, on the contrary, if a grand-father is willing to give his grand-son in adoption, the consent of the son is not necessary.

Qui dari possunt in adoptionem.

§ VIII. In pluris autem causis assimilatur is, qui adoptatus vel arrogatus est, ei, qui ex legitimo matrimonio natus est; et ideo, si quis per imperatorem, vel apud prætorem, vel præsidem provinciæ, non extraneum adoptaverit, potest cundem in adoptionem alii dari.

§ 8. He, who is either adopted or arrogated, bears similitude in many things to a son born in lawful marriage; and therefore, whoever is adopted either by rescript, or before a praetor, or before the governor of a province, the same, if he be not a stranger, may be given in adoption to another.

Non extraneum adoptaverit.] No person can give another in adoption, who is not under his power; and it appears by the second paragraph of this title, that, if Titius should adopt a stranger, the stranger would not be subject to Titius, but still remain under the power of his natural father; and it therefore follows, that Titius could not give such stranger in adoption to another.

Si is, qui generare non potest, adoptet.

§ IX. Sed et illud utriusque adoptionis commune est, quod et ii, qui generare non possunt, quales sunt Spadones, adoptare possunt: castrati autem non possunt.

§ 9. It is observed as a common rule both in adoption, and arrogation, that such, who are impotent [whom we denominate Spadones] may adopt children, but that those, who are castrated, cannot adopt.

Quales sunt Spadones.] Those, who were denominted Spadones, might also marry, as well as adopt, as there was a possibility of their becoming potent. And by marriage they were intituled to have an action pro dote. See 25. t. 3. l. 39. de jure dotum. The emperor Leo, in his novels, permitted even castrated persons to adopt. Leon. Nov. 26.

Si fœmina adoptet.

§ X. Fœminæ quoque arrogare non possunt, quia nec naturales liberos in sua potestate habent: sed, ex indulgentia principis, ad foliatum liberorum amissorum adoptare possunt.

§ 10.
§ 10. Women are also prohibited to adopt; for the law does not permit them to have even their own children under their power: but, when death has deprived them of their children, they may, by the indulgence of the prince, adopt others, as a comfort and recompense for their loss.

Sed ex indulgentia.] R. 5. t. 2. l. 29. de insufficien. testamento.

De liberis arrogatis.

§ XI. Ilud proprium est adoptionis illius, quæ per facrum oraculum fit, quod is, qui liberos in potestate habet, si se arrogandum dederit, non solum ipse potestati arrogatoris subjicitur, sed etiam liberij ejus sunt in eius potestate, tantum nepotes. Sic eterum divus Augustus non ante Tiberium adoptavit, quam is Germanicum adoptavit; ut protinus, arro-gatione facta, inciperet Germanicus Augusti nepos esse.

§ 11. It is peculiar to that kind of adoption, which is made by rescript, that, if a person, having children under his power, should give himself in arrogation, both he, as a son, and his children, as grand-children, would become subject to the power of the arrogator. It was for this reason, that Augustus did not adopt Tiberius, till Tiberius had adopted Germanicus; so that Tiberius became the son, and Germanicus the grandson of Augustus, at the same instant, by arrogation.

Hoc proprium est.] For in common adoptio-
s, made before a magistrate, no other person can pass under the power of the adoptor, than the single person, whom he adopts; and the reason of this difference between adoption and arrogatio is plain. "Nam in adoptionem domum filii familiarum, quorum liberi sunt in potestate alterius; nemo ejus, qui in adoptionem daret: idemque etiam in illius potestate remanet. Arrogantur autem patres familiarum, qui eum ipsi liberos suos in patrebatem babent, nihil remanet, si secum etiam illius, in familia et potestate alienam, transferant." Vinn. b. 1.

§ 12. The following answer of Cato was approved of by the ancient lawyers, viz. that slaves, adopted by their masters, obtain freedom by the adoption. And, from hence instructed, we have enacted by our constitution, that a slave, whom any master nominates to be his son, in the presence of a magistrate, becomes free by such nomination, although it does not convey to him any filial right.

De servo adoptato, vel filio nominato, a domino.

§ XII. Apud Catonem bene scriptum refert antiquitas, servos, si a domino adoptati sint, ex hoc ipso posse liberari. Unde et nos eruditi, in nostra constitutione, etiam eum servum, quem dominus, actis intervenientibus, filium suum nominaverit, liberum esse constituimus: licet hoc ad jus filii accipiendum non sufficiat.
Titulus Duodecimus.

Quibus modis jus patriæ potestatis solvitur.


Scopus et nexus. De morte.

Videamus nunc, quibus modis ii, qui alieno juri sunt subjecti, eo jure liberentur. Et quidem, quemadmodum liberentur servi a potestate dominorum, ex iis intelligere possimus, quæ de servis manumittendis superioris expostulmus: hi vero, qui in potestate parentis sunt, mortuo eo, sui juris sunt. Sed hoc distinctionem recipit: nam, mortuo patre, sane omnimo modo illi, filiave, sui juris efficiuntur: mortuo vero avo, non omnimodo nepotes, necfies, sui juris sunt: sed ita, si post mortem avo in potestate patris sui recatur non sunt. Itaque, si, moriente avo, pater eorum vivit, et in potestate patris sui est, tunc post obitum avo in potestate patris sui sunt. Si vero is, quo tempore avus moritur, aut jam mortuus est, aut, per emancipationem, exit de potestate patris, tunc ii, qui in potestate ejus cadere non posse, sui juris sunt.

Let us now inquire how those, who are in subjection to others, can be freed from that subjection. The means, by which slaves obtain their liberty, may be fully understood by what we have already said in treating of manumission: but those, who are under the power of a parent, become independent at his death; yet this rule admits of a distinction. When a father dies, his sons and daughters are, without doubt, independent; but, by the death of a grand-father, his grand-children do not become independent, unless it happens, that there is an impossibility of their ever falling under the power of their father. Therefore, if their father is alive at the death of their grand-father, and they are still then under his power, the grand-children, in this case, become subject to the power of their father. But, if their father is either dead or emancipated before the death of their grand-father, they then can not fall under the power of their father, and therefore become independent.

De deportatione.

§ 1. Cum autem is, qui ob aliquod malesficiun in insulam deportatur, civitatem amittit, sequitur, ut, qui eo modo ex numero civium Romane- rum tollitur, perinde quasi eo mortuus, desineri in potestate ejus esse. Pari ratione et fit is, qui in potestate parentis sit, in insulam deportatus fuerit, desineret esse in potestate parentis. Sed, si ex indulgentia principis restitutioni fuerint per omnia, pristinum statum recipiunt.

§ 1. If a man, upon conviction of some crime, is deported into an island, he loses the rights of a Roman citizen; and it follows, that the children of such a person cease to be under his power, as if he was naturally dead. And, by a parity of reasoning,
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foning, if a son is deported, be ceases to be under the power of his father. But, if by the indulgence of the prince a criminal is wholly restored, be regains instantly his former condition.

Deportatur.] Deportation denotes a perpetual banishment, and is so called, because the criminal is as it were carried from the rights, which he had in his native country; for, by this punishment, he lost the birth-right of a citizen, his paternal power, his estate, and his right of succession.

De relegatione.

§ II. Relegati autem patres in Insulam in potestate liberos retinent, et liberi relegati in potestate parentum remanent.

§ 2. A Father, who is relegated, retains his paternal power; and a son, who is relegated, still remains under the power of his father.

Relegati.] Relegation imports either a perpetual or temporary banishment. But a sentence of relegation did not necessarily deprive a man of the rights of a citizen; and in general it was a much milder punishment, than deportation.

Mnfsinger.

De servitute pœnæ.

§ III. Pœnæ servus effectus filios in potestate habere definit. Servi autem pœnæ efficiuntur, qui in metallum damnantur, et qui bestias subjiciuntur.

§ 3. When a man is judicially pronounced to be the slave of punishment, be loses his paternal jurisdiction. The slaves of punishment are those, who are condemned to the mines, or sentenced to be destroyed by wild beasts.

Servi autem pœnæ.] The slaves of punishment are so called, because they have no other matter, than the labor or punishment to which they are condemned. Viuss. h. t.

De dignitate.

§ IV. Filius-familias, si militaverit, vel si senatorem, vel consul factus fuerit, remanet in potestate patris: militia enim, vel consularis dignitas, de patris potestate filium non liberat. Sed, ex constitutione nostra, summa patriciana dignitas illico, imperialis codicillis praetitis, filium a patria potestate liberat. Quis enim patiatur, patrem quidem posse, per emancipationis modum, potestatis sue nexitus filium liberare; imperatorium autem celsitudo nem non valere eum, quem patrem siti elegit, ab aliena eximere potestate?

§ 4. If the son of a family becomes a soldier, a senator, or a consul, he shall remain under the power of his father, from which neither the army, the senate, nor consular dignity can emancipate him. But it is enabled by our constitution, that the patrician dignity, conferred by our special diploma, shall be free every son from all paternal subjection. For it is absurd to think, that a parent may emancipate his son, and that the power of an emperor should not be sufficient to make any person independent, whom he hath chosen to be a father of the commonwealth; or, in other words, a senator.

Constitutione nostra.] Cod. 12. 1. 3. 1. 5. De consulis.

Patriciatus dignitas.] During the republic the title of patricians was conferred on those only, who were the descendents of those senators, whom Remus had created: and Livy testifies, that in his time the children of every antient senatorial family were nominated patricians.
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Patricii eorum senatumque præges in ducis
Remolius creavit: hoc tamem attace, antiquissi-
num exsurgens senatuum familiae liberis patricii ap-
pellantur. But, after the translation of the seat of the empire to Constantiopolis, those only were
called patricians (quasi patres communes urbis publicae)
who, having been Curule magistrates, were chosen by the emperors to be councillors of state.

De captivitate et postliminio.

§ V. Si ab hostibus captus fuerit pater, quamvis servus hostium sit,
tamen pendent jus liberorum, propter jus postliminii: quia hi, qui ab hosti-
bus capti sunt, si reveri fuerint, omnia prætina jura recipiunt: idcirco re-
versus etiam liberos habebit in potestate: quia postliminium fingit eum,
qui captus est, in civitate semper possesse. Si vero ibi decesserit, exinde, ex
quo captus est pater, filius sui juris suam videtur. Ipsa quoque filius, ne-
poße, si ab hostibus captus fuerit, similiter dicimus, propter jus postliminii,
jus quoque potestatis parentis in suspensio esse. Dicitum autem est postlimi-
nium a limine et postr. Unde eum, qui ab hostibus captus est, et in fines
nostros poëta pervenit, postliminium reversum recte dicimus. Nam li-
mina sicut in domo finem quendam faciunt, sic et imperii finem esse
limen vetere voluerunt. Hinc et limen dictum est, quo finis quidam et
terminus. Ab eo postliminium dictum est, quia ad idem limen revertex-
tur, quod amiserat. Sed et, qui captus victus hostibus recuperatur, postlimi-
nium redisse exigitur.

§ 6. If a parent is taken prisoner by the enemy, although he be thus becomes a slave,
yet be loses not his paternal power, which remains in suspense by reason of a privilege
granted to all prisoners; namely, the right of return: for captives, when they obtain
their liberty, are possessed of all their former rights, in which paternal power of
course must be included; and, at their return, they are supposed, by a fiction of law,
ever to have been absent. If a prisoner dies in captivity, his son is deemed to have
become independent, not from the time of the death of his father, but from the com-
 mencement of his captivity. Also, if a son, or grand-son, becomes a prisoner, the
power of the parent is said, for the reason before assigned, to be only in suspense. The
term postliminium is derived from postr and limen. We therefore apply the ex-
pression reversus postliminium, when a person, who was a captive, returns within our
own confines.

De emancipatione, item de modis et effectibus ejusdem.

§ VI. Praeterea emancipatione quoque definunt liberi in potestate pa-
rentum esse. Sed emancipatio antea quidem vel per antiquam legis obser-
vationem procedebat, quæ per imaginarias venditiones et intercedentes ma-
umissiones celebrabant, vel ex imperiali rescripto. Nostra autem pro-
dentia etiam hoc in melius per constitutionem reformavit: ut, fictione præ-
tina explofa, recta via ad competentem iudices, vel magistratus, parentes in-
trant, et filios suos vel filias, vel nepotes vel nepthes, ac deinceps, a sua ma-
nu dimittant. Et tune, ex edicto praetoris, in bonis ejusmodi filii vel filiae, vel
nepotis vel nepthis, qui eaque a parente manumissit et manumissa fuerit,
aedem jura praebuntur parenti, quæ tribuuntur patrono in bonis liberti. Et
praeterea, si impubes sit filius, vel filia, vel ceteri, ipse parens ex manum missione tutelam ejus nanciscitur.

§ 6. Children also cease to be under the power of their parents by emancipation. Emancipation was effected according to our ancient law, either by imaginary sales and intervening manumissions, or by the imperial rescript; but it has been our care to reform these ceremonies by an express constitution, so that parents may now have immediate recourse to the proper judge or magistrate, and emancipate their children, grand-children, &c. of both sexes. And also, by a praetorian edit, the parent is allowed to have the same right in the goods of those, whom he emancipates, as a patron has in the goods of his freed-man. And farther, if the children emancipated were within the age of puberty, the parent, by whom they were emancipated, obtains the right of wardship or tutelage, by the emancipation.

Emancipatio ante quidem. It was enacted by a law of the twelve tables, "that a son was not free from paternal power, 'till he had been thrice sold by his father." [§ 6. S. 2. filius servus, filius a patre liber esto. That the condition of a son was worse than that of a slave. But, altho' this law soon lost its force, yet the formal part of it was retained, and three sales were still thought requisite to effect the emancipation of a son, altho' they were but imaginary. There was therefore always a feigned contract, made between the father and a person, whom he could confide in, called pater fiduciarium, who after each sale restored the son into the hands of his father. The emperor Augustus was the first, who dispensed with these fictitious sales by his rescript; but Justinian entirely abolished them, having ordained, "that all persons might emancipate their children without the observance of such vain ceremonies."

Si alii emancipentur, alii retineantur in potestate.

§ VII. Admonendi autem sumus, liberum arbitrium esse ei, qui filium, et ex eo nepotem vel nepem, in potestate habet, filium quidem de potestate dimittere, nepotem vero vel nepem retinere: et, è converso, filium quidem in potestate retinere, nepotem vero vel nepem manumittere: vel omnes sui juris efficere. Eadem et de pronepote et pronepte dicta esse intelliguntur.

§ 7. A parent having a son under his power, and by that son a grandson or grand-daughter, may emancipate his son, and yet retain his grandson or grand-daughter in subjection. He may also manumit his grandson or grand-daughter, and still retain his son under his power; or, if he is so disposed, he may make them all independent. And the same may be said of a great-grandson, or a great-grand-daughter.

De adoptione.

§ VIII. Sed et, si pater filium, quem in potestate habet, avo, vel pro avo naturali, secundum nostras constitutiones super his habitas, in adoptionem dederit, id est, si hoc ipsum actis intervenientibus apud competentem judicem manifesterit, praevente eo, qui adoptatur, et non contradentem, nec non eo praevente, qui adoptat, solvitur quidem jus potestatis patris naturalis; transit autem in hujusmodi parentem-adoptivum; in cujus perisona et adoptionem esse plenissimam ante diximus.

§ 8. If a father gives his son in adoption to the natural grand-father, or great-grand-father of such son, strictly adhering to the rules laid down in our constitutions for
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De nepote nato post filium emancipatam.

§ IX. Illud scire oporet, quod si natus ex filio tuo conceperit, et filium tuum emancipaveris, vel in adoptionem dederis, praeincante nascitur, nihilominus, quod ex ea nascitur, in potestate tua naicitur. Quod si post emancipationem vel adoptionem conceptus fuerit, patris sui emancipati, vel avi adoptivi, potestas subjicitur.

§ 9. Et in necessario esse notabile, ut, si a sors iustae concepit, et duxerit adSynopsis adoptionem, his euis praebente, in potestate tua naicitur. Quod si post emancipationem vel adoptionem conceptus fuerit, patris sui emancipati, vel avi adoptivi, potestas subjicitur.

Patris sui emancipati, vel avi adoptivi. [In England, if a man hath a wife, and dieth, and within a very short time after the wife marries again, and within nine months hath a child, so as it may be the child of the one, or of the other, there have been, that in this case the child may have his father, quis filiatio nostro probatur: for avoiding of which question, and other incertainties, this was the law before the conquest: Six omnis vidua sine marito duodecim menibus, et, si maritaretur, perdit dotem. Co. Lit. 3. s. D. Ang. Sax. Wilkins, Ed. 109, 122, 144.]

By the civil law a second marriage, in a man or woman, is condemned, tho' not absolutely forbidden. But a widow is prohibited to marry, infra annum latus, under severe penalties. Si qua ex femininis, postulo marito, infra annum patrum illi nuptias sanctius, tandem id ipsum ex ilium suos homines, pro bruta integritate, beneficium nobilium pueri, suos et suos privato: argum sanctum, quos de prima mariti bonis, vel juris sponsalium, vel judicio derivati coniugali, conferens parenti, animat. Lapp. Gisculiana, Valentiniana, et Theodotus AAA. Europo F. P. Cod. 5, t. 9.

An parentes cogi possunt liberos suos de potestate dimittere?

§ X. Et quidem neque naturales liberi, neque adoptivi, ullo pene modo possunt cogere parentes de potestate suae eos dimittere.

§ 10. Children, either natural or adopted, can rarely compel their parents by any method to dismiss them from sucession.

Ullpene modo.] It is true in general, that parents could not be obliged to emancipate their children, and that their children could not be compelled to be emancipated. But these rules were not without exception: for a son might have compelled his father to emancipate him on various accounts, but particularly for cruelty. Divus Iustani filium, quem pater male contra pietatem officiabat, cogit emancipare. D. 37, t. 12. l. 9. D. 35, t. 1, l. 50. Cod. 1, t. 4, l. 12. D. t. 7, l. 32.

And a father might also have forced his son to be emancipated in all cases, which would have justified him in disinheritance such son. vid. Baut. i, l. 132. D. 4, t. 1, Mynh. 5, t. 5.
LIB. I. TIT. XIII.

TITULUS DECIMUS-TERNIUS.

De tutelis.

D. xxvi. T. i. Nov. 72.

De personis sui juris.

Transseamus nunc ad aliam divitionem perfonarum. Nam ex his personis, quae in potestate non sunt, quaedam vel in tutela sunt, vel in curatone, quaedam neutro juro tenentur. Videamus ergo de his, quae in tutela vel curatone sunt: ita enim intelligemus ceteras personas, quae neutro juro tenentur. Ac prius discipiamus de his, qui in tutela sunt.

Let us now proceed to another division of persons. Of those who are not in the power of their parents, some are under tutelage, some under curatone, and some under neither. Let us then inquire what persons are under tutelage and curatone; for thus we shall come to the knowledge of those who are not subjects to either. We will first treat of those persons who are under tutelage.

In tutela vel curatone.] By the law of England the term guardianship denotes either the tutelage or the curation of minors; and of guardianship there are three kinds, by common law, by statute, and by particular custom. First, by common law there were formerly four species of guardians; but guardianship in chivalry having been taken away by 12 Car. 2. there now remain but three, viz. guardianship by nature, by nurture, and in socage. 3 Co. rep. 77. b.

Secondly, by statute; for by 4 and 5 Ph. and M. cap. 8. a father, or mother after the father's death, without assignation, are guardians of women's children. And by 12 Car. 2. "A father under age, or of full age, by deed in his life-time, or by will, in presence of two witnesses, may dispose the custody of his child under twenty-one years of age, and not married at the time of his death, whether then born, or in utero;" so mere, during his non-age, to any in poesia, or remainder, other than to Popish relations; which persons may maintain any action of trespass against wrongful takers away, and detainers of such child, and recover damages for the child's use, and may take into their custody his lands and personal estate, according to such disposition, and bring actions, as guardian in socage might do.

Before this act, a tenant in socage, of age, might have disposed of his lands by deed, or left will, in trust for his heir, but not the custody of his heir; for the law gave that to the next of kin, to whom the land could not descend. Vamgh. 178.

And 3dly, By particular custom, as in London, where the tuition of orphans unmarried, who are the children of freemen, belongs by custom, to the city. Co.Litt. 88. b.

Tutelae definition.

§ 1. Est autem tutela (ut Servius definit) vis ac potestas in capite liberum, ad tuendum eum, qui per aetatem se defendere nequit, jure civilis data ac permissa.

§ 1. Tutelage, as Servius has defined it, is an authority and power, given and permitted by the civil law, and exercised over such independent persons, who are unable, by reason of their age, to protect themselves.
Lib. I. Tit. XIII.

Definitio et etymologia tutoris.

§ II. Tutores autem sunt, qui eam vim ac potestatem habent; exque ipsa re nomen acceperunt. Itaque appellantur tutores, quas tutores atque defensores; sic et整齐 dicuntur, qui ædes tuentur.

§ 2. Tutores are those, who have the authority and power before mentioned; and they take their name from the nature of their office. For they are called tutors, quasi tutores; as those, who have the care of the sacred buildings, are called ædilis, quod ædes tuentur.

Quibus testamento tutor datur: et primum, de liberis in potestate.

§ III. Permissum est itaque parentibus liberis impuberibus, quos in potestate habent, testamento tutores dare: et hoc in filios filiisque procedit omnimodo: nepotibus vero nepotibusque ita demum parentes postrunt testamento tutores dare, si post mortem eorum in potestate patris sui non sunt recusari. Itaque, si filius tuus mortis tuae tempore in potestate tua sit, nepotes ex eo non poterunt ex testamento tuo tutores habere, quamvis in potestate tua fuerint: sic licet, quia, mortuo te, in potestate patris sui recausuri sunt.

§ 3. Parents are permitted to assign tutors by testament to such of their children, who are not arrived at puberty, and are under their power. And this privilege of parents extends without exception over sons and daughters. But grand-fathers can only give tutors to their grand-children, when it is impossible, that such grand-children should ever fall under the power of their father, after the death of their grand-father. And therefore, if your son is in your power at the time of your death, your grandchildren by that son can not receive tutors by your testament, alio modo they were actually in your power, because at your decease they will become subject to their father.

Tutores dare.] Because after puberty curators only can be appointed.

De posthumis.

§ IV. Cum autem in compluribus aliis causis posthumi pro jam natis habeantur, et in hac causa placuit non minus posthumis, quam jam natis tutores dari posse; si modo in ea causa sint, ut, si vivis parentibus nascensrentur, sui heredes et in potestate corum fierent.

§ 4. As posthumous children are in many cases reputed to have been born before the death of their fathers, therefore tutors may be given by the testament of a parent as well to a posthumous child, as to a child already born, if such posthumous child had been born in the life-time of his father, would have been his proper heir and under his power.

De emancipatis.

§ V. Sed et, si emancipato filio tutor a patre datus fuerit testamento, confirmandus est ex sententia praesidis omnimodo, id est, sine inquisitione.

§ 5.
§ 5. But, if a father gives a tutor by testament to his emancipated son, such tutor must be confirmed by the sentence of the governor of the province without inquisition.

Sine inquisitione.  

Tutore, sed eum in liberdade, autroque tutore dat, ut eum dubitentur in sua ente iure praedicto, aequum esse autem, quod tempore tempus, tempore facta, et tempore facta, facta. That is, without inquiring, whether the person appointed to be a tutor is in good circumstances, or whether he is otherwise qualified to conduct the affairs of his pupil: for, in relation to these points, the sole testimony of the deceased gives a perfect satisfaction. Theoph. 6. 1.

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Titulus Decimus-Quartus.

Qui testamento tutores dari possunt.


Qui tutores dari possunt.

Dari autem tutor potest testamento non solum pater-familias, sed etiam filius-familias.

Not only the father of a family may be appointed by testament to be a tutor, but also the son of a family.

De servo.

§ 1. Sed et servus proprius testamento cum libertate recte tutor dari potest: sed siendum est, et sine libertate tutorem datum tacite libertatem directam accepisse videri; et per hoc recte tutorem esse: plane, si per errorem, quafi liber, tutor datus sit, alius dicendum est. Servus autem alius, inutiliter testamento datur tutor: sed ita, cum liber erit, utiliter datur. Proprius autem servus inutiliter eo modo tutor datur.

§ 1. A man may by testament assign his own slave to be a tutor with liberty. But note, that, if a master by testament appoints his slave to be a tutor without mentioning liberty, such slave seems tacitly to have received immediate liberty, and is thus legally enabled to commence a tutor: yet, if a testator thro' error, imagining his slave to be a free person, by testament appoints him, as such, to be a tutor, the appointment will not avail. Also the absolute appointment of another man's slave to be a tutor is altogether ineffectual: but, if the appointment is upon condition, that the person appointed obtains his freedom, then it is made profitably: but, if a man by testament appoints his own slave to be a tutor, when he shall obtain his liberty, the appointment will be void.

De furioso et minore viginti-quinque annis.

§ II. Furiosus, vel minor viginti-quinque annis, tutor testamento datus, tutor tunc erit, cum compos mentis, aut major viginti-quinque annis, fuerit factus.

§ 2.
§ 2. If a madman, or a minor, is by testament appointed to be a tutor, the one shall begin to act, when he becomes of sound mind, and the other, when he has completed his twenty-fifth year.

Purifius vel minor.] The same law is also observed in England, in respect to madmen and minors. But it must be noted, that with us the minority of all persons determines at the age of twenty-one years complete. Cae. Let. 79. b.

Quibus modis tutorum dantur.

§ III. Ad certum tempus, vel ex certo tempore, vel sub conditione, vel ante heredis institutionem, posse dari tutorum non dubitatur.

§ 3. It is not doubted, but that a testamentary tutor may be given either to a certain time, or from a certain time, or conditionally, or before the institution of an heir.

Ad certum tempus.] e.g. Let Titius be my son's tutor until the calends of December.

Ex certo tempore.] e.g. Let Titius commence to be my son's tutor after the expiration of two years.

Sub conditione.] e.g. Let Titius take upon him the tutelage of my son, if the ship Argo returns from Asia.

Ante heredis institutionem.] e.g. Let Titius be tutor to my son, and let Titius also be my heir.

It must here be observed, that the civil law calls him heir, who succeeds to the whole estate of another, whether it is real or personal.

But, by the law of England, he only is heir, who succeeds to a real estate of inheritance by the act of God, and by right of blood. Ca. Lett. 237. b.

And he, who succeeds to personal estate, or goods, is in law called an executor, if he succeeds by the appointment of the deceased in his last will; or administrator, if he succeeds by the appointment of the ordinary.

Cui dantur.

§ IV. Certae autem rei, vel causae, tutor dari non potest: quia formæ, non causa vel rei, tutor datur.

§ 4. A tutor can not be assigned to any particular thing, or upon any certain account, but can only be given to persons.

De tutore dato filiabus, vel filiis, vel liberis, vel nepotibus.

§ V. Si quis filiabus suis, vel filiis, tutores dederit, etiam posthumæ vel posthumo dedisse videtur: quia, filii ei filiae appellacione, et posthumus et postuma continentur. Quod si nepotes sint, an appellacione filiorum et ipsius tutores dati sint? Dicendum est, ut et ipsius quoque dati videantur, si modo liberos dixerit; ceterum, si filios, non continentur. Aliter enim filii, aliter nepotes appellantur. Plane, si pueris dederit, tam filii posthumi, quam ceteri liberi, continentur.

§ 5. If a man by testament nominates a tutor for his sons or his daughters, the same person seems also to be appointed tutor to his posthumous issue, because, under the appellation of son or daughter, a posthumous child is comprehended. But, should it be questioned, whether grand-children are denoted by the word sons, and can receive tutors by that denomination, we answer, that under the general term, children, grand-children are undoubtedly included, but that the word sons does not comprehend them: for the word son, and grandson, widely differ in their signification. But, if a testator assigns a tutor to his descendents, it is evident, that not only his posthumous sons are comprehended, but all his other children.
Quibus autem testamento tutor datus non est, his, ex lege duodecim tabularum, agnati sunt tutores, qui vocantur legitimi.

The Agnati are, by the law of the twelve tables, appointed to be tutors to those, to whom no testamentary tutor was given; and these tutors are called legitime.

Quibus autem] By a law in the twelve tables, if a man died intestate, and had no children, the agnati were called to the legitime inheritance. But, if the intestate had a child, the agnati were then called to the legitime tutelage. For it was the opinion of the Romans, that as the next heir to the pupil was most interested in the estate, he was therefore the most proper person to take care of it. But Solon was of a very different opinion. Lege autem Solonis (fays Laetius) tutela non deferebatur agnatis, nisi remotionibus, contraria habita ratione, quod fere quisque conatus esset, quem proximus hares inquisuit, expugnare. Vinn. And our own law goes still farther; for he, who is guardian in socage, must be the next of blood, who can never inherit: for example, if the lands of a minor descented to him from his mother, then the wardship belongs to the uncle on the side of the father; but, if the lands of a minor descented from his father, then the uncle on the mother's side must be guardian in socage. And the same rule ought also to be observed for the common benefit of all minors, whose inheritances do not lie in tenure. Co. Litt. 87. b.

Qui vocantur legitimi.] These tutors are called legitime, because tutelage, when there is no testamentary tutor, devolves upon the agnati merely by the act of the law, without the intervention of any magistrate. Quippe legitimos tutores nemo dat. 25. t. 4. l. 5.

 Qui sunt agnati.

§ 1. Sunt autem agnati cognati, per virilis sexus cognitionem conjuncti, quasi a patre cognati: veluti frater ex eodem patre natus, fratris filius, neposve ex eo: item patruus et pratrius filius, neposve ex eo. At, qui per femininum sexus personas cognitione junguntur, agnati non sunt, sed alias naturalis jure cognati. Itaque amicis et fratri illius non est tibi agnatus, sed cognatus: et invicem tu illi eodem jure conjungeris: quia, qui ex ea nascuntur, patris, non matris, familiae sequuntur.

§ 1. Agnati are those, who are collaterally related to us by males, as a brother by the same father, or the son of a brother, or by him a grandson; also a father's brother, or the son of such brother, or by him a grandson. But those, who are related to us by a female are not said to be agnate, but cognate, bearing only a natural relation to us. Thus the son of a father's sister is not related to you by agnation, but by cognation, and you are related to him in the same manner; that is, by cognation; for the children of a father's sister follow the family of their father, and not that of their mother.

Sunt autem agnati.] The distinction, between the agnati and cognati, is entirely taken away by justification. Nov. 118. cap. 4, 5.
LIB. I. TIT. XVI.

Quis dicatur intestatus.

§ II. Quod autem lex duodecim tabularum ab intestato vocat ad tutelam agnatos, non hanc habet significacionem, si omnino non fecerit testamentum is, qui poterat tutores dare; sed si, quantum ad tutelam pertinent, intestatus decesserit: quod tunc quoque accidere intelligitur, cum is, qui datus est tutor, vivo testatore decesserit.

§ 2. The law of the twelve tables, in calling the agnati to tutelage in case of intestacy, relates not solely to persons altogether intestate, in whose power it was to have appointed a tutor, but extends also to ibose, who are intestate only in respect to tutelage; and this may happen, if a tutor, nominated by testament, should die in the lifetime of the testator.

Quibus modis agnatio, vel cognatio, finitur.

§ III. Sed agnationis quidem jus omnibus modis capitis diminutione plerumque perimitur: nam agnatio juris civilis nomen est; cognitionis vero jus non omnibus modis commutatur: quia civilis ratio civilia quidem jura corrumpere potest, naturalia vero non utique.

§ 3. The right of agnation is taken away by almost every diminution, or change of state; for agnation is but a name given by the civil law; but the right of cognition is not thus altered; for albo' civil policy may extinguish civil rights, yet over our natural rights it has no such power.

TITULUS DECIMUS-SEXTUS.

De capitis diminutione.

D. iv. T. 5.

Definitio et divisio.

Est autem capitis diminutio prioris status mutatio; eaque tribus modis accidit: nam aut maxima est capitis diminutio, aut minor, (quam quidam medium vocant,) aut minima.

Diminution is the change of a man's former condition, which is effected three ways, according to the threefold division of diminution into the greater, the less, and the least.

De maxima capitis diminutione.

§ I. Maxima capitis diminutio est, cum aliquis simul et civilatem et libertatem amittit; quod accidit his, qui servi poenae efficiuntur atrocitate sententiae; vel libertis, ut ingratis erga patronos condemnatis; vel his, qui se ad pretium participandum venundari passi sunt.
§ I. The greater diminution is, when a man loses both the right of a citizen and his liberty, which is the case of those, who by the rigor of their sentence are pronounced to be the slaves of punishment — and of freed-men, who are condemned to slavery for ingratitude to their patrons — and of all such, who suffer themselves to be sold, in order to become purchasers of 'the price.'

Vel libertas ut ingratis.] In England, if a villein was once manumitted, although afterwards became ingrateful in the highest degree, yet the manumission remained good. 1 Inst. 137. b. Libertinum ingratum leges civiles in prifinam redigunt foriuitum, sed leges Angliae semel manumissionem sancper libereum judicant, gratum et ingratum. Fort. de laud. 2. Angliae, cap. 46.

Ingrat.] The emperor Claudius first inflicted this punishment upon libertines or freed-men. Ingratos libertinum (lugis Suspectum) et de quibus patroni quererentur, recovocit in foriuitum. And Constantine afterwards promulgated a law to the same effect.

Imp. Constant. ad Maximum.

Si manumissius ingratus circa patronum fuisse sit, et quosdam fiant, vel contaminatus, veritatem adversus eum confestit, a patrono purissus sub imperio ditissimus mittatur. Cod. 6. t. 7. l. 2. ann. Dom. 319.

But this is not the Roman law only copied from the Athenians, who permitted a patron to bring an action called doxoria against such freed-persons, who had been remiss in their duty, and to reduce them to their prifin status of bondage, if the charge was proved. Archæologia Greac. vol. 1. p. 153.

And, in the year 567, the emperors Valentinian, Valens, and Gratian, enacted, "that children, who had behaved ingrately after emancipation, should forfeit their liberty by being reduced under the power of their parents."

Imp. Valentin. Valens, et Gratianus, AAA.

Filios (et filias, castraeque liberos) contaminantes, qui parentes vel acerbitate convivii vel cujuscumque atrocis injuriis dolere, putassest, leges emancipati

De media.

§ II. Minor, five media; capitis diminutio est, cum civitas quidem amittitur, libertas vero retinetur; quod accidit ei, cui aqua et igni interdictum fuerit, vel ei, qui in insulam deportatus est.

§ 2. The less or middle diminution is, when a man loses the rights of a citizen, but retains his liberty; which happens to him, who is forbidden the use of fire and water, or to him, who is transported into an island.

De minima.

§ III. Minima capitis diminutio est, cum civitas retinetur et libertas, sed status hominis commutatur; quod accidit his, qui, cum sui juris fuerint,
Lib. I. Tit. XVI.

rint, ceperunt alieno juri subjecti esse; vel contra, veluti si filius-familias a patre emancipatus fuerit, est capite diminutus.

§ 3. The least diminution is only said to have been suffered, when the condition of a man is changed without the forfeiture either of his civil rights, or his liberty; as when he, who is independent, becomes subject by adoption, or when the son of a family hath been emancipated by his father.

De servio manumissio.

§ IV. Servus autem manumissus capite non minuitur, quia nullum, caput habuit.

§ 4. The manumission of a slave works not any change of state in him, because he had, before manumission, no state or civil capacity.

De mutatione dignitatis.

§ V. Quibus autem dignitas magis quam statum permutatur, capite non minuuntur; et ideo, a senatu motos capite non minuit, constat.

§ 5. Those, whose dignity is rather changed than their state, are not said to have suffered diminution, and therefore it appears, that they, who are removed from the senatorial dignity, do not suffer diminution.

Interpretatio § ult. sup. tit. prax.

§ VI. Quod autem dictum est, manere cognitionis jus estiam post capitis diminutionem, hoc ita est, si minima capitis diminutio interveniat: manet enim cognatio. Nam, si maxima capitis diminutio interveniat, jus quoque cognitionis perit, ut puta servitute alicujus cognati; et ne quidem, si manumissus fuerit, recipit cognitionem. Sed et, si in insulam quis deportatus sit, cognitione solvitur.

§ 6. What has already been said in a section of the preceding title, to wit, that the right of cognition remains after diminution, relates only to the least diminution. For, by the greater diminution, as for instance, by servitude, the right of cognition is wholly destroyed, even so as not to be recovered by manumission. The right of cognition is also lost by the less or medium diminution, as by deportation into an island.

Ad quos agnatos tutela pertinet.

§ VII. Cum autem ad agnatos tutela pertineat, non simul ad omnes pertinet, sed ad eos tantum, qui proximior gradus sunt: vel si plures ejusdem gradus sunt, ad omnes pertinet; veluti si plures fratres sunt, qui unum gradum obtinunt, pariter ad tutelam vocantur.

§ 7. Alsi the right of tutelage belongs to the cognati, yet it belongs not to all the cognati in common, but to those only, who are in the nearest degree. But, if there are many in the same degree, the tutelage belongs to all of them, however numerous. For example, if there are several brothers; they are all called equally to tutelage.
Lib. I. Tit. XVII.

Titulus Decimus-septimus.

De legitima patronorum tutela.


Ratio, ob quam patronorum tutela dicitur legitima.

Ex eadem lege duodecim tabularum, libertorum et libertarum tutela ad patronos liberofique eorum pertinet, quæ et ipsa legitima tutela vocatur; non quia nominatim in ea lege de hac tutela caveatur; sed quia perinde accepta est per interpretationem, ac si verbis legis introducěta efficerat.

Eo enim ipso, quod hæreditates libertorum libertarumque, si intestati depressissent, jussaret lex ad patronos liberofique eorum pertinere, crediderunt vetere, voluisset legem, etiam tutelas ad eos pertinere; cum et agnatos, quos ad hæreditatem lex vocat, eosdem et tutores esse jussisset, quia plerumque, ubi succedissent est emolumentum, ibi et tutela onus esse debet.

Ideo autem diximus plerumque, quia, si fœmina impubes manumittatur, ipsa ad hæreditatem vocatur, cum alius sit tutor.

By the same law of the twelve tables, the tutelage of freed-men, and freed-women, is adjudged to belong to their patrons, and to the children of such patrons: and this tutelage is called legitime, alioquin it exists not nominally in the law, but it is as firmly established by interpretation, as if it had been introduced by express words. For, inasmuch as the law commands, that patrons and their children shall succeed to the inheritance of their freed-men or freed-women, who die intestate, it was the opinion of the ancient lawyers, that tutelage also by implication should belong to patrons and their children. And the law, which calls the agnati to the inheritance, commands them to be tutors, because the advantage of succession ought to be attended in most cases with the burden of tutelage. We have said, in most cases, because where any person, not arrived at puberty, is manumitted by a female, such female is called to the inheritance, but not to the tutelage.

Cum alius sit tutor.] The tutelage of a child, by the civil law, could not regularly be committed to a woman.

Feminae tutores duri non possint, quia id manus masculorum eff. ff. 26. t. 1. l. 18. De tutelis.

But the mother or grandmother was allowed by constitution to execute this office upon condition, that she bound herself solemnly not to contract a second marriage. Cod. 5. t. 35. l. 2.

Nov. 118. cap. 5.

But in England women, as well as men, are equally permitted to become Guardians.
LIB. I. TIT. XVIII, XIX.

TITULUS DECIMUS- OCTAVUS.

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, impuberem emancipaverit, legitimus eorum tutor erit.

In similitudine of the tutelage of patrons, another kind of tutelage is received, which is also called legitime; for, if any parent emancipates a son or a daughter, or a grandson or a grand-daughter, who is the issue of that son, or any others descended from him by males in a right line and not arrived at puberty, then shall such parent be their legitime tutor.

TITULUS DECIMUS-NONUS.

De fiduciaria tutela.

Filiis-familias a patre manumisit pater tutor est legitimus; eo vero defuncto, frater tutor fiduciarius existit.

Est et alia tutela, quae fiduciaria appellatur: nam, si parens filium vel filiam, nepotem vel neptem, vel deinceps, impuberem manumiserit, legitimam nanciscitur eorum tutelam: quo defuncto, si liberi ejus virilis sexus exsistent, fiduciarii tutores filiorum fuorum, vel fratris, vel sororis, vel ceterorum, efficiuntur. 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 efficeretur, nec in fratrum potestatem recideret, ideoque nec in tutelam. Libertus autem, si servus manumisset, utique eodem jure apud liberos domini post mortem ejus futurus efficit. Ita tamen hi ad tutelam vocantur, si perfectae sint aetas; quod nostra constitutio in omnibus tutelis et curationibus observavi generaliter praecepit.

There is another kind of tutelage called fiduciary; for, if a parent emancipates a son or a daughter, a grandson or a grand-daughter, or any other of his children, not arrived at puberty, he is then their legitime tutor: but, at his death, his male children of age become the fiduciary tutors of their own sons, or of a brother, a sister, or of a brother's children emancipated by the deceased. But, when a patron, who is a legitime tutor, dies, his children also become legitime tutors. The reason of which difference is this: a son, albeit he was never emancipated, becomes independent at the death of his father; and therefore, as he falls not under the power of his brothers, it follows, that he can not be under their legitime tutelage. But the condition of a slave is not altered at the death of his master; for he then becomes a slave to the children of the deceased.
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deceased. It must here be noted, that the persons above mentioned can not be called to tutelage, unless they are of full age, and our constitution hath in general commanded this rule to be observed in all tutelages and curations.

Si perfecte sint etatis.] No man is said, by the civil law, to be perfecte etatis, unless the twenty-fifth year of his age is completed. Si quis absoluta dixerit perfecte etatis, illam tantummodo-

TITULUS VIGESIMUS.

De Atiliano tutore, et eo, qui ex lege Julia et Titia dabatur.


S I cui nullus omnino tutor fuerat, ei dabatur, in urbe quidem a praetore urbano et majore parte tribunorum plebis, tutor ex lege Atilia: in provinciis vero a praefidibus provinciarum ex lege Julia et Titia.

By virtue of the law Atilia, the praetor of the city, with a majority of the tribunes, had authority to assign tutors to all such, who otherwise were not intitled to tutors: but, in the provinces, tutors were appointed by the respective governors of each province, in consequence of the law Julia and Titia.

Ex lege Atilia.] The law Atilia was a Plebeian law, made in the year B.C. 444, by Lucius Atilius and Caius Martius, tribunes of the people. Marcellus.

But of the law Julia-Titia there is no certain account. Without much law suit, ut lex Julia et Papia sed, quando aut a quibus lata fit, parum constat.

Si spes fuit futuri tutoris testamentarii.

§ I. Sed et, si in testamento tutor sub conditione, aut ex die certo datus fuerat, quamdui conditio aut dies pendebat, ex iisdem legibus tutor alius interim dari poterat. Item si pure datus fuerat, quamdui ex testamento nemo hæres existebat, tamdui ex iisdem legibus tutor petendus erat, qui definebat esse tutor, si conditio extiterat, aut dies venerat, aut hæres ex-titerat.

§ I. If a tutor had been given by testament conditionally, or from a certain day, another tutor might have been assigned by virtue of the above named laws, whilst the condition depended, or 'till the day came. Also if a tutor had been given simply, i. e. upon no condition, yet, as long as the testamentary heir deferred taking upon him the inheritance, another tutor might have been appointed during the interval. But the office of such tutor ceased, when the cause ceased, for which he was appointed, as when the event of the condition happened, the day came, or the inheritance was entered upon.
Si in testamento. With us also guardians may be appointed either from a certain time, or conditionally: and, in either of these cases, the guardianship is committed, and the committe administer, 'till the term, for which he was assigned, is expired, or 'till the condition is fulfilled. Swin. 215.

Si tutor ab hostibus sit captus.

§ II. Ab hostibus quoque tutore capto, ex his legibus tutor petebatur, qui definebat esse tutore, fi is, qui captus erat, in civitate reversus fuerat: nam reversus recipiebat tutelam jure postliminii.

§ 2. By the Atilian and Julio-titian laws, if a tutor was taken by the enemy, another tutor was immediately requested, whose office ceased of course, when the first tutor returned from captivity; for he then resumed the tutelage by his right of return.

Quando et cur deserverint ex dictis legibus tutores dari.

§ III. Sed ex his legibus tutores pupillos deservunt dari, posteaquam primo consulibus utriusque sexus tutores ex inquisitione dare compelletur, dein praetores ex constitutionibus. Nam supradictis legibus neque de cautione a tutoribus exigenda, rem pupillos salvam fore, neque de compellendis tutoribus ad tutelam administrationem, quicquam cavebatur.

§ 3. The Atilian and Julio-titian laws, concerning the appointment of tutors, were first established, when the consuls began to give tutors to pupils of either sex, with inquisition; and the praetors were afterwards invested with the same authority by the imperial constitutions. For, by the above mentioned laws, no caution was required from the tutors for the security of their pupils, neither were these tutors compelled to act.

Jus novum.

§ IV. Sed hoc jure utimur, ut Româ quidem praefectus urbi, vel praetor secundum suam jurisdictionem, in provinciis autem praefides ex inquisitione tutores crearent, vel magistratus jufti praefidum, fi non sint magnum pupilli facultates.

§ 4. But, by the later usage, at Rome the prefect of the city, or the praetor according to his jurisdiction, and, in the provinces, the governors [each in his respective province] may assign tutors, after an inquiry into their morals and circumstances: and an inferior magistrate, at the command of a governor, may also appoint tutors, if the possessions of the pupil are not large.

Sec hoc jure.] In England, if a minor has no tutor, and is possessed only of goods and chattels, then the ordinary may commit the tuition of such minor to the next of kin, who demands it. 2 Lev. 162. 217. Swin. Part 3. Sec. 9. But, according to the usage of court christian, if the child is past seven years of age, it must be at his own request and nomination, that the judge appoints him a tutor; but, if the child is under the age of seven years, then the ordinary may proceed ex officio. Strahan.

And, in the court of chancery, a guardian can not be otherwise appointed, than by bringing the infant into court, or his praying a commission to have a guardian assigned him. Abr. of Cases in By. 260.

Jus novissimum.

§ V. Nos autem, per constitutionem nostram hujusmodi difficultates bominum referentes, nec expectata jussione praefidum, disposuiimus, si facultates
cultates pupilli vel adulti usque ad quingentes solidos valeant, defensores
civitatum una cum ejusdem civitatis religiosissimo antifite, vel alias per-
sonas publicas, id est, magistratus, vel juricicum Alexandrinæ civitatis,
tutores vel curatores creare; legitima cautela secundum ejusdem con-
stitutionis normam praestanda, videlicet eorum periculo, qui eam acci-
piunt.

§ 5. But we, for the ease of our subjects, have ordained by our constitution,
that the judge of Alexandria and the magistrates of every city, together with the
chief ecclesiastic, may give tutors or curators to pupils or adults, whose fortunes do
not exceed five hundred aurei, without waiting for the command of the governor, to
whose province they belong. But all such magistrates must, at their peril, take from
every tutor, so appointed, the caution required by our constitution.

Nos autem per constitutionem.] Cod. t. 1. l. 30. De episcopali audientia.

Ratio tutelæ.

§ VI. Impugneres autem in tutela esse, naturali juri conveniens est; ut
is, qui perfectæ ætatis non sit, alterius tutela regatur.

§ 6. It is agreeable to the law of nature, that all such, who are not arrived at
puberty, should be put under tutelage, to the intent that all, who are not adults,
may be under the government of proper person.

De tutelæ ratione reddenda.

§ VII. Cum ergo pupillorum pupillarumque tutores negotia gerant,
pot? pubertatem tutela judicio rationem reddunt.

§ 7. Tutors therefore, since they have the administration of the affairs of their
pupils, may be compelled to render an account, by an action of tutelage, when their
pupils arrive at puberty.

Cum ergo.] By the civil law an action of f. 27. c. 3. l. 4. De tut. et rat. disf. &c. But in
tutelage can not be instituted, 'till the tutelage is England an infant may, by procunam amel, oblige
expired. Nisi finita tutela sit, tutela aeg non potest. his guardian to account. lVer. 542.

Titulus Vigesimus-primum.

De auctoritate tutorum.


In quibus causis auctoritas sit necessaria.

Auctotitas autem tutoris in quibusdam causis necessaria pupillis
eft, in quibusdam non est necessaria: ut, ecce, si quid dari sibi stipulatur, non est necessaria tutoris auctoritas; quod si alius promittant pu-
pilli, necessaria est tutoris auctoritas: namque placuit, meliorem quidem
con-
conditionem licere iis facere etiam sine tutoris auctoritate; deteriorem vero non alter, quam cum tutoris auctoritate. Unde in his causis, ex quibus obligationes mutuae nascentur, ut in emptionibus, venditionibus, locationibus, conductionibus, mandatis, depositis, si tutoris auctoritas non interveniat, ipse quidem, qui cum his contrahunt, obligantur; at invicem, pupilli non obligantur.

The authority or confirmation of a tutor is in some cases necessary, and in others not necessary. When a man stipulates to make a gift to a pupil, the authority of the tutor is not requisite; but, if a pupil enters into a contract, there is a necessity for the tutor’s authority; for it is an established rule, that pupils may better their condition, but not impair it, without the authority of their tutors. And therefore in all cases, where there are mutual obligations, as in buying, selling, letting, hiring, mandates, deposits, &c., he, who contracts with a pupil, is bound by the contract; but the pupil is not bound, unless the tutor hath authorized it.

In quibusdam necessariis, in quibusdam non necessariis.] A minor, by the laws of England, may bind himself without the authority of a guardian, either by bond or promiss, to pay for those things, which are suitable to his degree, and necessary. 1. Lord Raymond 344. 1. Perre Williams 558.

Namque placuit.] In England, if the act of the guardian is prejudicial to the minor, it is in most cases voidable; and, when it is not voidable, the guardian may be obliged to indemnify his pupil. Thus, if an infant appears by guardian, and sufers a recovery, the recovery is not voidable, but the guardian is answerable, if his pupil sustains damage. Also if a guardian faints or mispleads in an action, to the injury of his pupil, the pupil will be bound; but he may afterwards have an action against his guardian. 1 mod. 48, 49.

Unde in his causis.] The same law obtains also in England: thus a lease, made to an infant, is not void of itself, but voidable only at his election. 2 Cro. 320.

Exceptio.

§ I. Neque tamen hæreditatem adire, neque bonorum possessionem petere, neque hæreditatem ex fidei-commisso fuçcipere, aliter posseunt, nisi tutoris auctoritate, (quamvis illis lucrosa sit,) negegulum damnum habeant.

§ 1. But no pupil, without the authority of his tutor, can enter upon an inheritance, or take upon him the possession of goods, or an inheritance in trust; for, although there may be a probability of profit, there is a possibility of damage.

Quomodo auctoritas interponi debet.

§ II. Tutor autem statim in ipso negotio presens debet auctor fieri, si hoc pupillo prodeessi exstitimaverit. Poit tempus vero, vel per epistolam, aut per nuntium, interposita auctoritas nihil agit.

§ 2. If a tutor would authorize any act, which he sees advantageous to his pupil, such tutor ought to be present at the negotiation: for the authority of a tutor can have no effect, when given by letter, by messenger, or after a contract is finished.

Quo casu interponi non potest.

§ III. Si inter tutorem pupillumque judicio agendum sit, quia ipsi tutor in rem suam auctore esse non potest, non pretorius tutor (ut olim) constituitur sed curator in locum ejus datur; quo curatore interveniente, judicium peragitur; et, eo peracto, curator esse definit.
§ 3. When a suit is to be commenced between a tutor and his pupil, inasmuch as the tutor can not exercise his authority, as such, against himself, a curator, and not a prætorian tutor, (as it was formerly the custom,) is appointed, by whose intervention the suit is carried on; and, when it is determined, the curatorship ceases.

Si inter tutorem.] In England, according to the present practice, the procœbs amī, or next friend of the minor, supplies the place of the curator, mentioned in the text. For procœbs amī was first appointed by W. 1. cap. 47. in case of necessity, where the infant was to sue his guardian, or where the guardian would not sue for him. 2 Cor. 6:40.

TITULUS VIGESIMUS-SECUNDUS.

Quibus modis tutela finitur.

C. v. T. 60.

De pubertate.

Pupilli, pupillaæque, cum puberes esse coeperint, a tutela liberantur. Pubertatem autem veteres quidem non solum ex annis, sed etiam ex habitu corporis, in masculis assequari volebant. Nostra autem majestas, dignum esse cañtitate nostrorum temporum exitĭmansus, bene putavit, quod in feminis etiam antiquis impudicum esse visum est, id est, inspectionem habitudinis corporis, hoc etiam in masculis extendere: et ideo, nostra sancta constitutione promulgata, pubertatem in masculis post decimum quartum annum completum ìlico ininitum accipere dispousimus: antiquitatis rem in feminis bene postrem in suo ordine reliquentes, ut post duodecim annos completos viri potentes esse credantur.

Pupils, both male and female, are freed from tutelage, when they arrive at puberty. The ancients judged of puberty in males, not by years only, but also by the habit of their bodies. But our imperial majesty, regarding the purity of the present times, hath esteemed the inspection of males to be an immodest practice, and hath thought it proper, that the same decency, which was ever observed in respect to females, should be also observed in respect to males: and therefore, by our sacred constitution, we have enacted, that puberty in males should be reputed to commence immediately after the completion of their fourteenth year. But, in relation to females, we leave that wholesome and ancient rule of law unaltered, by which they are esteemed marriageable after the twelfth year of their age is completed.

Et ideo nostra sancta constitutione.] vid. esse defamant. "Indecoram observationem in exm. Cod. 5. 1. 60. l ult. Quando tutores sunt curatores " minanda marium pubertate refectantes, &c.

De capitis diminutione pupillii.

§ 1. Item finitur tutela, si arrogati sint adhuc impuberes; vel deportati: item si in servitutem pupillus redigatur, vel si ab hostibus captus fuerit.
§ 1. Tutelage is determined before puberty, if the pupil is either arrogated or suffers deportation, and it also determines, if he is reduced to slavery, or becomes a captive.

Ab hostibus captus.] Quia nemo in tutela esse potest, nisi qui sit sui juris. ff. 36. t. 1. l. 14.

De conditionis eventu.

§ II. Sed et, si usque ad certam conditionem datus sit tutor testamento, quae evenit, ut definat esse tutor existente conditione.

§ 2. But, if a testamentary tutor is given upon a certain condition, after that condition is fulfilled, the tutelage ceases.

De morte.

§ III. Simili modo finitur tutela morte pupillorum vel tutorum.

§ 3. Tutelage is also determined either by the death of the tutor, or by the death of the pupil.

De capitis diminutione.

§ IV. Sed et capitis diminutione tutoris, per quam libertas vel civitas amittitur, omnis tutela perit. Minima autem capitis diminutione tutoris, veluti si se arrogandum dederit, legitima tantum perit; cetera non persunt. Sed pupilli et pupillae capitis diminutio, licet minima sit, omnes tutelas tollit.

§ 4. When a tutor suffers the greater diminution of estate, by which he at once loses his liberty and the privileges of a citizen, every kind of tutelage is then extinguished. But, if the least diminution is only suffered, as when a tutor gives himself in arrogation, then no species of tutelage is extinguished, except the legitime. But every diminution of estate in pupils takes away all tutelage.

De tempore.

§ V. Praeterea, qui ad certum tempus testamento dantur tutores, finito eo, deponunt tutelam.

§ 5. Thee, who are by testament made tutors for a term only, are, at the expiration of such term, discharged from the tutelage.

De remotione et excusatione.

§ VI. Definunt etiam tutores esse, qui vel removentur a tutela ob id, quod suspeci vifs sunt; vel qui ex justa causa se excusant, etonus administranda tutela deponunt, secundum ea, quae inferius proponemus.

§ 6. They also cease to be tutors, who are either removed from their office upon suspicion, or excuse and exempt themselves from the burden of tutelage for just reasons, of which we shall treat hereafter.
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TITULUS VIGESIMUS-TERTIUS.

De curatoribus.


De adultis.

MASCULI quidem puberes, et feminæ viri potentes, utque ad vigesimum quintum annum completum curatores accipiant; quia licet puberes sint, adhuc tamen ejus ætatis sunt, ut sua negotia tuere non potint.

Males arrived at puberty, and females marriageable, do nevertheless receive curators, 'till they have completed their twenty-fifth year: for, albo' they have attained to puberty, they are not as yet of an age to take a proper care of their own affairs.

Male] By the civil law, males at the age of twenty years complete, and females at eighteen, having given a sufficient proof, by five or more witnesses, of their prudence and morality, may obtain a licence from the emperor, enabling them to administer their own affairs under proper restrictions. For minors are not permitted by this licence to alien, or even to mortgage their immoveable possessions, but must always obtain a special decree for such purposes. Cod. 2. t. 145. l. 1. 2, 3. De his qui ven. et. impetraverunt.

A quibus dentur curatores.

§ 1. Dantur autem curatores ab eisdem magistratibus, a quibus et tutores. Sed curator testamento non datur; datus tamen confirmatur decreto prætoris vel præsidis.

§ 1. Curators are appointed by the same magistrates, who appoint tutors. A curator can not be absolutely given by testament, but a curator, named in a testament, must be confirmed such, either by a praetor or the governor of a province.

Testamento non datur.] A curator can not be given by testament; because a curator, by virtue of his office, has the care of the minor's estate: and a father can not dispose of the goods of his son, who is arrived at puberty; for at that age he hath a right to make a will. ff. 28. t. 6. l. 2. But the magistrates generally appoint him to be curator, whom the father hath recommended, tho' not always. ff. 26. t. 1. l. 39. § 1.

Quibus dentur.

§ II. Item inviti adolescentes curatores non accipiant, præterquam in litem; curator enim et ad certam causam dari potest.

§ 2. No adults can be obliged to receive curators, unless ad litem; for a curator may be appointed to any special purpose, or to the management of any particular affair.

Item inviti adolescentes.] Recardus and others have accused Tribonian, as guilty of an error, in saying, that minors, after fourteen, could not be obliged to receive curators. — And, in support of their accusation, they allege the opinion of Ulpian, whose words are these. — Hodie in banc ufque ætatem adolescentes curatores axilis reguntur, nec ante rei sue administratio eis committit debeat, quovis bene rem suam gerentibus. ff. 4. t. 4. l. 1. — But it must be observed, that,
with regard to minors after puberty, the Roman law has frequently been altered. By the law Lactantia, ann. urb. con. 550. such adults only, who behaved ill, were obliged to receive curators after proof had been made of their ill behavior. But afterwards it was enacted, by a constitution of Marcus Antoninus, Ut omnes adulti curatores accipiant, non redditis causis: which must mean, that adults might be obliged to receive curators, altho' nothing could be alleged against their conduct: for it is certain, that adults might voluntarily receive curators, even before the law Lactantia. And, when Ulpian wrote, the constitution of Marcus Antoninus was as yet un repeal, but afterwards, in the latter part of the reign of Antoninus Caracalla, it appears from Coll. 5. 31. 1. 1. that the Roman law was again altered, and that curators could not be given, but to such minors as were willing to receive them, unless ad litum.

And, in this, the law of England may be said to agree in general with the civil law: for, with us, guardianship regularly determines, when the minor has completed his fourteenth year; except, when there is a guardian by nature, or when the father of a minor has specially appointed a guardian either by deed, or will, to continue for a longer time. And therefore a minor, after fourteen, being of course freed from custody, is at liberty, if willing, to put himself a second time under guardianship, until he is of full age. But, if a minor, being an adult, does not consent to receive a new guardian, then no court would appoint a guardian, unless ad litum.

But, if a testator nominates a guardian, 'til his son arrives at full age, then the son, altho' above fourteen, is compelled to receive the guardian, who is thus expressly appointed for a certain time; but, if no certain time is mentioned, there is then no guardianship, if the minor is an adult. Vaughan 185.

De furiosis et prodigis.


§ 3. By a law of the twelve tables, all madmen and prodigals, altho' of full age, must nevertheless be under the curation of their agnati. But, if there are no agnati, or if such, who do exist, are unqualified, then curators are appointed; at Rome, by the praefect of the city, or the praetor; and in the provinces, by the governors, after the requisite inquiry.

Sed solent. The text in this place is undoubtedly deficient, and Thesleffus, whose authority is followed in the English, has thus supplied, what seems to have been omitted.

De mente captis, furdis, &c.

§ IV. Sed et mente captis, et furdis, et mutis, et illis, qui perpetue morbo laborant, (quia rebus suis superfici non possunt,) curatores dandi sunt.

§ 4. Those, who are deprived of their intellects, or deaf, or mute, or subject to any continual disorder, insomuch as they are unable to take a proper care of their own affairs, must be placed under curators.

Sed et mente captis. With us all persons morbi mentis compositi are reputed to labor under either idiocy or lunacy; and the king, by law, is their general guardian. Idiocy is a fatuity, or madness, a naiquiria; and this excuses the party, as to his acts, but intitles the king, during the life of the idiot, to the profits of his estate, both real and personal, without rendering an account.

Lunacy is an adventitious madness or faciety, either permanent, or with intervals, and equally excueth with idiocy, as to all acts done, during the phrenzy. But the king, in case of lunacy, acts as a guardian and trustee for the lunatic, and is therefore accountable to him, if he regains his understanding, or if his representatives, if it happens otherwise. 4 Cr. rep. 125.

Bacon's abr. 80. vol. 3.
De pupillis.

§ V. Interdum autem et pupilli curatores accipient; ut puta, si legitimus tutor non sit idoneus: quoniam habenti tutorem tutor dari non potest. Item, si testamento datu tutor, vel a praetore aut praefide, idoneus non sit ad administrationem, nec tamen fraudulenter negotia administraret, folet ei curator adjungi. Item loco tutorum, qui non in perpetuum, sed ad tempus, a tutela excusatur, solent curatores dari.

§ 5. Sometimes even pupils receive curators; for instance, when the legal tutor is unqualified: for a tutor must not be given to him, who already has a tutor. Also, if a testamentary tutor, or a tutor given by a praetor or the governor of a province, appears to be afterwards incapable of executing his trust, it is usual, albo' be is guilty of no fraud, to appoint a curator to be joined with him. It is also usual to assign curators in the place of such tutors, who are not wholly excused, but excused for a time only.

De constituenlo aetore.

§ VI. Quod si tutor vel adversa valetudine, vel alia necessitate, impediatur, quo minus negotia pupilli administrare possit, et pupillis vel absit, vel infans sit, quem velit aetorem, periculo ipsius tutoris, praetor, vel qui provincie praeerat, decreto constituet.

§ 6. If a tutor, by illness or any other necessary impediment, should be hindered from the personal execution of his office, and his pupil should be absent, or an infant, then the praetor or the governor of the province shall decree any person, whom the tutor approves of, to be the pupil's agent, for whose conduct the tutor must be answerable.

TITULUS VIGESIMUS-QUARTUS.

De satisfactione tutorum, vel curatorum.


Qui satisfactione cogantur.

Nec tamen pupillorum, pupillarumve, et eorum, qui quaeve in curatione sunt, negotia a curatoribus tutoribusve confundantur vel diminuantur, curet praetor, ut et tutores et curatores eo nomine satisfient. Sed hoc non est perpetuum; nam tutores testamento dati satisfactione non coguntur: quia fides eorum et diligentia ab ipso teftatore approbata est. Item ex inquisitione tutores vel curatores dati satisfactione non onerantur, quia idonei electi sunt.

It is a branch of the praetor's office to see, that tutors and curators give a sufficient caution for the safety and indemnification of their pupils. But this is not always necf-
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necessary; for a testamentary tutor is not compelled to give caution, inasmuch as his fidelity and diligence seem sufficiently approved of by the testator. Also all tutors, and curators, appointed to be such, after inquiry, are supposed in every respect to be qualified, and are therefore not obliged to give security.

Quatenui satisfactio in iis, qui satisfiare non compelluntur, locum habere possit.

§ I. Sed, si ex testamento vel inquisitione duo pluresve dati fuerint, potest unus offerre satisfationem de indemnitate pupilli vel adolescentis, et contutori suo vel concuratori praeferr, ut solus administraret; vel ut contutor aut concurator fatis offerens praeponatur ei, ut et ipse solus administraret. Itaque per se non potest petere satisfationem a contutore vel concuratore; sed offerre debet, ut eleccionem det concuratori vel contutori suo, utrum velit fatis accipere, an satisfiare. Quod si nemo eorum fatis offerat, siquidem adscriptum fuerit a testatore, quis gerat, ille gerere debet; quod si non fuerit adscriptum, quem major pars elegerit, ipse gerere debet, ut dixit prætoris cavetitur. Sin autem ipsi tutores diffierent circa eligendum eum vel eos, qui gerere debent, prætor partes suas interponere debet. Idem et in pluribus ex inquisitione dati comprobandum est, id est, ut major pars eligere possit, per quem administration fiat.

§ 2. If two, or more, are appointed by testament or by a magistrate, after inquiry, to be tutors or curators, any one of them, by offering caution, may be preferred to the sole administration, or cause his co-tutor, or co-curator, to give caution, in order to be admitted himself to the administration. Thus it appears, that a man can not demand security from his co-tutor or co-curator; but that, by offering caution himself, he may compel his co-tutor, or co-curator, to give or receive caution. But, when no security is offered, if the testator hath appointed any particular person to act, such person must be preferred; but, if no particular person is specified by the testator, then must the administration be committed to such person or persons, whom a majority of the tutors shall elect, according to the praetorian edict: but, if they disagree in their choice, the prætor may interpose his authority. The same rule is also to be observed, when many, either tutors or curators, are nominated by the magistrate, viz. that a majority of them may appoint one of their number, to whom the administration shall be committed.

Editio praetoris. J This edict is not extant.

Qui ex administratione tuteæ vel curationis tenentur.

§ II. Sciendum autem est, non solum tutores vel curatores pupillis vel adultis, ceterisque personis, ex administratione rerum teneri: sed etiam in eos, qui satisfationem accipiunt, subsidiariam actionem esse, quæ ultimum eis praedium posse afferrer. Subsidiaria autem actio in eos datur, qui aut omnino a tutoribus vel curatoribus satisdati non curaverunt, aut non idoneè passi sunt caveri: quæ quidem tam ex prudentum responsis, quam ex constitutionibus imperialibus, etiam in haereses eorum extensur.
§ 2. It is necessary to be known, that tutors and curators are not the only persons subject to an action, on account of the administration of the affairs of pupils, minors, and others under their protection. For a subsidiary action, which is the last remedy to be used, will also lie against a magistrate, either for entirely omitting to take sureties, or for taking such, as are insufficient: and this action according to the answers of the lawyers as well as by the imperial constitutions, is extended even against the heir of any such magistrate.

Sciendum.] Various remedies are given to pupils and minors, who have received any damage by the male-administration or negligence of their tutors or curators. The personal actions, to which minors are intituled, against their tutors or curators, are called Actiones tutelae and negotiorum gytorum usile. Quiquid tutoris dolo vel lata culpa aut levis, seu curatoris, minores amiserint, vel, cum jussent, non acquiserint; hoc in tutelae seu negotiorum gytorum usile judicium venire, non est incerti juris.

Cod. 5. t. 51. l. 7.

And the heirs of tutors and curators are also liable to the same actions ob dolum et latam culpa.

Cod. 2. t. 19. l. 17.

Pupils or minors may also sue the sureties of their tutors or curators, by an action arising from the stipulation entered into by such sureties. D. 27. t. 7. l. 8. 3. Cod. 5. t. 57. l. 8. 2.

And lastly, as their dernier refert, minors have a right to an action called subsidiary, against any magistrate, who hath neglected to do his duty, either by taking no security, or what was not sufficient. D. 27. t. 8. l. 1. 4. 6.

But the heirs of tutors, curators, sureties and magistrates, are only liable in cases of fraud in themselves, or in those, to whom they are heirs; but not merely on account of negligence. D. 27. t. 7. l. 4. C. 5. t. 75. l. 2. Claude Perrier, b. 1.

Constitutionibus.]

§ III. Si tutor vel curator cavere nolit.

Quibus constitutionibus et illud exprimitur, ut, nisi cæsant tutores et curatores, pignoribus captis coerceantur.

§ 3. And by the same constitutions it is expressly enacted, that all tutors and curators, who refuse to give caution, may be compelled to it.

Qui dicit aetioe non tenetur.

§ IV. Neque autem praefectus urbi, neque praetor, neque praefes provinciae, neque quisquam alius, cui tutores dandi jus est, hac aetione teneritur: sed hi tantummodo, qui satisfactioem exigere solent.

§ 4. Neither the praefect of the city, nor the praetor, nor the governor of a province, nor any other, who has power to assign tutors, shall be subject to a subsidiary action: but those magistrates only are liable to it, who exact the caution.

Exigere solent.] The exactio of caution was the business of the inferior magistrates; of the scribes at Rome, and of the duumviri in the pro-

Titu-
TITULUS VIGESIMUS-QUINTUS.

De excusationibus tutorum vel curatorium.


De numero liberorum.

Excusantur autem tutores et curatores variis ex cauis; plerumque tamen propter liberos, five in potestate sunt, five emancipati. Si enim tres liberos superfluites Romae quis habet, vel in Italia quatuor, vel in provinciis quinque, at tutela vel cura potest excusari, exemplo caeterorum munere; nam et tutelam et curam placuit publicum munus esse. Sed adoptivi liberi non profunt; in adoptionem autem dati naturali patri profunt. Item nepotes ex filio profunt, ut in locum patris sui succedant; ex filia non profunt. Filii autem superfluites tantum ad tutelae vel curae muneris excusationem profunt: defuncti autem non profunt. Sed, si in bello amissi sunt, quodcumque, an profunt? Et confit, eos solos prodesse, qui in acie amittuntur. Hi enim, qui pro republica ceciderunt, in perpetuum per gloriam vivere intelliguntur.

Persone, who are nominated to be either tutors or curators, may, upon diverse accounts, excuse themselves; but the most general plea offered is that of having children, whether they are subjict, or emancipated. For at Rome, if a man has three children living, in Italy four, or in the provinces five, he may therefore be excused from tutelage and curation, as well as from other employments of a public nature; for both tutelage and curation are esteemed public offices. But adopted children will not avail the adoptor; they will nevertheless excuse their natural father, who gave them in adoption. Also grand-children by a son, when they succeed in the place of their father, will excuse their grand-father; yet grand-children by a daughter will not excuse him. But those children only, who are living, can excuse from tutelage and curation; for the deceased are of no service; and should it now be demanded, whether a parent can avail himself of those sons, whom war has destroyed? It must be answered, that he can avail himself of those only, who have perished in battle: for those, who have fallen for the republic, are esteemed to live for ever, in the immortality of their fame.

Excusantur autem.] The laws of England are silent concerning the excuses of guardians, because no man can be compelled to take the office of guardianship. De excusatione tutorum vel curatorium, legis nostrarum libellum, quia nemini, i.e. poetae, nocens improprium, Cow. LIII. t. 25.

Qui in acie amittuntur.] Acts is here opposed to bellum, in conformity to the following opinion of Ulpian. — Bello amissi ad tutela excusationem profunt. — Quaesitum est autem, qui sunt jis: utrum iis, qui in acies sunt interempti; an vero omnes omnia, qui per caussa veli parentibus sunt absenti, in obsequentia forte, Melius est probabilius, eos solos, qui in acie amittuntur, prodire deber, ex jussuque legatorum, vel atatis fuit: hi enim pro republica ceciderunt. E. 27. t. 116. de excusationibus.
LIB. I.  TIT. XXV.

De administratione rei fiscalis.

§ I. Item divus Marcus in semestribus rescriptit, eum, qui res fiscalis administrat, à tutela et cura, quanquam administrat, excusari possit.

§ 1. The emperor Marcus declared by rescript from his Semestrial council, that whoever is engaged in the administration of affairs relating to the treasury, may be excused from tutelage and curation, when he is so employed.

In Semestribus. The Semestrial council was a privy council, composed of a certain number of senators, who were chosen by lot, and were changed every six months. This council was first appointed by Augustus Caesar, that he might diminish the power of the senate and increase his own. Sibique inlitteris confulit inprimis semestria, cum quibus de negotiis ad frequentem senatum referendi ante tradescat. Suet. in Aug. c. 35. Dion. lib. 53. § 27. t. i. l. 41. Cod. 5. t. 62. l. 10. 25.

De abseniæ reipublicæ causâ.

§ II. Item, qui reipublicæ causa abstint, à tutela vel cura excusantur. Sed et, si fuerint tutores vel curatores dati, deinde reipublicæ causa absente cæperint, à tutela vel cura excusantur, quatenus reipublicæ causa abstint: et interea curator loco eorum datur; qui, si reversi fuerint, recipiunt omnes tutela: nam nec annis habent vacationem, ut Papianus libro quinto reponit curis: nam hoc spatium habent ad novas tutelas vocati.

§ 2. Those, who are absent from the affairs of the republic, are exempted from tutelage and curation; and if such, who are already assigned to be either tutors or curators, should afterwards be absent on the business of the republic, their absence is dispensed with, when they continue in the public service; and curators must be appointed in their place; but, when such tutors return, they must again take upon them the burden of tutelage. But they are not entitled (as Papianus affirms in the fifth book of his answers) to the privilege of a year's vacation: for that term is allowed to those only, who are called, at their return, to a new tutelage.

De potestate.

§ III. Et, qui potestatem aliquam habent, se excusare possunt, ut divus Marcus re cripit: sed susceperat tutelam deserere non possunt.

§ 3. By a rescript of the emperor Marcus, all superior magistrates may, as such, excuse themselves: but they can not desert a tutelage, when once they have undertaken it.


De lite cum pupillo vel adulto.

§ IV. Item propter litem, quam cum pupillo vel adulto tutor vel curator habet, excusari non potest: nisi forte de omnibus bonis vel hereditate controversia sit.
§ 4. No man can excuse himself from taking the office of a tutor or curator, by alleging a law-suit with the pupil or minor, unless the suit is for all the goods, or the whole inheritance of such pupil or minor.

Propert item. This law is now useless; for, creditors of minors are prohibited to be their tutors or curators.

De tribus tutele et curae oneribus.

§ 5. Item tria onera tutele non affectae, vel curae, praebent vacatio-

§ 6. Three tutelages or curacies, which are not acquired merely for advantage, will exempt a man, during their continuance, from the burden of a fourth. But the tutelage or curation of many pupils, as of three or more brothers, under one patri-

§ 7. Sed et propter paupertatem excussionem tribui, tam divi fra-

§ 8. The imperial brothers have declared by their rescript, and the emperor Marcus by his separate rescript, that poverty is a sufficient excuse, when it can be proved to be such, as must render a man incapable of the burden imposed upon him.

De paupertate.

§ 9. Divi fratries.] The emperors were called divi or divine, because they were always considered, in every respect, as gods, after the ceremony of their apotheosis had been performed. vid. Herod. 3. 3. As to the emperors here meant by the words divi fratries, the commentators are not agreed in ascertaining, who they were; but Vini-

§ 10. Ut tamen.] D. 27. 1. 1. 31.

De adversa valetudine.

§ 11. Item propter adversam valetudinem, propter quam ne suis qui-

de num, iudicet inter se potest, excusatio locum habet.

§ 12. Illius alio, if it is so great as to bind a man from transferring his own benefacies, is a sufficient excuse.

De imperitia literarum.

§ 13. Similiter eos, qui literas nesciunt, esse excusandos, Divus Pius reipriscit; quamvis et imperiti literarum possint ad administrationem nego-

§ 14. By the rescript of the emperor Antoninus Pius, illiterate persons are to be excused; aliqua in some cases an illiterate man may not be incapable of the administration.

De inimicitia patris.

§ 15. Item si propter inimicitias aliquem testamento tutorem, pater de-
derit, hoc ipsum prætat ei excussionem; sicut per contrarium non excu-
suntur, qui, se tutelam administraturos, patri pupillorum promiserant.
§ 9. If a father by testament be determined by testament, to be tutor to his children, the motive of such an appointment will afford a sufficient excuse. But he, who by promise hath engaged himself to a testator, is not to be excused from the office of tutelage.

De ignorantia testatoris.

§ X. Non esse autem admittendam excusationem ejus, qui hoc solo utitur, quod ignorant patri pupillorum suorum Divi fratres rescripterent.

§ 10. The divine brothers have enacted by their reversion, that the pretense of being unknown to the father of a pupil is not to be admitted solely, as a sufficient excuse.

De inimicitia cum patre pupilli vel adulti.

§ XI. Inimicitiae, quas quis cum patre pupillorum vel adultorum exercuit, si capitales fuerunt, nec reconciliatio intervenit, a tutela vel cura solent excipiare.

§ 11. A capital enmity, against the father of a pupil or adult, will sufficiently excuse any man, either from tutelage or curatorship, if no reconciliation hath intervened.

— Si capitales. By a capital enmity is understood such as hatred, which might arise from a public accusation, affecting the life, liberty, and good name of the party accused. §§ 38. 14. 50. 103. de verb. fœm. But even such an accusation could not excuse a testamentary tutor.

De status controversiae a patre pupilli illata.

§ XII. Item is, qui status controversiam a pupillorum patre passus est, excusatur a tutela.

§ 12. Also be, whose condition hath been controverted at the instance of the father of the pupil, is upon that account excused from the tutelage.

De æate.

§ XIII. Item major septuaginta annis a tutela et cura se potest excusare. Minores autem viginti quinque annis olim quidem excusabantur: nostra autem constitutione prohidentur ad tutelam vel curam adscribatur: adeo ut nec excusatione o, us sit. Qua constitutione cavetur; ut nec pupillus ad legitimam tutelam vocetur, nec adultus: cum sit inci ile, eos, qui alieno auxilio in rebus suis administrandis egere noscuntur, et ab aliis reguntur, aliorum tutelam vel curam subire.

§ 13. Any person, who is above seventy years of age, may be excused both from tutelage and curatorship. Also minors, as such, were formerly excusable; but, by our constitution, they are now prohibited from aspiring to these trusts; and of course all excuses are become unnecessary. It is also enacted by the same constitution, that neither pupils, nor adults, shall be called even to a legitimate tutelage. For it is absurd that persons, who are themselves under governors, and known to want assistance in the administration of their own affairs, should notwithstanding this be admitted, either as tutors or curators, to have the management of the affairs of others.

De
De militia.

§ XIV. Idem et in milite observandum est, ut nec volens ad tutela eonus admitatur.

§ 14. And we must also observe, that no military person, alioeo willing, can be admitted to become a tutor or curator.

De grammaticis, rhetoribus, et medicis.

§ XV. Item Romæ grammatici, rhetores, et medici, et qui in patria sua has artes exercent, et intra numerum sunt, a tutela et cura habent vacationem.

§ 15. Both at Rome and in the provinces, all grammarians, teachers of rhetoric, and physicians, who exercise their professions within their own country, and are within the number authorized, are exempted from tutelage and curation.

De tempore et modo proponendi excusationes.

§ XVI. Qui autem se vult excusare, si plures habeat excusationes, et de quibusdam non probaverit, alii uti, intra tempora constituta, non prohibet. Qui autem excusare se volunt, non appellant, sed intra quinquaginta dies continuos, ex quo cognoverint se tutores vel curatores datos, se excusare debent, cujuscunque generis sint, id est, qualitercunque dat fuerint tutores, si intra centesimum lapidem sint ab eo loco, ubi tutores dati sunt. Si vero ultra centesimum lapidem habitant, denominatione facta viginti millium diurnorum, et amplius triginta dierum; qui tamen, ut Scavola dicebat, sic debent computari, ne minus sint, quam quinquaginta dies.

§ 16. He, who can allege many excuses, and hath failed in his proof of those, which be hath already given, is not prohibited from alleging others within the time prescribed. But tutors and curators of whatever kind, whether legal, testamentary, or dative, (if they are willing to excuse themselves) ought not to prefer an appeal merely on account of their appointment; but they should first exhibit their excuses before the proper magistrates; and this they ought to do within fifty days after they are certified of their nomination, on supposition, that they are within an hundred miles from the place, where they were nominated. But, if they are at the distance of more than an hundred miles, they are allowed a day for every twenty miles, and thirty days besides; which, taken together, ought never, according to Scavola, to make a less number of days than 50.

Non appellant.] They ought not to appeal from the appointment, but from the sentence, by which their excuses are rejected. Non a datione sed a sententia, qua excusatio non fuit admissa: si quis eum tutore dat us fuerit, vel testamento, vel a quo alio, qui jus dandi habet, non speret cum pronovrace; hoc enim dixit Marcus Aurelius effect: sed intra tempora præstita excusationem alias sumbam habeat, et, si fuerit falsa, tunc dixitque, que dixisse debuit; eodem ante seplia appellatur. h. 49. t. 3. l. 1.
LIB. I. TIT. XXVI.

De excusatione pro parte patrimonii.

§ XVII. Datus autem tutor ad universum patrimonium datus esse creditur.

§ 17. When a tutor is appointed, he is reputed to have the care of the whole patrimonium of his pupil.

De tutelae gestione.

§ XVIII. Qui tutelam alicujus gestit, invitus curator ejusdem fieri non compellitur; in tantum ut, licet pater-familias, qui testamento tutorem dedit, adjecerit se eundem curatorem dare, tamen, invitus eum curam sustinere non cogendum, divi Severus et Antoninus rescripsissent.

§ 18. He, who hath been the tutor of a minor, cannot be compelled to become his curator: and, by the rescript of the emperors Severus and Antonius, albo the father of a family should, by testament, appoint any person to be first the tutor of his children, and afterwards their curator, if the person so appointed is unwilling to take upon him the curation, he is by no means compellable.

De marito.

§ XIX. Idem rescripsissent, maritum uxori suae curatorem datum excudare se potuisse, licet se immiscerat.

§ 19. The same emperors have likewise, by their rescript, enacted, that an husband may excuse himself from being a curator to his wife, even after he hath begun to act.

De falsis allegationibus.

§ XX. Si quis autem falsis allegationibus excusationem tutelae merue-rit, non est liberatus onere tutelae.

§ 20. If any man should, by false allegations, have appeared to merit a discharge from the office of curation, he is not therefore freed from the burden of that office.

TITULUS VIGESIMUS-SEXTUS.

De suspectis tutoribus vel curatoribus.


Unde suspecti crimen descendat.

SCIENDUM est, suspecti crimen ex lege duodecim tabularum descendere.

The accusation of a suspected tutor, or curator, is derived from the law of the twelve tables.

Suspecti crimen.] Crimen here signifies an accusation, and is so interpreted by Theophilus in his paraphrase. "Ειτε τω ρω ή δ' τα περι των καθηνευσις. It is also frequently used by Tully and the best commentators, in the same sense. Tria sunt quantum eximiam faciam, quae obstant, haec tempore, sexto Roficio; crimen adversariorum, et audacia, et potestas. Pro Refe. Amer.
Qui de hoc crimine cognoscunt.

§ I. Datum autem est jus removendi tutores suspecitos Romae pretori, et in provinciis praefidis earum, et legato proconfilis.

§ 1. At Rome the power of removing suspected tutors belongs to the prætor, and in the provinces to the governors, or to the legate of a praefidium.

Qui suspecit fieri possunt.

§ II. Oftendimus, qui possunt de suspetto cognoscere; nunc videamus, qui suspeti fieri possint: et possunt quidem omnes tutores fieri suspecli, sive sunt testamentarii, sive non sint, sed alterius generis tutores. Quare, eti licet legitimis fuerit tutor, accusari poterit. Quid si patronus? Adhuc idem erit dicendum: dummodo meminerimus, famae patroni parceendum esse, licet ut suspecli remotus fuerit.

§ 2. We have already showed, what magistrates may take cognizance of suspected persons: let us now therefore inquire, what persons may become suspected. And indeed all tutors may become so, whether they are testamentary, or of any other denomination. For even a legitimate tutor may be accused; neither is a patron his subject to an accusation; but we must remember, that, as such, his reputation must be preserved, altius he is removed from his trust, as a suspected person.

Et possunt quidem omnes.] Guardians at common law may be removed, or compelled to give security, if there appears any danger of their abusing either the person, or the estate of the minor. Sirk 456. Hard. 96. 3 Chan. rep. 58. 1 Sid. 424. 3 Salk. 177.

But there is no instance of the removal of a statute guardian; yet terms have frequently been imposed, so as effectually to prevent such guardian from doing any act to the prejudice of the minor. But quarre, whether cases may not arise, for which a statute or testamentary guardian may totally be removed, notwithstanding the statute, as if he become mad, lunatic, &c., for a guardianship is not assignable, neither can it go to executors, or administrators, being a personal trust. Fawb. 180. Cæsars in Eq. abr. 261.

Fama patroni parceandum.] When an action is brought against a suspected patron or parent, it ought to be an action in factum, and no mention must be made of fraud. Sed ex quibus causa adhibetur aliqua causa datur, ex ilium adhibetur illius in factum datur, omnia adhuc mentiones. F. 4. t. 3. l. 3.

De dolo malo.

Qui possunt suspecitos postulare.

§ III. Consequens est, ut videamus, qui possint suspecli postulare. Et sciemendum est, quia publicum esse hanc accusacionem; hoc est, omnibus parent. Quinimo mulieres admiratur ex rescripto divorum Sevieri et Antonini; sed haec sola, qua, pietatis necesstitudine ductae, ad hoc procedunt: ut puta mater, nutrix quoque et avia: potest et soror. Sed et, si qua alia mulieres fuerit, quam prætor propernia pietate intellexerit, sese verecumdiem non egrediementem, sed pietate productam, non suftinere injuriam pupillorum, admittis eam ad accusacionem.

§ 3. It now remains, as a consequence, that we inquire, by whom suspected persons may be accused. It must therefore be known, that an accusation of this sort is of a public nature, and open to all. For, by a rescript of the emperors Severus and Antoninus, even women are admitted to be accusers; yet such only, who are induced to it by their duty, or by their relation to the minor: thus a mother, a nurse, or a grandmother, may become accusers; and also a sister. But the prætor can at discretion allow...
mit any woman, who acting with a becoming modesty, but impatient of wrongs offered to pupils, appears to have no other motive, than to relieve the injured.

An pubes vel impubes.

§ IV. Impuberes non possunt tutores fuos suspectos postulare: puberes autem curatores fuos ex consilio necessitiorum suspectos possunt arguere: et ita Divi Severus et Antoninus reciperunt.

§ 4. No pupil can bring an accusation of suspicion against his tutor: but adults, by the rescript of Severus and Antoninus, are permitted, when they act by advice of persons related to them, to accuse their curators.

Qui dicatur suspectus.

§ V. Suspectus autem est, qui non ex fide tutelam gerit, licet solvendo sit, ut Julianus quoque scripsit. Sed, et antequam incipiat tutelam gerere tutor, posse eum quasi suspesctum removeri, idem Julianus scripsit; et secundum eum constitutum est.

§ 5. Any tutor, who does not faithfully execute his trust, let his circumstances be ever so sufficient to answer damages, may, according to Julian, be pronounced suspected. And it is also the opinion of the same Julian, (whose opinion is adhered to in our constitutions,) that a tutor may be removed from his office, as suspected, even before he has begun to execute it.

Constitutum est. 1 Cod. 5. t. 43. t. 23.

De effectu remotionis.

§ VI. Suspectus autem remotus, liquidem ob dolum, famosis est, si ob culpam, non aequ.

§ 6. When any person is removed upon suspicion, if it is of fraud, he is stigmatized with infamy; but, if of neglect only, he does not become infamous.

De effectu accusationis.

§ VII. Si quis autem suspectus postulatur, quoad cognitio inest in terdicitur ei administratio, ut Papiniano vifum est.

§ 7. If any tutor is accused upon suspicion, his administration, according to Papian, is suspended, whilst the accusation is under cognizance.

Quibus modis cognitio finitur.

§ VIII. Sed, si suspecti cognitio suscepta fuerit, posteaque-tutor vel curator decesserit, extinguitur suspescti cognitio.

§ 8. If a suspected tutor or curator should die, pending the accusation, both the cognizance of it is extinguished.

Si tutor copiam sui non faciat.

§ IX. Si quis tutor copiam sui non faciat, ut alimenta pupillo decentantur, cavetur epistola divorium Severi et Antonini, ut in possessionem bono-
honorum ejus pupillus mitattur; et, quæ mora deteriora futura sunt, dato
curatore, disfrahi iubentur: ergo, ut suspectus, moveri po:erit, qui non
praeflat alimena.

§ 9. If a tutor fails to appear, with an intent to defer the appointment of an
allowance for the maintenance of his pupil, it is provided by the constitution of Severus
and Antoninus, that the pupil shall be put into the possession of his tutor's effects;
and that, a curator being appointed, those things, which will be impaired by delay,
may be immediately put to sale: and therefore any tutor, who, by abjuring himself,
impedes the grant of an allowance to his pupil, may be removed, as suspected.

Si neget alimenta decerni posse, vel tutelam redemerit.

§ X. Sed, quæ praefens negat propter inopiam alimenta posse decerni,
fi hoc per mendacium dicat, remittendum eum esse ad praefectum urbi
puniendum placuit: sicut ille remittitur, qui, data pecunia, ministerium
tutelae acquirerit, vel redemerit.

§ 10. But if a tutor makes a personal appearance, and falsely avers, that the
effects of his pupil are insufficient for an allowance, such tutor shall be remitted to the
praefect of the city, and punished by him in the same manner, as he, who hath acquired
a tutelage by bribery.

De liberto fraudulenter administrante.

§ XI. Libertus quoque, fi fraudulenter tutelam filiorum vel nepotum
patroni geffisse probetur, ad praefectum urbi remittitur puniendus.

§ XI. Also a freed-man, who is proved to have fraudulently administered the tu-
telage of the son, or grandjon of his patron, must be remitted to the praefect to be
condignly punished.

Si sus:pectus satis offerat; et quis dicatur sus:pectus.

§ XII. Novissime autem sciemus est, eos, qui fraudulenter tutelam
administrant, etiam si fatis offerant, removendos esse a tutela, quia sati-
dato tutoris propositum malevolum non mutat, sed diutius grafiandi in re
familiari facultatem præflat. Suspectum etiam eum putamus, qui moribus
talis est, ut sus:pectus sit. Enimvero tutor vel curator, quamvis pauper sit,
fidelis tamen et diligens, removendus non est, quasí sus:pectus.

§ 12. It is lastly to be observed, that they, who unfaithfully administer their trust,
must be immediately removed from it, albo' they tender a sufficient caution. For the
act of giving caution alters not the malevolent purpose of the tutor, but procures him
a longer time for the continuance of his depredations. We also deem every man sus-
pected, whose immoralities give cause for it: but a tutor or curator, who, albo' poor,
is yet faithful and diligent, can by no means be removed, as a suspected person, mere-
ly on account of poverty.

FINIS LIBRI PRIMI.

K

DIVI
DIVI JUSTINIANI
INSTITUTIONUM
LIBER SECUNDUS.

Titulus Primus.

De rerum divisione, et acquirendo earum dominio.


Continuatio et duplex rerum divisio.

Superiore libro de jure personarum expouimus; modo videamus de rebus; quæ vel in nostro patrimonio, vel extra patrimonium nostrum, habentur. Quaedam enim naturali jure communia sunt omnium, quædam publica, quædam universitatis, quædam nullius, plerique singularum, quæ ex variis causis cuique acquiruntur, sic ut ex subjectis apparet.

We have already treated of persons in the foregoing book; let us now therefore inquire concerning things, which may be divided into those, which can, and those, which can not come within our patrimony and be acquired; for some things are in common among mankind in general; some are public; some universal; and some are such, to which no man can have a right. But most things are the private property of individuals, by whom they are variously acquired, as will appear hereafter.

De aëre, aqua profluenti, mari, littore, &c.

§ I. Et quidem naturali jure communia sunt omnium hæc, aër, aqua profluentes, mare, et per hoc littoria maris; nemo igitur ad littus maris accedere prohibetur; dum tamen à villis et monumentis et ædificiis abstinent: quia non sunt juris gentium, sicut est mare.

§ 1. Those things, which are given to mankind in common by the law of nature, are the air, running water, the sea, and consequently the shores of the sea: no man therefore is prohibited from approaching any part of the sea-shore, whilst he abhains from
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from committing acts of violence in destroying farms, monuments, edifices, &c. which are not in common, as the sea is.

De fluminibus et portibus.

§ II. Flumina autem omnia, et portus, publica sunt: ideoque jus piscandi omnibus commune est in portu fluminibusque.

§ 2. All rivers and ports are public; and therefore the right of fishing in a port, or in rivers, is in common.

Definitio littoris.

§ III. Est autem littus maris, quatenus hybernus fluctus maximus excurrat.

§ 3. All that tract of land, over which the greatest winter flood extends itself, is the sea-shore.

De usu et proprietate riparum.

§ IV. Riparum quoque usus publicus est jure gentium, sicut ipsius fluminis; itaque naves ad eas appellere, funes arboribus ibi natis religare, unus aliquod in his reponere, cui librum liberum est, sicut per ipsum flumen navigare: sed proprieas earum illorum est, quorum praeidis haerent: unde cava arbores quoque in eisdem natae corundem sunt.

§ 4. By the law of nations the use of the banks of rivers is also public, as the rivers themselves are; and therefore all persons have the same liberty to bring their vessels to the land, to unload them, and to fasten ropes to trees upon the banks of a river, as they have to navigate upon the river itself: but notwithstanding this, the banks of a river are the property of those, who possess the land, adjoining to such banks; and therefore the trees, which grow upon them, are also the property of the same persons.

De usu et proprietate littorum.

§ V. Littorum quoque usus publicus est et juris gentium, sicut et ipsum maris: et ob id cilia librum et casum ibi ponere, in quam sequi, sicut retia siccare, et ex mari deducere: proprieas autem eorum potest intelligi nullius esse: sed eisdem juris esse, cujus et mare, et, quae abiacet maris, terra vel arena.

§ 5. The use of the sea-shore is also public and common by the law of nations, as is the use of the sea; and therefore any person is permitted to erect a cottage upon it: for his habitation, in which he may dry his nets, and preserve them from the water; for the shores are not understood to be a property in any man, but are compared to the sea itself, and to the sand or ground, which is under the sea.

De rebus universitatis.

§ VI. Universitas sunt, non singulorum, quae in civitatibus sunt, theatra, stadia, et his familia, et si qua alia sunt communia civitatum.

§ 6. Theatres, ground appropriated for a race or public exercises, and things of this like nature, which belong to a whole city, are universal, and not the property of any particular person.
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De rebus nullius.

§ VII. Nullius autem sunt res sacræ, et religiosæ, et sanctæ: quod enim divini juris est, id nullius in bonis est.

§ 7. Things sacred, religious, and holy, cannot be vested in any person, as his own: for that, which is of divine right, is nullius in bonis, and can be no man's property.

De rebus sacrís.

§ VIII. Saeæ res sunt, quæ rite per pontifices Deo consacrata sunt: veluti ædæ sacræ, et donaria, quæ rite ad ministerium Dei dedicata sunt: quæ etiam per nostram constitutionem alienari et obligari prohibimus, excepta causa redemptionis captivorum. Si quis autem auctoritate sua quasi sacrum sibi constituerit, sacrum non est, sed profanum. Locus autem, in quo ædæ sacræ sunt ædificatae, etiam, diruto ædificio, facer adhuc manet, ut et Papinianus scripsit.

§ 8. Those things, which have been consecrated by the pontiffs in due form, are esteemed sacred; such are churches, chapels, and also all moveable things, if they have been properly dedicated to the service of God: and we have forbidden by our constitution, that these things should be either aliened or obligated, unless for the redemption of captives. But, if a man should consecrate a building merely by his own authority, it would not be rendered sacred by such a consecration; but the very ground, upon which a sacred edifice hath once been erected, will, according to Papinianus, continue to be sacred, alibò the edifice is destroyed.

Per nostram constitutionem.] Cod. 1. t. 3. l. 23. de sacra sanctis ecclesiæ.

De religiosis.

§ IX. Religiosum locum anuisquise sua voluntate facit, dum mortuum in locum suum: in communem autem locum purum, invitos loco, infere non licet: in commune vero sepulchrum etiam, invitis cæteris, licet infere. Item, si alienus ususfructus est, proprietarium placet, nisi con- sentiente usufructuario, locum religiosum non facere. In alienum locum, consentiente domino, licet infere; et, licet posset a ratum non habuerit, quam interdum usus mortuos, tamen locum religiosus sit.

§ 9. Any man may at his will render any place, which belongs solely to himself, religious, by making it the repository of a dead body; yet, when two are joint possessors of a place or spot of ground, not before used for such a purpose, it is not in the power of the one, without the consent of the other, to cause it to become religious. But, when there is a sepulchre in common among many, it is in the power of any one joint possessor to make use of it, alibò the rest should dissent. And, when there is a proprietor, and an usufructuary, of the same place, the proprietor, without the consent of the usufructuary, can not render it religious. But it is lawful to lay the body of a dead person in a place, belonging to any man, who has given his consent to it; and, alibò he should dissent after the burial, yet the place becomes religious.
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De rebus sanctis.

§ X. Sanctae quoque res, veluti muri et portae civitatis, quodammodo divini juris sunt; et ideo nullius in bonis sunt. Ideo autem muros sanctos dicimus, quia poena capitis constituta est in eos, qui aliquod in muros deliquerint. Ideo et legum eas partes, quibus poenas constituimus adversus eos, qui contra leges fecerint, sanctiones vocamus.

§ 10. Holy things also, as the walls and gates of a city, are in some degree of divine rights, and therefore the property of no man. The walls of a city are esteemed sancti or holy, insomuch as any offence against them is always punished capitally, and therefore all those parts of the laws, by which punishments are inflicted upon transgressors, we generally term sanotions.

De rebus singulorum.

§ XI. Singulorum autem hominum multis modis res sunt: quarumden enim rerum dominium nanciscimus jure naturali, quod, sicut diximus, appellatur jure gentium; quarumdem vero jure civili. Commodus est itaque a vetustiore jure incipere. Palam est autem, vetustius esse jure naturali, quod cum ipso genere humano rerum natura proedit. Civilia autem jura tunc effe coeperunt, cum et civitates condit, et magistratus creari, et leges scribi, coeperunt.

§ 11. There are various means, by which things become the property of private persons. Of some things we obtain dominion and property by the law of nature, which (as we have already observed) is also called the law of nations: and we acquire a property in other things by the civil law. But it will be most convenient to begin from the more antient law: and that the law, which nature established at the birth of mankind, is the most antient, appears evident: for civil laws could then only commence to exist, when cities began to be built, magistracies to be created, and laws to be written.

De occupatione ferarum.

§ XII. Ferae igitur bestiae, et volucres, et piscis, et omnia animalia, quae mari coelo et terra nascentur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt: quod enim ante nullius est, id naturali ratione occupanti conceditur: nec interept, feras bestias et volucres utrum in suo fundo quis capiat, an in alieno. Plane, qui alienum fundum ingreditur venandi ut auxupandi gratia, potest a domino, si is praebiderit, prohiberi, ne ingrediatur. Quicquid autem eorum cepereis, eo usque tuum esse intelligitur, donec tua custodia coerctetur; cum vero tuum evaserit custodiam, et in libertatem naturalem se se repperit, tuum esse definit, et rursus occupantis sit. Naturallem autem libertatem recipere intelligitur, cum vel oculos tuos effugierit, vel ita sit in conspectu tuo; ut difficilis sit ejus persequitio.

§ 12. Wild beasts, birds, fish, and all the animals, which are bred either in the sea, the air, or upon the earth, do, as soon as they are taken, become instantly, by
by the law of nations, the property of the captor: for it is agreeable to natural reason, that those things, which have no owner, should become the property of the first occupant: and it is not material, whether they then are taken by a man upon his own ground, or upon the ground of another: but yet it is certain, that whoever bastes entered into the ground of another for the sake of hunting or fowling, might have been prohibited from entering by the proprietor of the ground, if he had foreseen the intent. But, baste wild beasts, or fowl, when taken, are esteemed to be the property of the captor, while they continue in his custody; yet, when they have once escaped and recovered their natural liberty, the right of the captor ceases, and they become the property of the first, who seizes them. And they are understood to have recovered their natural liberty, if they have run or flown out of sight; and even if they are not out of sight, when it so happens, that they can not without difficulty be pursued and retained.

De vulneratione.

§ XIII. Illud quæstium est, an, si fera beftia its vulnerata sit, ut capi posset, statim tua esse intelligatur. Et quibusdam placuit, statim esse tuam, et eaque tuam videri, donec eam persequearis: quod si desieris persequi, definere tuam esse, et rursum fieri occupantis: alii vero putaverunt, non aliter tuam esse, quam si eam ceperes. Sed posteriorem sententiam nos confirmamus, quod multa accidere foletant, ut eam non capias.

§ 13. It bastes been a question, whether a wild beast is understood to belong to him, by whom it bastes been so wounded, that it may easily be taken. And, in the opinion of some, it belongs to such person, as long as he perseveres it; but, if he quits the pursuit, they say it ceases to be his, and again becomes the right of the first occupant. But others have thought, that property in a wild beast can not otherwise be obtained, than by actually taking it. And we confirm this latter opinion, because many accidents frequently happen, which prevent the capture.

De apibus.

§ XIV. Apium quoque fera natura est: itaque apes, quæ in arbores tuae confederint, antequam a te alveo includantur, non magis tuae intelliguntur esse, quam volucres, quæ in arbores tuae nidum fecerint: ideaque, si alius eas incellerit, is earum dominus erit. Favos quoque, si quos effecerint, eximere quilibet potest. Plane integra re, si prævidereis ingredientem fundum tuum, poteris eum jure prohibere, non ingrediatur. Examens quoque, quod ex alveo tuo evolaverit, eaque intelligitur esse tuum, donec in conspectu tuo est, nec difficilis persequitio ejus est; aliquin occupantis fit.

§ 14. Bees also are wild by nature; and therefore, albo' they swarm upon a tree, which is yours, they are not reputed, until they are bised by you, to be more your property, than the birds, which have nests there: and therefore, if any other person shall inclose them in a bive, he thus becomes their proprietor. Their honeycomb also become the property of him, who takes them: but, if you observe any person entering into your ground, with that intent, you may justly binder him. A swarm, which bats flown from your bive, is still reputed to continue yours, as long as it remains in sight, and may easily be persevered; but, in any other case, it will become the property of the occupant.
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De pavanibus et columbis, et ceteris animalibus manu factis.

§ XV. Pavonum quoque et columbarum fera natura est; nec ad rem pertinet, quod ex confuetudine evolare et revolare solent; nam et apes idem faciunt, quarum confitat feram esse naturam. Cervos quoque quidam ita manu factos habent, ut in silvam ire et redire solent, quorum et iporum feram esse naturam nemo negat. In iis autem animalibus, quae ex confuetudine abire et redire solent, talis regula comprobata est; ut scilicet tua esse intelligatur, donec animum revertendi habeas: nam, si revertendi animum habere desideras, etiam tua esse desinunt, et sunt occupantium. Revertendi autem animum videntur desinere habere tune, eum revertendi confuetudinem deseruerint.

§ 15. Peacocks and Pidgeons are also naturally wild; nor is it any objection to say, that, after every flight, it is their custom to return: for bees do the same thing; and, that bees are naturally wild, is evident. Some have been known to have trained deer to be tame, that they would go into, and return from the woods, at regular periods: and yet no man denies, but that deer are wild by nature. But, with respect to these animals, which go and return customarily, the rule to be observed is, that they are underbond to be yours, as long as they appear to retain an inclination to return; but, if this inclination ceases, that they cease to be yours, and will again become the property of him, who takes them. And these animals seem then to cease to have an inclination to return, when they disjube the custom of returning.

De gallinis et anseribus.

§ XVI. Gallinarum autem et anserum non est fera natura: idque ex eo possimus intelligere, quod aliae sunt gallinæ, quas feras vocamus; item aliæ sunt anseres, quos feros appellamus: ideoque, si anseres tuæ, aut gallinæ tuae, aliquo modo turbati turbatae evolaverint, licet confecitum tuum effugerint, quocumque tamen loco sint, tui tuæve esse intelliguntur: et, qui lucrandi animo ea animalia detinet, furtum committere intelligitur.

§ 16. But geese, and fowls, are not wild by nature; and this we are induced to observe, because there is a species of fowls, and a species of geese, which in contradistinction we term wild: and therefore, if the geese, or fowls of Titius, being disturbed and frightened, should take flight, they are nevertheless reckoned to belong to him, in whatever place they are found, alibò' be shall have lost flight of them: and whoever retains such animals, with a lucrative view, is understood to commit a theft.

De occupatione in bello.

§ XVII. Item ea, quæ ex hostibus capimus, jure gentium stamim nostram siunt; adeo quidem, ut et liberi homines in servitutem nostram deducantur; qui tamen, si evaserint nostram potestatem, et ad suos reverti fuerint, pristinum stamum recipiunt.

§ 17.
§ 17. All those things, which we take from our enemies in war, become instantly by our own by the law of nations: so that free-men may be brought into a state of servitude by capture: but, if they afterwards escape, and shall have returned to their own people, they then obtain again their former state.

De occupatione eorum, quæ in littore inveniuntur.

§ XVIII. Item lapilli, et gemmæ, et cætera, quæ in littore maris inveniuntur, jure naturali statim inventoris sunt.

§ 18. Precious stones, pearls, and other things, which are found upon the sea-shore, become instantly, by the law of nations, the property of the finder.

De factu animalium.

§ XIX. Item ea, quæ ex animalibus dominio tuo subjectis nata sunt, eodem jure tibi acquiruntur.

§ 19. The product of those animals, of which we are the owners and masters, is, by the same law, esteemed to be our own.

De alluvione.

§ XX. Præterea, quod per alluvionem agro tuo flumen adiécit, jure gentium tibi acquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adjici, quod quo paulatim adjicitur, ut intelligi non possit, quantum quod tempus temporis momento adjicatur.

§ 20. And farther—that ground, which a river hath added to your estate by alluvion, [i.e. by an imperceptible increase,] is properly acquired by you according to the law of nations. And that is said to be added by alluvion, which is added in a manner, which renders it impossible to judge, how much ground is added in the space of each moment of time.

De vi fluminis.

§ XXI. Quod si vis fluminis de tuo prædio partem aliquam detriment, et vicini prædio attulerit, palam est, eam tuam permanere: plane si longior tempore fundo vicini tui haœserit; arborefque, quas fecum traxerit, in eum fundum radices egerint; ex eo tempore videntur vicini fundo acquisita esse.

§ 21. But, if the impetuosity of a river should sever any part of your estate, and adjoin it to that of your neighbour, it is certain, that such part would still continue yours; but, if it should remain, for a long time, joined to the estate of your neighbour, and the trees, which accompanied it, shall have taken root in his ground, such trees seem, from the time of their taking root, to be gained and acquired to his estate.

De insula.

§ XXII. Insula, quæ in mari nata est (quod raro accidit) occupantis est: nullius enim esse creditur. At insula in flumine nata (quod frequenter accidit) si quidem medium partem fluminis tenet, communis est eorum; qui
qui ab utraque parte fluminis prope ripam praedia posseunt, pro modo scilicet latitudinis cujuque praedil, quae prope ripam sit: quod si alteri proximior sit parti, eorum est tantum, qui ab ea parte prope ripam praedia posseunt. Quod si qua parte divisum sit flumen, deinde infra unitum agrum alicujus in formam infusae redegerit, ejusdem permanet is ager, cujus et fuerat.

§ 22. When an island rises in the sea, (an event which rarely happens) the property of it is in the occupant; for the property, before occupation, is in no man. But, if an island rises in a river, (which frequently happens) and is placed exactly in the middle of it, such island shall be in common to them, who possess the lands near the banks on each side of the river, according to the proportion of the extent and latitude of each man's estate, adjoining to the banks. But, if the island is nearer to one side than the other, it belongs to them only, who possess lands next to the banks on that side, to which the island is nearest. But, if a river divides itself and afterwards unites again, having reduced a tract of land into the form of an island, the land still continues to be the property of him, to whom it before appertained.

De alveo.

§ XXIII. Quod si, naturali alveo in universum derelicto, ad amem partem fluere coeperit, prior quidem alveus eorum est, qui prope ripam ejus praedia posseunt; pro modo scilicet latitudinis cujuque agri, quae prope ripam sit; novus autem alveus ejus juris esse incipit, cujus et ipsum flumen est; id est, publicus: quod si post aliquod tempus ad proriem alveum reversum fuerit flumen, rursus novus alveus eorum esse incipit, qui prope ripam ejus praedia posseunt.

§ 23. If a river, intirely forsaking its natural channel, hath began to flow elsewhere, the first channel appertains to those, who possess the lands, close to the banks of it, in proportion to the breadth of each man's estate next to such banks: and the new channel partakes of the nature of the river, and becomes public. And, if after some time the river shall return to its former channel, the new channel commences to be the property of those, who possess the lands, contiguous to the banks of it.

De inundatione.

§ XXIV. Alia sane causa est, si cujus totus ager inundatus fuerit; neque enim inundatio fundi speciem commutat: et ob id, si recesserit aqua, palam est eum fundum ejus manere, cujus et futur.

§ 24. But it is otherwise in respect to lands, which are overflowed only; for an inundation alters not the face and nature of the earth; and therefore, when the waters have receded, it is apparent, that the property will be found still to remain in him, in whom it was vested before the inundation.

De specificacione.

§ XXV. Cum ex aliena materia species aliqua facta sit ab aliquo, quæri solet, quis eorum naturali ratione dominus sit; utrum is, qui fecerit, an potius ille, qui materiae dominus fuerit: ut ece, si quie ex alienis uis,
aut olivis, aut spicis, vinum, aut oleum, aut frumentum, fecerit; aut ex alieno auro, vel argento, vel ære, vas aliquod fecerit; vel 'ex alieno vino et melle mulsum miscuerit; vel ex medicamentis alienis emplastrum aut collyrium compouuerit; vel ex aliena lana vestimentum fecerit; vel ex alienis tabulis navem, vel armarium, vel subfella, fabricaverit. Et, post multam Sabinianorum et Proculianorum ambiguitatem, placuit media tentia exexitantium, si ea species ad priorem et rudem materiam reduci possit, cum videri dominum esse, qui materiae dominus fuerit; si non possit reduci, eum potius intelli dignum, qui fecerit: ut ecce, vas conflatum potest ad rudem materiam aris, vel argenti, vel auris, reduci: vinum autem, vel oleum, aut frumentum, ad uvas, vel olivas, vel spicas, reverti non potest: ac ne mulsum quidem ad vinum et mel resolvit potest. Quod si partim ex sua materia, partim ex aliena, speciem aliquam fecerit quis; vel uti ex suo vino et alieno melle mulsum miscuerit; aut ex suis et alieuis medicamentis emplastrum aut collyrium; aut ex sua lana et aliena vestimentum fecerit; dubitandum non est, hoc cauam eum esse dominum, qui fecerit: cum non solum operam suam dederit, sed et partem ejusdem materiae praefirerit.

§ 25. When a man hath made any species, or kind of work, with materials, belonging to another, it is often demanded, which of them ought, in natural reason, to be deemed the master of it:—whether he, who made the species, or he, who was the undoubted owner of the materials? as, for instance, if any person should make wine, oil, or flower, from the grapes, olives, or corn of another,—should cast a vessel out of gold, silver, or brass, belonging to another man,—should make a liquor, called mulce, with the wine and honey of another,—should compose a plaster or collyrium, with another man's medicines,—should make a garment with another's wool,—or should fabricate, with the timber of another, a bench, a ship, or a cheff?—And after much controversy, concerning this question between the Sabinians and Proculians, the opinion of those, who kept a mean between the two parties, proved most satisfactory to us: and their opinion was this:—that, if the species can be reduced to its former, rude materials, then the owner of such materials is also to be reckoned the owner of the new species: but, if the species cannot be so reduced, then he, who made it, is understood to be the owner of it: for example, a vessel can easily be reduced to the rude mass of brass, silver, or gold, of which it was made; but wine, oil, or flower, can not be converted into grapes, olives, or corn; neither can mulce be resolved and separated into wine and honey. But, if a man makes any species, partly with his own materials, and partly with the materials of another: as, for instance, if he should make mulce with his own wine, and another's honey, or a plaster, or eye-water, partly with his own, and partly with another man's medicines, or should make a garment with an intermixture of his own wool with the wool of another,—it is not to be doubted in all such cases, but that he, who made the species, is master of it; since he not only gave his labor, but furnished also a part of the materials.

Sabinianorum et Proculianorum.] The two sects of Sabinians and Proculians took their rise in the reign of Augustus, but were not distinguished by any particular appellation, till long afterwards: for the Sabinians obtained their name from Sabinus, who was a favorite of the emperor Tiberius; and the Proculians were so called from Proculus, who flourished under Tiberius.


De accessione.

§ XXVI. Si tamen alienam purpuram vestimento suo quis intexuerit, licet pretiosior sit purpura, tamen accessionis vice cedit vestimento: et, qui dominus fuit purpurae, adversus eum, qui furripuit, habet furti actionem et conditionem, sive ipse sit, qui vestitum fecit, sive alius: nam extincta res licet vindicari non possint, considi tamen à furibus et quibusque aliis possessoribus posunt.

§ 26. If any man shall have interwoven the purple of another into his own vestment, then the purple, albeit it may be more valuable, doth yield and appertain to the vestment by accession: and he, who was the owner of the purple, may have an action of theft, and a personal action, called a condition, against the purloiner; nor is it of any consequence, whether the vestment was made by him, who committed the theft, or by another: for albeit things, which become, as it were, extinct by the change of their form, can not be recovered identically, yet a condition may be brought for the recovery of the value of them, either against the thief, or against any other possessor.

De confusione.

§ XXVII. Si duorum materiae voluntate dominorum confusae sint, totum id corpus, quod ex confusione sit, utriusque commune est: veluti si qui vina sua confuderint, aut massas argentii vel aurum confabaverint. Sed, eti diversae materiae sint, et ob id propria species facta sit, forte ex vino et meli mulfum, aut ex auro et argento electrum, idem juris est: nam et hoc caelo, communem esse speciem, non dubitatur. Quod si fortuito et non voluntate dominorum confusae fuerint vel ejusdem generis materiae, vel diversae, idem juris esse placuit.

§ 27. If the materials of two persons are incorporated together, then the whole mass, or composition, is common to both the proprietors: for instance, if two owners shall have intermixed their vinos, or shall have melted together their gold or their silver. The same rule is also observed, if diverse substances are so incorporated, as to become one species: as when mulse is made with wine and honey; or when an electrum is composed by an intermixture of gold and silver in different proportions: for in these cases it is not doubted, but that the species becomes common. Neither is any other rule observed, when either homogeneous, or even different substances, are confounded and incorporated together fortuitously, without the consent of their proprietors.
De commixtione.

§ XXVIII. Quod si frumentum Titii frumento tuo mistum fuerit, siquidem voluntate vestra, commune est; quia singula corpora, id est, singula grana, quae cujusque propria fuerunt, confensus vestro communicata sunt. Quod si casu id mistum fuerit, vel Titius id miscuerit sine tua voluntate; non videtur communge esse: quia singula corpora in sua substantia durant. Sed nec magis itis caibus commune fit frumentum, quam grex intelligentur esse communis, si pecora Titii tuis pecoribus mista fuerint. Sed si ab alterutro vestrum totum id frumentum retineatur, in rem quidem actio pro modo frumenti cujusque competet: arbitrio autem judicis continetur, ut ipse aestimet, quale cujusque frumentum fuerit.

§ 28. If the corn of Titius hath been mixed with the corn of another by consent, then the whole is in common; because the single bodies, or grains, which were the private property of each, are, by the mutual consent, made common. But, if the intermixture was accidental, or if Titius made it without consent, it then seems, that the corn is not in common; because the single grains still remain united, and in their proper substance: for corn, in such a case, is no more understood to be in common, than a flock would be, if the sheep of Titius should accidentally intermix with the sheep of another. But, if the whole quantity of corn should be retained by either of the parties, then an action in rem ites for the quantity of each man’s corn: and it is the business and duty of the judge to make an exact estimate of the quality, or value, of the corn, belonging to each party.

De his quae solo cedunt. De ædificazione in suo solo ex alie-nna materia.

§ XXIX. Cum in suo solo aliquid ex aliena materia ædificaverit, ipse intelligitur dominus ædifici: quia omne, quod solo inædificatur, solo cedit. Nec tamen ideo is, qui materiæ dominus fuerat, definit dominus ejus esse: sed tantisper, neque vindicare eam potest, neque ad exhibendum de ea re agere, propter legem duodecim tabularum, qua cavetur, ne quis tignum alienum ædibus suis junctum eximere cognatur, sed duplum pro eo præfert, per actionem, qua vocatur, de tigno juncto. Appellatione autem tigni omnis materia significatur, ex qua ædificia sunt. Quod ideo provisum est, ne ædificia rescindi necesse sit. Quod si aliqua ex causa dirutum sit ædifici- cium, poterit materiæ dominus, si non fuerit duplum jam consequutus, tunc eam vindicare, et ad exhibendum de ea re agere.

§ 29. When any man hath raised a building upon his own ground, he is understood to be the proprietor of such building, albo the materials, used in it, were the property of another: for every building is an accession to the ground, upon which it stands. But, notwithstanding this, he, who was the owner of the materials, does not cease to be the owner; yet he cannot demand his materials, or bring an action for the exhibition of them; for it is provided, by a law of the twelve tables, that a person, whose house is built with the materials of another, can not be compelled to restore those materials; but, by an action, intitled de tigno juncto, he may be obliged to pay
pay double the value: and here note, that all the materials for building are compre- 
135 hendend under the general term tignum. The above cited provision, in the law of 
the twelve tables, was made to prevent the demolition of buildings. But, if it hap- 
pens, that, by any cause, a building should be disinterred, or pulled down, then the 
owner of the materials, if he hath not already obtained double the value of them, is 
not prohibited to claim his identical materials, and to bring his action ad exhiben-
dum.

De ædificatione ex sua materia in solo alieno.

§ XXX. Ex diverso, si quis in alieno solo ex sua materia domum ædi-
ficaverit, illius fit domus, cujus et solum et. Sed hoc cau materiæ domi-
nus proprietatem ejus amittit, quia voluntate ejus intelligitur esse alienata ; 
uteque si non ignorabat, se in alieno solo ædificare: et ideo, licet diruta sit 
domus, materiam tamen vindicare non potest. Certe illud constat, si, in 
possessione constituto ædificatore, soli dominus petat, domum suam esse, 
nec solvat pretium materiæ et mercedes fabrorum, posse eum per excep-
tionem soli mali repellere; utique si bona fidei possessor fuerit, qui ædifica-
vit. Nam scienti, solum alienum esse, potest objici culpa, quod ædifica-
verit iure in eo solo, quod intellegat alienum esse.

§ 30. On the contrary, if a man shall have built an edifice with his own mate-
rials upon the ground of another, such edifice becomes the property of him, to whom 
the ground appertains: for, in this case, the owner of the materials loses his pro-
erty, because he is understood to have made a voluntary alienation of it: and this 
is the law, if he was not ignorant, that he was building upon another’s land: and 
therefore, if the edifice should fall, or be pulled down, such person can even then 
have no claim to the materials. But it is apparent, if the proprietor of the ground, 
of which the builder was in confirmed possession, should plead, that the edifice is his; 
and refuse to pay the price of the materials and the wages of the workmen, that then 
such proprietor may be repelled by an exception of fraud: and this may assuredly be 
done, if the builder was the possessor of the ground bona fide. But it may be justly 
objected to any man, who understood, that the land appertained to another, “that 
he had built rashly upon that ground, which be knew to be the property of an-
other.”

De plantatione.

§ XXXI. Si Titius alienam plantam in solo suo posuerit, ipsius erit; 
et ex diverso, si Titius suam plantam in Maevii solo posuerit, Maevii plan-
ta erit; si modo utroque cau radices egerit: ante enim quam radices ege-
rit, ejus permanet, cujus fuerat. Adeo autem ex eo tempore, quo radices 
egerit planta, proprietas ejus commutatur, ut, si vicini arbor ita terram Ti-
tii preterit, ut in ejus fundum radices egerit, Titii effici ar borem dicamus: 
ratio enim non patitur, ut alterius arbor esse intelligatur, quam cujus in 
fundum radices egerit: et ideo circa confinium arbor posita, si etiam in 
vicini fundum radices egerit, communis fit.

§ 31. If Titius sets another man’s plant in his own ground, the plant will become 
the property of Titius: and, on the contrary, if Titius shall have set his own plant 
in Maevius’s ground, the plant will appertain to Maevius; on supposition in either 
case,
De factione.

§ XXXII. Qua ratione autem planta, quæ terræ coalescunt, solo cedunt, eadem ratione frumenta quoque, quæ fata sunt, solo cedere intelliguntur. Cæterum sicut is, qui in alieno solo edificavit, si ab eo dominus petat edificio, defendi potest per exceptionem doli mali, secundum ea, quæ diximus: ita eadem exceptionis auxilio tutus esse potest is, qui alienum fundum sua impenias bona fide conexit.

§ 32. As all plants are esteemed to appertain to the soil, in which they have rooted, so every kind of grain is also understood to follow the property of that ground, in which it is sown. But as he, who hath built upon the ground of another, may (according to what we have already said) be defended by an exception of fraud, if the proprietor of the ground should demand the edifice; so he, who at his own expense and bona fide sowed in another man's land, may also be benefited by the help of this exception.

De scriptura.

§ XXXIII. Literæ quoque, licet aureae sint, perinde chartis membranisiva cedunt, at solo cedere solent ea, quæ inadsciscantur, aut inferuntur. Ideoque, si in chartis membranisiva tuis carmen vel historiam vel orationem Titius scripserit, hujus corporis non Titius, sed tu dominus esse videris. Sed, si a Titio petas tuos libros, tuaeae membranas, nec impenias scriptuæ solvere paratus es, poterit fe Titius defendere per exceptionem doli mali, utique si earum chartarum membranarumque possessionem bona fide nactus est:

§ 33. As whatever is built upon, or sown in the ground, belongs to that ground by accession; so letters also, although written with gold, appertain to the paper or parchment, upon which they are written. And therefore, if Titius shall have written a poem, an history, or an oration, upon the paper or parchment of Seius, then Titius will not be deemed the master of his own work, but the whole will be reputed to be Seius's property. But if Seius demands his books or parchments from Titius, and at the same time refuses to defray the expense of the writing, then Titius can defend himself by an exception of fraud: and this he may certainly do, if he was in possession of such papers and parchments bona fide, that is, honestly, and believing them to be his own.
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De pictura.

XXXIV. Si quis in aliena tabula pinxerit, quidam putant tabulam picturâ cedere: alius videtur, picturam (qualiscunque sit) tabulæ cedere: sed nobis videtur melius esse, tabulam picturæ cedere: ridiculum est enim, picturam Apellis vel Parrhaisi in accessionem vilissimæ tabulæ cedere. Unde, si a domino tabulæ imaginem possidente is, qui pinxit, eam petat, nec solvat pretium tabulæ, poterit per exceptionem doli mali submoveri. At, si is, qui pinxit, eam possideat, consequens est, ut utilis actio domino tabulæ adversus eum detur: quo caus, si non solvat impensam picturæ, poterit per exceptionem doli mali repelli: utique si bona fide possessor fuerit ille, qui picturam imposuerit. Illud enim palam est, quod sustineo, qui pinxit, surripuit tabulas, five alius, competit domino tabularum furti actio.

§ 34. If any man shall have painted upon the tablet of another, some think, that the tablet should yield and accede to the picture: but it is the opinion of others, that the picture (whatever the quality of it may be) should accede to the tablet. But it appears to us to be the better opinion, that the tablet should accede to the picture: for it seems ridiculous, that the painting of an Apelles, or a Parrhais, should yield, as an accession, to a worthless tablet. But if be, who hath painted upon a tablet, demands it from the owner and possessor, and offers not the price of it, then such demandant may be defeated by an exception of fraud: but, if the painter is in possession of the picture, the owner of the tablet is entitled to an action called utilis, i.e. beneficial; in which case, if the owner of the tablet demands it, and does not tender the value of the picture, he may also be repelled by an exception of fraud, if he, who painted upon the tablet, was the possessor of it upon good faith. But, if be, who hath painted upon it, or any other, shall have taken away a tablet feloniously, it is evident, that the owner of it may prosecute such person by an action of theft.

De fructibus bona fide perpectis.

§ XXXV. Si quis a non domino, quem dominum esse crediderit, bona fide fundum emerit, vel ex donatione, aliave qualibet justa causâ, æque bona fide acceperit, naturali ratione placuit, fructus, quos percepit, ejus esse pro cultura et cura: et ideo, si postea dominus supervenerit, et fundum vindiceret, de fructibus ab eo consumptis agere non potest: ei vero, qui alienum fundum ficens possederit, non idem concessum est; itaque cum fundo etiam fructus, licet consumpti sint, cogitur restituere.

§ 35. If any man shall have purchased lands from another, believing the seller to have been the true owner, when in fact he was not, or shall have obtained an estate bona fide, either by donation, or any other just means, it is agreeable to natural reason, that the fruits, which he shall have gathered, shall be reckoned to have become his own: on account of his care in the culture and tillage: and therefore, if the true owner, shall afterwards appear and claim his lands, he can have no action against the bona fide possessor, for those fruits and that product, which have been consumed. But this exemption from such an action is not granted to him, who knowingly keeps possession of another's estate; and therefore, when ever there is a mala fides, the possessor is compellable to restore all the ensuing profits together with the lands.

De
Lib. II. Tit. I.

De fructibus a fructuario et colono perceptis.

§ XXXVI. Is vero, ad quem ususfructus fundi pertinet, non alter fructuum dominus efficitur, quam si ipse eos perceperit; et ideo, licet materius fructus, nondum tamen perceptis, decesserit, ad heredes ejus non pertinent, sed domino proprietatis acquiruntur. Eadem fere et de colono dicuntur.

§ 36. He, to whom the usufruct of lands belongs, can gain no property in the fruits of such lands, until he hath actually gathered them; and therefore, if the usufructuary should die, whilst the fruits, albo ripe, are yet ungathered, they could not be claimed by his heirs, but would be acquired by the proprietor of the lands; and the same may be said in general, in relation to farmers.

Quae sunt in fructu.

§ XXXVII. In pecudum fructu etiam foetus est, sicuti lac, pilus, et lana: itaque agni, haedi, et vituli, et equuli, et suculi, statim naturali jure dominii fructuarii sunt. Partus vero ancillae in fructu non est; itaque ad dominum proprietatis pertinet. Absursum enim videbatur, hominem in fructu esse; cum omnes fructus rerum natura gratia hominis comparaverit.

§ 37. In estimating the product of animals, we not only reckon milk, fries, and wool, but also their young; and therefore lambs, kids, calves, colts, and pigs, appertain by natural right to the usufructuary; but the offspring of a female slave is not to be included within this product; and can belong to him only, in whom the property of such female slave is vested: for it seemed absurd to think, that man, for whom nature hath framed all things, should be enumerated among the productions of the brute creation.

De officio fructuarii.

§ XXXVIII. Sed, si gregis ususfructum quis habeat, in locum demortuorum capitum ex foetu fructuarius submittere debet, (ut et Juliano viisum est) et in vinearum demortuarum vel arborem locum alias debet substituere. Recte enim colere, et quasi bonus paterfamilias uti, debet.

§ 38. He, who has the usufruct of a flock, ought (according to the opinion of Julian) to preserve the original number of his sheep intire, by supplying the place of those, which die, out of the produce of the flock; and the duty of a usufructuary is the same in regard to other things; for he ought to supply the place of dead vines, or trees, by substituting others in their stead; and to act in every respect, like a good husbandman.

De inventione thesauri.

§ XXXIX. Thefauros, quos quis in loco suo invenerit, divus Adrianus, naturali aequitatem sequutus, ei concepit, qui eos invenerit; idemque statuit, si quis in sacro aut religioso loco fortuito cafu invenerit. At, si quis
quis in alieno loco, non data ad hoc opera, sed fortuito invenerit, dimidium domino soli concepit, et dimidium inventori: et convenienter, si quis in Caesaris loco invenerit, dimidium inventoris, et dimidium esse Caesaris, statuit. Cui conveniens est, ut, si quis in fiscallo loco vel publico vel civitatis invenerit, dimidium ipsius esse debetur, et dimidium suci, vel civitatis.

§ 39. It hath been allowed by the emperor Adrian, in persuasion of natural equity, that any treasure, which a man finds in his own lands, shall become the property of the finder; and that whatever is casually found, in a sacred or religious place, shall also become the property of him who finds it. But, if a person, not making it his business to search, should fortuitously find a treasure in the ground of another, the emperor hath granted the half of such treasure to the proprietor of the soil, and half to the finder. He hath in like manner ordained, that, if anything is found within the imperial demesnes, half shall appertain to the finder and half to the emperor: and, similar to this, if a man finds any valuable thing in a place or district belonging to the treasury, the public, or the city, the same emperor hath decreed, that half shall appertain to the finder, and half to the treasury, the public, or the city, to which the place or district belongs.

Thefauros.] Treasures naturally belong to the finder; that is, to him, who moves them from the Place where they are, and secures them; yet nothing forbids but that the laws and customs of any country may ordain otherwise. Plate was definable, that notice should be given to the magistrates, and that the oracle should be consulted: and Apolloius, looking upon a treasure found as a particular blessing from heaven, adjudged it to the first man. The Hebrews gave it to the owner of the ground where it was found, as may be gathered from Christ’s parable, Matt. xiii. 44, and, that the Sirens did the same, we may infer from a story in Plinefratius, lib. vi. cap. 16. The laws of the Roman emperors are very various upon this subject, as appears partly from their constitutions, and partly from the histories of Lamtridius, Zonaras, and Caesarus. The Germans awarded treasures found, and indeed all other deserudda (i.e., things without an owner) to their prince; which is now grown common, that it may pass for the law of nations, for it is now observed in Germany, France, Spain, Denmark, and England; where treasure-trove is underfoot to be any gold or silver, in coin, plate or bullion, which hath been of ancient time hidden; and whereover it is found, if no person can prove it to be his property, it belongs to the king, or his grantee. A concealment of treasure-trove is now only punished by fine and imprisonment; but it appears from Glareville and Braden, that occultato thesauri iurante fraudulento was formerly an offense punishable with death.

De traditione. 1. Regula, ejusque ratio.

§ XL. Per traditionem quaque jure naturali res nobis acquisuntur: nihil enim tam conveniens est naturali acquitati, quam voluntatem domini, volentis rem suam in alium transffe, ratam haberi: et ideo, cujuscunque generis sit, corporalis res trahi potest, et a domino tradita alienatur: itaque stipendia quoque et tributaria prædica codem modo alienantur. Vocantur autem stipendia et tributaria prædica, quae in provinciis sunt: inter quæ nec non et italica prædica, ex nostra constitutio, nulla est differentia: sed, siquidem ex cauæ donationis, aut dotis, aut qualibet alia ex cauæ, tradantur, fine dubio transferuntur.

§ 40. Things are also acquired (according to the law of nature) by tradition or delivery; for nothing is more conforme to natural equity, than to confirm the will of him, who is desirous to transfer bis property into the hands of another: and therefore co-


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corporeal things, of whatever kind they are, may be delivered; and, when delivered by the true owner, are absolutely aliened. Stipendiary and tributary possessions (and those, which are situated in the provinces, are so called) may also be aliened in the same manner: for between the's, and the Italian estates, we have now taken away all distinction, by our imperial ordinance: so that, on account of a donation, a marriage-portion, or any other just cause, stipendiary and tributary possessions may undoubtedly be transferred by livery.

Ex nostra constitutione.] vid. Cod. 7. t. 31. lata differentia rerum mancipi et nec mancipi, l. viii. de usucapiione transformanda, et de sub- ann. Ch. 581.

2. Limitatio.

§ XLI. Vendite vero res et tradita non alter emptori acquiritur, quam si is venditori pretium solvent, vel alio modo ei satisfecerit; veluti expromissore aut pignore dato: quod quamquam cavetur lege duodecim tabularum, tamen recte dicitur et jure gentium, id est, jure naturali, id effici. Sed, si is, qui vendidit, idem emtoris sequitus fuerit, dicendum est, statim rem emtoris fieri.

§ 41. Things, albo fold and delivered, are yet not acquired by the buyer, until he hath either paid the seller for them, or satisfied him in some other manner; as by a bondman or pledge. And, albo this is so ordained by a law of the twelve tables, yet the same rule of justice is rightly said to arise from the law of nations; that is, from the law of nature. But, if the seller shall have given credit to the buyer, we must affirm, that the things will then become instantly the property of the latter.

3. Ampliatio.

§ XLII. Nihil autem interest, utrum ipse dominus tradat alicui rem suam, an voluntate ejus alius, cui ejus rei possessione permissa sit. Qua ratione, si cui liberam universorum negotiorum administratione permissa fuerit a domino, ilisque ex his negotiis rem vendiderit et tradiderit, faciet eam accipientis.

§ 42. It makes no difference, whether the owner of a particular thing delivered it himself, or whether another, to whom the care and possession of it was intrusted, should have delivered it with the owner's consent. And, for this reason, if the free and universal administration of all business is committed by a proprietor to any certain person, and the committee, by virtue of his commission, shall fall and deliver any goods, then will such goods become the property of the receiver.

De quasi traditione. Si traditio ex alia causa praecesserit.

§ XLIII. Interdum etiam fine traditione nuda voluntas domini sufficit ad rem transferendum; veluti si rem, quam tibi aliquis commodaverit, aut locaverit, aut apud te deponuerit, postea aut vendiderit tibi, aut donaverit, aut dotis nomine dederit: quamvis enim ex ea causa tibi eam non tradiderit, eo tamen ipso, quod patitur tuam esse, statim tibi acquiritur proprietas, perinde ac si eo nomine tibi tradita fuisset.
§ 43. In some cases, even without delivery, the mere consent of the proprietor is sufficient to transfer property: as when it happens, that a person hath lent any thing to you, hath let it, or deposited it in your possession, and hath afterwards sold it to you, made a donation of it, or given it to you, as a marriage portion: for alibis shall not have delivered it, for any of these last mentioned purposes, yet, as soon as it is by consent reputed to be yours, you have instantly acquired the property of it; and that as fully, as if it had actually been delivered to you, as a thing sold, a donation or a marriage portion.

Acquiritur proprietas:] This is called façio brevis manus; which takes place, when goods are put into the possession of some person by way of deposit or loan, and are afterwards given over to the same person, he being already the possessor. ff. 23. t. 3. l. 43.

De traditione clavium.

§ XLIV. Item, si quis mercers in horreo depositas vendiderit, simul atque claves horrei tradiderit emptori, transfert proprietatem mercium ad emptorem.

§ 44. Also if a person hath sold any species of merchandize, deposited in a store-house, such person is understood to have transferred the property of his merchandize as soon as he hath delivered the keys of the store-house to the buyer.

De missilibus.

§ XLV. Hoc amplius, interdum et in incertam personam collata voluntas domini transiit rei proprietatem: ut ecce, pratores et consules, cum missilia jactant in vulgus, ignorant quid eorum quisque sit excepturus: et tamen, quia volunt, quod quisque accipit, ejus esse, statim eum dominum efficiunt.

§ 45. It also sometimes happens, that the property of a thing is transferred, by the master of it, to an uncertain person: thus for instance, when the praetors and consules cast their missilia, or liberalities, among the people, they know not what any particular man will receive; and yet, because it is their will and desire, that what every man then receives shall be his own, it therefore instantly becomes his property.

De habitis pro derelicto.

§ XLVI. Qua ratione verius esse videtur, si rem pro derelicto a domino habitam occupaverit quis, statim eum dominum efficiat. Pro derelicto autem habitur, quod dominus ea mente abjecerit, ut id in numero rerum fuerum esse nolit: ideoque statim dominus ejus esse definitor.

§ 46. By a parity of reason it appears true, that a thing, which hath been made a derelict by the owner, will become the property of the first occupant. And whatever hath either been thrown away, or abandoned by the owner, to the intent, that it might never more be reckoned among his possessions, is properly accounted a derelict: and therefore ceases to be his property.

Pro derelicto:] What the Romans called a dere-

§ 36: the English lawyers call a waif: and this was formerly looked upon as the natural right of the finder, but it now belongs to the prince. A waif, strictly so called, is a personal or move-
able chattel, which having been feloniously tak-

en, and then forfaken thro' fear, has no owner to claim it; and therefore, if any such thing is found, it becomes either the property of the

king, or of the lord, to whom the king hath granted.
De iactis in mare levandae navis causa. Item de bis, quæ de rheda currente cadunt.

§ XLVII. Alia navis causa est earum rerum, quæ in tempestate levandæ navis causa ejiciuntur: Hæ enim dominorum permanent: quia palam est, eas non eo animo ejici, quod quis eas habere nolit, sed quo magis cum ipse navis maris periculum effugiat. Quæ de caufa, si quis eas fluxibus expulsas, vel etiam in ipso mari nactus, lucrandi animo abstulerit, furtum committit. Nec longe videntur discedere ab his, quæ de rheda currente, non intelligentibus dominis, cadunt.

§ 47. But the law is otherwise in respect to those things, which are thrown overboard in a storm, for the sake of lightening a ship; for such things remain the property of the owners, inasmuch as it is evident, that they were not thrown away, through dislike, but that each person in the ship might avoid the dangers of the sea. And, upon this account, whoever bath, with a lucrative intention, taken away such goods, although found even upon the high sea, he is guilty of theft. And, with those, those goods may be ranked, which have dropped from a carriage in motion, without the knowledge of the owner.

Furtum commitit.] None of those goods, which are called Jefam, (from being cast into the sea while the ship is in danger) or those called Platam (from floating after shipwreck) or those called Ligan, (that is, goods sunk in the sea, but tied to a buoy, that they may be found) are to be esteemed wreck, so long as they remain in the sea. And by 3 Edu. 1. cap. 4, it is enacted—That, if a man, cat, or dog, escape alive out of the ship, whereby the owner of the goods may be known, neither the vessel, nor any thing therein, shall be adjudged wreck; but shall be restored to the owner, if be claims within a year and a day. A man, cat, or dog. are only put for examples; but all other living things are to be under flood; and, if the owner of the ship should die within the year and a day, his executors or administrators may make proof. 2. Co. inf. 167, 168. Wood's inf. 214. If the goods are taken away by wrong-doers, the owner may have his action; and, if the wrong-doers are unknown, he may have a commission of oyer and terminer, to inquire what persons committed the trespass, and make restitution.

Titulus Secundus.

De rebus corporalibus et incorporalibus.

Secunda rerum divisio.

Quædam præterea res corporales sunt, quædam incorporales. Corporales hæ sunt, quæ sui natura tangi possunt; veluti fundus, homo, vestis, aurum, argentum, et denique aliae res innumerabiles. Incorporales
porales autem sunt, quae tangi non possunt: quaelia sunt ea, quae in jure consitunt; sicut hereditas, usufructus, usus, et obligationes, quoquo modo contracte. 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, plurumque corporale est; veluti fundus, homo, pecunia: nam ipsum jus hereditatis, et ipsum jus utendi fruendi, et ipsum jus obligationis, incorporale est. Eodem numero sunt et jura praelorum urbanorum et rusticorum, quae etiam servitutes vocantur.

Things may also be farther divided into corporeal and incorporeal. Things corporeal are those, which may be touched, as, for example, lands, houses, vestments, gold, silver, and others innumerable. Things incorporeal are those, which are not subject to the touch, but consist in rights and privileges; as inheritances, usufructs, uses, and all obligations, in every manner forever they are contracted: nor is it an objection of any consequence to urge, that things corporeal are contained in an inheritance: for fruits, gathered from the earth, are corporeal; and that also is generally corporeal, which is due to us upon an obligation; as a field, a slave, or money: but it must be observed, that we here mean only the right to an inheritance, the right of using and enjoying any particular thing, and the right of an obligation; all which rights are undoubtedly incorporeal. And to these may be added the rights, or rather qualities, of rural and city estates, which are also termed services.

Rustici praelorum jura.] Predial or real services are the rights, which one estate owes to another. And, as estates are either rural inheritances, as lands, barns, stables, &c. or city inheritances, as houses for habitation, predial services are subdivided into rusticis et urbanis, rural and city services. Personal services are those, which are due from a thing to a person. By some these are called mixed; and they are many and various, without any certain name, except three, which are termed, usufructus, ute, and habitation. Wood’s imp. law. p. 145.

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Titulus Tertius.

De servitutibus rusticorum et urbanorum praeliorum.


De servitutibus rusticis.

De servitutibus urbanis.

§ I. Prædiorum urbanorum servitutes sunt ha, quæ ædificis inherunt, ideo urbanorum prædiorum dictæ, quoniam ædificia omnia urbana prædia appellamus, et si in villa ædificata sunt. Item urbanorum prædiorum servitutes sunt ha; ut vicinus onera vicini sustineat: ut in parietem ejus liceat vicino tignum immittere: ut stillicidium, vel flumen, recipiat quis in ædes suas, vel in aram, vel in cloacam, vel non recipiat: et ne altius quis tollat ædes suas, ne luminibus vicini officiavit.

§ 1. The services of city-estates and inheritances are those, which appertain and adhere to buildings: and they are therefore called the services of city-estates, because we call all edifices city-estates, also they are built upon farms or in villages. It is required by city-services, that neighbours should bear the burdens of neighbours; and, by such services, one neighbour may be permitted to place a beam upon the wall of another; — may be compelled to receive the dropings and currents from the gutter-pipes of another man's house, upon his own house, area, or sewer; or may be exempted from receiving them; — or may be restrained from raising his house in height, lest he should darken the habitation of his neighbour.

Et in villa.] In the Roman law all houses and buildings, whether in town or country, are called prædia urbana: and all lands, whether meadows, arable lands, or vineyards, are denominated prædia ruris.

Urbana prædia omnium ædificia acipimur, non se-bum ea, quæ sunt in agrippidem, sed ubi forte flabula vel alia meritória in villis et in urbis, vel si præteria voluptati tantum deferentia: quia urbanum præ-dium non locus facit sed materia. § 50. t.16. l.198.

De reliquis servitutibus rusticis.

§ II. Inter rusticorum prædiorum servitutes quidam computati restante aquæ haurientum, pecoris ad aquam appulsit, jus pasendi, calcis coquendæ, arens fodienda.

§ 2. Some are with reason of opinion, that, among rural services, we ought to reckon those, by which we obtain the right of drawing water, watering and feeding cattle, making lime, digging sand, &c. in the ground of another.

Quidam restant: These services are sometimes prædial, and sometimes personal, according to the case and reason of their constitution. Personales, si non in usum vicini prædii, sed personæ, constituantur: prædiales, si vicino prædio infeudant. Hein.

Quid servitutem debere vel acquirere posseunt.

§ III. Ideo autem ha servitutes prædiorum appellantur, quoniam fine prædiis consistere non possunt. Nemo enim potest servitutem acquirere urb.
bani vel rustici prædii, nisi qui habet prædium; nec quisquam debere, nisi qui prædium habet.

§ 3. All these services are called the services of estates or inheritances, because they can not be constituted without an inheritance to support them; for no man can either owe, or acquire, a rural or city-service, if he possess nor house nor lands.

Quibus modis servitus constituitur.

§ IV. Si quis velit vicino aliquod jus constituere, pactisibus atque stipulationibus id effecere debet. Potest etiam quis testamento haeredem suum dannare, ne altius tollat aedes suas, ne luminibus vicini officiat; vel ut patiatur eum tignum in parietem suum inmittere, stillicidiumve adversus eum habere; vel ut patiatur eum per fundum ire, agere, aquamve ex eo ducere.

§ 4. When ever any one is willing to demise the right of a service to another, he may do it by contract and stipulation. A man may also by testament prohibit his heir from brightening his house, lest he should obstruct the view of his neighbour; or may oblige his heir to permit the rafter of another man’s house to be laid upon his wall; or to receive upon his own house the droppings of another; or to suffer any person to walk, drive cattle, or draw water in his grounds.

TITULUS QUARTUS.

De usufructu.


Definitio usufructus.

Ususfructus est jus alienis rebus utendi fruendi, salva rerum substantia. Est autem jus in corpore, quo sublato, et ipsum tollit necesse est.

An usufruct is the right of using and enjoying, without diminution, the things, which are the property of another. But alio an usufruct is a right, and therefore incorporeal, yet, as it appertains always to a substance, it necessarily follows, that, if the substance perishes, the usufruct must cease.

Quibus modis constituitur.

§ I. Ususfructus a propriete separationem recipit, idque pluribus modis accidit: ut ecce, si quis usumfructum alciui legaverit: nam haeres nudam habet proprietatem, legatarius vero usumfructum. Et contra, si fundum legaverit deducito usumfructu, legatarius nudam habet proprietatem, haeres vero usumfructum. Item alii usumfructum, alii, deducito eo, fundum legare potest. Sine testamento vero si quis velit usumfructum alii con-
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constituere, pactiobus et stipulationibus id efficere debet. Ne tamen in
universum inutiles essent proprietates, semper abscedente usufructu, pla-
cuit certis modis exstingui usufructum, et ad proprietatem reverti.

§ 1. The usufruct of things is frequently separated from the property; and this
happens by various means: it happens, for instance, when the usufruct is bequeathed
by testament: for the heir bairn only the nude property vested in him, whilst the
legatee possesses the usufruct — or, on the contrary, it happens, when a testa-
tor bairn bequeathed his lands without the usufruct; for then the legatory bairn only
the nude property, whilst the heir enjoys the profits: for the usufruct may be be-
queathed to one man, and the lands, without the usufruct, to another. Yet, if any
man would constitute an usufruct otherwise, than by testament, he must do it by pa-
tion and stipulation. But, left the property of lands should be rendered wholly unbene-
ficial by deducting the usufruct for ever, it was thought convenient, that the usufruct
should by certain means become extinguisheb, and revert to the property.

Usufructus a proprietate.] In the laws of or by testament. An estate for life, for years,
England there is no mention of such usufructs, or at the will of the lord, &c. are almost of the
which were among the Romans; but they may
undoubtedly be created among us by agreement.

Quibus in rebus constituitur.

§ II. Constituitur autem usufructus non tantum in fundo et ædibus,
verum etiam in servis, et jumentis, et cæteris rebus; exceptis ipsis,
quæ ipso usu consumuntur: nam hæ res Æneae naturalis ratione, neque civili, recli-
piunt usufructum; quo in numero sunt vinum, oleum, frumentum, vesti-
menta: quibus proxima est pecunia numerata: namque ipso usu, adhibu
permutatione, quodammodo extinguitur. Sed utilitatis causa Senatorus cen-
fuit, posse etiam earum rerum usufructum constitui, ut tamen eo nomi-
ne hæredi utiliter caveatur: itaque, si pecuniaæ usufructus legatus fit, ita
datur legatorio, ut ejus fiat; et legatorius satiatur hæredi de tanta pecunia
refitiuenda, si morietur, aut capite minutetur. Cæteræ quoque res ita tra-
duntur legatorio, ut ejus fiat: sed æstimatis his satisdatur, ut, si moriatu
aut capite minuat, tanta pecunia refitiuatur, quanti hæ fuerint æstimata.
Ergo Senator non fecit quidem earum rerum usufructum, (nec enim po-
terat,) sed per cautemon quasi usufructum constituit.

§ 2. The usufruct not only of lands and houses is grantable, but also the usufruct of
slaves, cattle, and other things; except those of which the nature is such, that they
may be consumed by using; for the usufruct of such things is neither grantable by ci-
vil policy, nor natural reason; and among these may be reckoned wine, oil, cloaths,
&c. And money also is almost of the same nature; for by constant use, and the fre-
quent change of owners, it in a manner becomes extinguisheb. But the benefactor, thro'
a motive of public utility, hath ordained, that the usufruct of these things may be
constituted, if a sufficient caution is given upon this account to the heir; and there-
fore, if the usufruct of money is bequeathed, the money is so given to the legatory, as
to make it instantly his own: but then the legatory, lest he should die, or suffer dimi-
nution, is obliged to give security to the heir for the repayment of a like sum. Other
things also, which are in their nature liable to consumption in using, when the usu-
fruct of them is bequeathed, are so delivered to the legatory, as to become wholly bis
property;
property; but in this case, after an exact valuation hath been made, caution must be
given to the heir for the payment of a sum, equal to such valuation, either at the death
of the legatary, or if it happens, that he should suffer diminution. It is not there-
fore to be understood, that the senate hath created an usufruct of these things,
which is impossible; but that the senate hath constituted a quasi-usufruct by means
of a caution.

Senatus consult.] vid. SS. 7. 15. li. 1. 2. de usufructu earum rerum, que usu consumentur. Ulp.

Quibus modis finitur.

§ III. Finitur autem usufructus morte usufructuarii, et duabus capitibus
diminutionibus, maxima et media; & non utendo per modum et tempus;
quae omnia satis statuit constitution. Item finitur usufructus, si domino
proprietatis ab usufructuariio cedatur, (nam cedendo extraneo nihil agitur,)
vel ex contrario, si usufructuarius proprietatem rei acquisiverit: quae re
consolidatione appellatur. Eo amplius consistit, si aedificium consumptum
fuerint, vel etiam terrae motu, vel vitio suo corruerint, extinguui usu-
fructum; et ne areae quidem usufructum deberi.

§ 3. The usufruct of a thing determines by the death of the usufructuary; and by
two of the three diminutions; namely, the greatest and the middle diminution, or change
of state; and also by not being used, according to the manner, and during the
time prescribed: all which things are set forth in our constitution. The usufruct of
a thing also determines, if the usufructuary hath surrendered it to the lord of the
property; but a cession of it to a stranger does not work a surrender to the proprietor:
or, on the contrary, an usufruct determines, if the usufructuary hath acquired the
property of it: and this is called consolidation. And it is certain, if an house hath
been consumed by fire, or hath fallen by means of an earthquake, or th'o decay, that
then the usufruct of such house is wholly destroyed, and that no usufruct of the area,
or ground of it, can afterwards become due to the usufructuary.

Statuit constitution.] vid. Cod. 3. t. 23. l. 16.

Si finitus sit.

§ IV. Cum autem finitus fuerit totus usufructus, revertitur sedilect ad
proprietatem; et, ex eo tempore, nunc proprietatis dominus incipit plenam
in re habere potestatem.

§ 4. When the whole usufruct of a thing is determined, it then reverts to the pro-
erty; and, from that instant of time, the owner of the nude property commences to
have a full and intire power over the thing.

Titu-
LIB. II.  TIT. V.

TITULUS QUINTUS.

De usu et habitatione.


Communia de usufructu et usu.

Isdem illis modis, quibus usufructus constituitur, etiam nudus usu
constituit solet: isdem illis modis finitur, quibus et usufructus de-
finitur.

The usufruct, and the nude use of a thing, are both of them constituted, and both
determined by the same means.

Quid inter sit inter usum fructum et usum fundi.

§ I. Minus autem juris est in usu quam in usufructu: nam is, qui
fundis nudum habet usum, nihil ulterior habere intelligitur, quam ut ole-
ribus, pomis, floribus, feno, stramentis, et lignis, ad usu quotidiamum
utatur: inque eo fundo haecenus ei morari licet, ut neque domino fundi
molestus sit, neque iis, per quos opera rustica sunt, impedimento: nec
ulli aliis jus, quod habet, aut locare, aut vendere, aut gratis concedere,
potest; cum is, qui usufructum habet, posset haec omnibus facere.

§ 1. There is less benefit and emolument in the use of a thing, than in the usu-
fruct: for he, who hath but simply the use of lands, is understood to have nothing
more than the liberty of using such a quantity of herbe, fruit, flowers, hay, straw,
and wood, which may be sufficient to supply his daily exigencies: and he is permitted
only to be comminor upon the land, on condition, that he neither becomes troublesome
to the owner, nor impedes the husbandmen in their country-labors. And an usuary,
having but a mere use, can neither let, sell, or give away his right to another,
also it is in the power of an usufructuary to convey his usufruct, either by lease,
sale, or donation.

Minus autem.] An Ufe, by the laws of Eng-
land, is of as great an extent, as an usufruct by
the Roman law. And by 27 H. 8. He, who hath
the use of land, is deemed to have the land itself. But
as to such uses and rights of habitation, which
were among the Romans, tho' our laws have not
beaten them in any particular manner, yet
they may certainly be granted and acquired by
special covenants and agreements, as was said
of usufruct. Ufus apud nos aequae late extenditur,
atque usufructus apud auctores juris civilis; sed non
vidimus, cur ideo jus tamen de usu, ut illi exim intelligant,
quem de habitatione, apud nos non tenet, quod alim
inter Romanos tenet. Cowel, h. t. Wood's
imp. Law. 151.

Ædium usus.

§ II. Item is, qui aedium usum habet, haecenus jus habere intelligitur,
ui ipse tantum inhabitet; nec hoc jus ad alium transferre potest: et vix
receptum esse videtur, ut hospitem ei recipere liceat; sed cum uxore liberif-
que fuis, item libertis, nec non personis aliis liberis, quibus non minus,
N 2 quam
quam servis utitur, habitandi jus habeat. Et convenienter, si ad mulierem usus ædium pertineat, cum marito ei habitare liceat.

§ 2. He, who hath but the mere use of an house, is understood to have a right in it so far only, as to enable him to inhabit it himself: for he hath no power to transfer this right to another; and it is hardly thought allowable, that he should receive a guest or a lodger. But the usuary, notwithstanding what has been said, hath a right to inhabit the house together with his wife, his children, and his freed-men; and also with such other free persons, who are in the quality of servants. And, agreeably to this, if the use of an house appertains to a woman, she also hath the liberty of living in it with her husband, and her dependents.

Nudum habet usum.] An ususfruct is a right of enjoying all the fruits and revenues, which the estate, subject to it, is capable of producing; but an use consists only in a right to take out of the fruits of the ground what is necessary for the person, who has the use, or what is settled by his title; and the surplus belongs to the proprietor of the estate: thus thoe, who have the right of use in a forest or copice, can only take what is necessary for their use, or is regulated by their title. And he, who has the use of any other ground, can only take out of it what shall be necessary to supply the occasions he shall have for those kinds of fruits, which the ground produces; or the use may even be restrained to certain kinds of fruits, or revenues, without extending it to others. Thus we see in the Roman law, that he, who had only the simple use of a piece of ground, had no share of the corn or oil, which grew in it; and that he, who had the use of a flock of sheep, was restrained only to make use of them for dunging his grounds, and had no share either in the wool or lambs; and even of the milk, it is said in some places, that the usuary could take but a very small portion; and in others, that he had no right to any of it. 2177. 7. 8. 111. Deum. lib. 1. 2. sed. 2.

De servi vel jumenti usu.

§ III. Item is, ad quem servis usus pertinet, ipse tantum opera atque ministerio ejus uti potest; ad alium vero nullo modo jus suum transferre ei concessum est. Idem siclicit juris est et in jumento.

§ 3. He also, who hath simply the use of a slave, can benefit himself only by the labor and service of such slave: for it is by no means in the power of the usuary to transfer his right over to another. And the same law prevails in regard to beasts of burden.

De pecorum usu.

§ IV. Sed et, si pecorum vel ovium usus legatus sit, neque lacte, neque agnis, neque lana, utetur usuarius: quia ea in fructu sunt. Plane ad tertiorum agrum suum pecoris uti potest.

§ 4. If the use of cattle is left by testament; as, for example, the use of sheep, yet the usuary can neither use the milk, the lambs, nor the wool; for these of right belong to the ususfruct. But the usuary may undoubtedly employ the sheep, in feeding and improving his lands.

De habitatione.

§ V. Sed, si cui habitatio legata, sive aliquo modo constituta sit, neque usus videtur, neque ususfructus, sed quasi proprium aliquod jus: quamquam habitationem habentibus, propter rerum utilitatem, fecundum Marcelli sententiam, nostra decsione promulgata, permisimus non solum in ea degere, sed etiam aliis locare.
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§ 5. An habitation, whether given by testament, or constituted by any other means, appears to be neither an use, nor an usufruct, but seems to be rather a particular right. And, for the public utility and in conformity to the opinion of Marcellus, we have permitted, by our decision, that be, who hath an habitation, may not only live in it, but also let it to another.

Notra deciione.] Whoever hath a right of habitation in an house, or in a part of it, may assign over and let out his right to another, unless the instrument, from which he derives his title, bears some condition to the contrary: and the right of habitation, as well as that of use, if simply given, continues during the life of him, who possesseth it. Cod. §. i. 33. i. 13. de usu-fructu et habitacione. SS. 7. 8. i. 10. i. 12. 3.

Transitio.


§ 6. What we have already delivered, concerning real services, usufruits, uses, and habitations, may at this time be sufficient. Concerning inheritances, and obligations, we will treat in their proper places. We have already explained summarily by what means things are acquired, according to the law of nations; let us now therefore examine, by what means they are acquired according to the civil law.

TITULUS SEXTUS.

De usufracionibus et longi temporis prescriptionibus.


Juris civilis constitutum fuerat, ut, qui bona fide ab eo, qui dominus non erat, cum crederet eum dominum esse, rem emerit, vel ex donatione, aliave quavis juda causa acceperit, is eam rem, si mobilis erat, anno ubique uno, si immobiles, biennio tanunt in Italico solo, usucaperet: ne rerum dominia in incerto essent. Et, cum hoc placitum erat putantibus antiquioribus, dominis sufficere ad inquirendas res suas praefata tempora, nobis melior sententia refedit, ne domini maturius suis rebus defraudentur, neque certo loco beneficium hoc conclusatur: et ideo constitutionem super hoc promulgavimus, qua cautum est, ut res quidem mobiles per triennium; immobiles vero per longi temporis possessionem (id est, inter præsentes decennio, inter absentes viginti annis) usucapiantur. Et his modis, non
non solum in Italia, sed etiam in omni terra, quæ nostrorum imperio gubernatur, dominia rerum, justa causa posseffionis præcédente, acquirantur.

It was antiquely decreed by the civil law, that be, who by means of purchase, donation, or any other just title, had obtained a thing from another, whom be thought to be the true owner of it, (albo' in reality be was not,) and, if it was moveable, had posseffed it bona fide for the space of one year, either in Italy or the provinces — or, if it was immovable, had posseffed it for the term of two years within the limits of Italy, should prescribe to such thing by use: and this was held to be law, left the dominion, or property of things, should be uncertain. But albo' it was thought by the more antient legislators, that the above mentioned terms were of sufficient length to enable every owner to search after his different kinds of property, yet a better determination hath suggested itself to our thoughts, lest the true owners should be defrauded, or too hastily excluded, by the circumscription of time and place, from the benefit of recovering their just due: and we have therefore promulgated our ordnance, by which it is provided, that things moveable may be prescrib'd to after the expiration of three years, and that a possession, during a long tract of time, will also found a prescription to things immovable: and note, that, by a long tract of time, we mean ten years, if the parties are present, (i.e. in the province,) and twenty years, if either of them is absent. By these means the property of things may be acquired; and this not only in Italy, but throughout our dominions in general, if the possession was justly founded.

Et ideo constitutioem.] *vid. Cad. 7. t. 31.

L. 3m. De usuapone transformanda, et de jubilata differencia rerum mancipii et nec mancipii. By the common law of England the time of prescription is that time, of which there is no memory of man, or record, to the contrary; for if there is any sufficient proof of a record or writing to the contrary, altho' it exceeds the memory or proper knowledge of any man living, yet it is deemed to be within the memory of man: and this is the reason, that regularly a man cannot prescribe or allege a custom against an act of parliament, because it is the highest proof and matter of record in the law. *Co. Lit. 115. But, altho' a prescription is said to be constitutio by a portion of time, which exceeds the memory of man, yet this is not always true; for our laws admit a great variety of prescriptions; which for the sake of order may be divided into two forts; — into thoe, which secure us from losf and punishment; and into thoe, which enable us to acquire a property.

The statute of the 31st of *Eliz. c. 5. bars all popular actions on account of offences by a prescription of two years, in the case of the king, and by a prescription of one year, when there is an informer. Other penal statutes allow different periods to prescribe in — — — as one year; (3 H. 7. c. 1. 31 Eliz. c. 4.) — six months; (5 Eliz. c. 5.) — three months; (1 Eliz. 6. c. 1.) — one month; (23 Eliz. c. 1.) &c. &c. — and, by the common law, if a man is acquitt'd upon an indiction of murder, he may after a year and a day plead prescription against any appeal brought by the wife, or the next of kin to the party killed. *Natura brevium 624. G. — Things immovable also, whether corporeal or incorporeal, are variously prescribed to. The most usuall prescription is that, which is called emphatically the longest, and extends beyond the memory of man; for whoever will prescribe against another in regard to the maintenance of a chaplain to celebrate divine service, the repairs of a church, an annuity, or any service in his fee, he must prove them to have been time out of mind, or he does nothing. But there are prescriptions of a shorter time, as of 40 years in the case of prelatical tithes, by the 2d and 3d of *Ed.VI. — of five years for lands and tenements, when a fine hath been lawfully acknowledged with the due proclamations. (4 Hen. 7. c. 24.) — of three years, when lands and tenements, gotten by forcible entry, have been so long held in quiet possession; (8 H. 6. c. 9.) — of a year and a day for a villein to assert his liberty against his lord, if the villein has continued so long in ancient demise, or in any of the king's cities or towns, without being claimed or molested. — of a year and a day for the confirmation of any deed made by one, who is in prison, unless he, who made it, doth in the interim revoke it. — Alfo of a year and a day, to recover lands and tenements, of which he hath been unjustly diffeixed. *Co. 1. infra. pers 250. &c. of continual claim. But prescriptions do not take place in all things. No man can prescribe, for example, to things not in commerce, nor to thofe,
De bis, quae sunt extra commercium.

§ 1. Sed aliquando, etiamsi maxime quis bona fide rem possederit, non tamen illi ufcapio ullo tempore procedit: veluti si quis liberum hominem, vel rem sacram, vel religiosam, vel servum fugitivum, possideat.

§ 2. But it is certain in some cases, that alibi there hath been a possession incontestably bona fide, yet no length of time will be sufficient to found a prescription; and this happens, when a man possesse, as his property, a free person, a thing sacred or religious, or a fugitive slave.

De rebus furtivis, et vi possessoris.

§ II. Furtivæ quoque res, et quæ vi possessoris sunt, nec, si prædicto longo tempore bona fide possessoris fuerint, ufucapi possunt: nam furtivarum rerum lex duodecim tabularum, et lex Atilia, inhibent ufucapionem; vi possessorum lex Julia et Plautia. Quod autem dictum est, furtivarum et vi possessorum rerum ufucapionem per leges prohibeam esse, non eo pertinet, ut ne ipse fur, quive per vim possidet, ufucapere possit, (nam his alia ratione ufucapi non competit; quia scilicet mala fide possident,) sed ne ullus alius, quamvis ab eis bona fide emerit, vel ex alia causa acceperit, ufucapieri jus habeat. Unde in rebus mobilibus non facile procedit, ut bona fidei possessoribus ufucapi competit. Nam, qui scien s alienam rem vendiderit, vel ex alia causa tradiderit, furtum ejus committit. Sed tamen id aliquando alter fe habet. Nam, si hæres rem defuncto commodatam, aut locatam, vel apud eum depositam, ex intimans hæreditarium esse, bona fide accipienti vendiderit, aut donaverit, aut doxit nomine dederit, quin is, qui acceperit, ufucapere possit, dubium non est: quippe cum ea res in furti vitium non ceciderit; cum utique hæres, qui bona fide tanquam suam alienaverit, furtum non committat. Item, si is, ad quem ancilla ufucapi fructus pertinet, partum suum esse credens vendiderit, aut si donaverit, furtum non committit. Furtum enim, fine affecta furandi, non committitur. Aliis quoque modis accidere potest, ut quis, fine vitio furti, rem alienam ad aliquem transferat, et efficat, ut a possessori ufucapiatur. Quod autem ad eas res, quæ solo continentur, expedit, jus ita procedit, ut, si quis loci vacantis possessorionem, propter absentiam aut negligeniam domini, aut quia fine lucceusse decesserit, fine vi vacnat, quamvis ipse mala fide possideat, (quia intelligit, fe alienum fundum occupasse) tamen, si alii bona fide accipienti tradiderit, poterit ei longa possessorionem acquiri; quia neque furtivum, neque vi possessorum acceperit. Abolita est enim quorundam veterum fententia exintimantium, etiam fundi locive furtum fieri. Et eorum utilitati, qui res soli possident, principalibus constitutionibus prospicitur, ne cui longa et indubitata possessorion debetur auferri.

§ 2.
§ 2. It is also equally certain, that no prescription can be founded to things moveable, which have been stolen; or to things immovable, seized by violence; also such things have been possessed bona fide, during the length of time required by our constitution: for a prescription to things stolen is prohibited by a law of the twelve tables, and also by the law Atilia; and the laws Julia and Plautia forbid a prescription to things seized by violence. And it is not to be inferred from these laws, that a thief, or defensor only, is prohibited to take by prescription; (for such are prohibited for another reason, namely, because they are fraudulent and dishonest possessors;) but all other persons are also disabled from prescribing to things stolen, or seized forcibly, also they shall have purchased such things bona fide, or otherwise received them upon a just account; and from hence it follows, that things moveable can not easily be prescribed to, even by honest possessors: for whoever hath either sold or delivered the goods of another knowingly, upon any consideration, he is guilty of theft. But this rule sometimes admits of exceptions: for in some cases a thing moveable may be prescribed to: thus, if an heir, thinking a particular thing to be hereditary, which in reality had only been lent, let to, or deposited with the deceased, shall have sold, given it, or otherwise disposed of it to another, who received it bona fide, it is not to be doubted but that the receiver may prescribe: for such thing can never be refused stolen, inasmuch as it was honestly possessed from the beginning; and the heir, who sold it, believing it to have been his own property, hath committed no theft. Also if he, who hath the usufruct of a female slave, either sells or gives away the child of such slave, believing it to be his own property, he does not commit theft; for theft can not be constituted without an intention to commit it. It may also happen, by various means, that one man may transfer the property of another without theft, and give a right of prescription to the possessor. And in regard to things immovable the law ordains, that, if any man should take possession of an estate without force, by reason either of the absence, or negligence of the owner, or because he died without heirs, and (also) be heath thus possessed the land dishonestly, shall have made livery of it to another, who took it bona fide, the land by long possession may be acquired by such taker, who can not be said to have received either a thing stolen, or possessed by violence: for the opinion of those antient lawyers, who held, that lands and things immovable, might be stolen, is now abolished: and it is therefore provided by the imperial constitutions, in favour of all such, who possess an immovable property, that a long and undoubted possession ought not to be taken away.

De vitio purgato.

§ III. Aliquando etiam furtiva, vel vi possedea, res usucapi potest; veluti si in domini potestatem reversa fuerit: tunc enim, vitio rei purgato, procedit ejus usucapio.

§ 3. A prescription may sometimes be founded even to things, which have been stolen, or possessed by violence; as for instance, when such things shall have fallen again under the power of their true owner; for they are then reputed to be purged from the contamination of theft or violence, and may afterwards be claimed by prescription.

De re fiscal et bonis vacantibus.

§ IV. Res fisci nostri usucapi non potest: sed Papinianus scripti, bonis vacantibus fisco nondum nuntiatis, bona fide emptorem traditam fibi rem ex
ex his bonis usucapare posse; et ita Divus Pius, et Divi Severus et Antoninus rescripsicrunt.

§ 4. The things, which appertain to our treasury, can not be acquired by prescription. But, when things ejectionable have not been certified to the treasury, it is held by Papinian, that a purchaser, bona fide, may prescribe to any of them after delivery. And not only the emperor Pius, but the emperors Severus and Antoninus have also issued their rescripts, conformable to this opinion.

Regula generalis.

§ V. Novisimem sciemum est, rem talem esse debere, ut in se non ha-
beat vitium, ut a bonœ fidei emptore usuca pi possit, vel qui ex alia jueta
causa possidet.

§ 5. It is lastly to be observed, that, if any man shall purchase a particular
thing bona fide, or obtain the possession of it by any other just titre, he can by no
means prescribe to it, unless the thing, in itself, is free from all manner of excep-
tion.

De errore falsœ causœ.

§ VI. Error autem falsœ causœ usucapcionem non parit; veluti si quis,
cum non emeriit, emisseœ se exigitam, posseideat; vel, cum ei donatum non
ruerit, quasi ex donato posseideat.

§ 6. A mistake of the cause of possession shall not give rise to a prescription: as
when be, who posseffes a thing, imagines, that be bath purchased it, when he bath
not purchased it; or that the thing was a gift, when in reality it was not given.

De accessione possessionis.

§ VII. Diutina posseffio, quœ prodessic cooperat defuncto, et hæredi et
honorum posseffori continuatur, licet ipse fciat, prædiunm alienum esse. Quod si ille iniunum non habuit, hæredi et honorum posseffori, li-
cet ignoranti, posseffio non prodeet. Quod nostra constitutio similiter et
in usucapcionibus observari conuituit, ut tempora continuuntur.

§ 7. If a thing immovable is posseffed by any man bona fide, so that the posse-
ffion is justly commenced, then the heir of that man, when deceased, or the posseffor
of his goods, may continue the possession; so as to raise a prescription, albo' he is con-
scious, that what he posseffes is the property of another; but, if the posseffion was
commenced from the beginning mala fide, or unjustly, then will the continuance of it
avail neither the heir, nor the possessor of the goods, albo' he was ignorant of any
male-feazance. And we have enacted by our imperial constitution, that the time of
usucapcion or prescription to things moveable shall be continued in the same manner
from the deceased to his successor.

Quod nostra constitutio.] vid. Cod.7. t.31. l.un. de usucapione transformanda.

§ VIII. Inter venditorem quoque et emptorem conjungi tempora, divi
Severus et Antoninus rescripsicrunt.

§ 8. And, in regard to the computation of the years, necessary to raise a pre-
scription, the emperors Severus and Antoninus have ordained by their rescript, that,
L I B. II.  T I T. VI.

between seller and buyer, the time of the continuance of the possession of the one shall be joined to the time of the continuance of the possession of the other.

De his, qui a fisco, aut Imp. Augustææ domo, aliquid acceperunt.

§ IX. Editio divi Marci cavit, eum, qui a fisco rem alienam emit, si post venditionem quinquennium pratererit, posse dominum rei exceptione repellere. Constitutio autem divae memoriae Zenonis bene profpexit is, qui a fisco per venditionem, aut donationem, vel alium titulum accipiant aliquid; ut ipsi quidem securi statim sint, et victores existant, tibi conveniantur, five conveniantur: adversus autem sacratissimum aerarium usque ad quadriennum liceat is intendere, qui pro dominio vel hypotheca eorum rerum, quae alienata sunt, putaverint, sibi quasi dam competere actiones. Nostra autem divina constitutio, quam nuper promulgavimus, etiam de is, qui a nostra vel venerabilis Augustæ domo aliquid acceperint, haec statuit, quæ in fiscalibus alienationibus praefatæ Zenonianaæ constitutionis continentur.

§ 9. It is enacted by an edict of the emperor Marcus, that, when a thing is purchased from the treasury, the purchaser, after an uninterrupted possession of it for the space of five years, subsequent to the sale, may repel the true owner by an exception of prescription. But the emperor Zeno, of sacred memory, hath well provided by his constitution, that all those, who by sale, donation, or any other title, have received things either moveable, or immovable, from the public treasury, may instantly be secured in their possession, and made certain of success, whether they are plaintiffs or defendants—and that those, who think, that they are intitled to certain aliens, either as proprietors or mortgagors of the things alienated, may commence their suits against the treasury, at any time within the space of four years, but not afterwards. And, in our own sacred ordinance, which we have lately promulgated in favor of those, who receive any thing, whether moveable or immovable, from the private possessions either of our Self, or of the empress, our confort, we have made the same regulations, which are contained in the above mentioned constitution of the emperor Zeno, concerning fiscal alienations.

Editio divi Marci, a Cod. 2. t. 37. l. 3.
Constitutio autem, a Cod. 7. t. 37. l. 2.
Divina constitutio, a Cod. 7. t. 36. l. 3.
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TITULUS SEPTIMUS.

De donationibus.


De donatione.

Est et aliud genus acquisitionis, donatio. Donationum autem duo sunt genera; mortis causa, et non mortis causa.

There is another way, by which property is acquired, namely, by donation; of which there are two kinds; the one mortis causa, i.e. on account of death; the other non mortis causa, i.e. not on account of death; and this takes effect, during the life of the donor.

De mortis causa donatione.

§ 1. Mortis causa donatio est, quae propter mortis ficta suspicione; cum quis ita donat, ut, si quid humanitas ei contigisset, haberet is, qui accipit: fin autem superexigitis, qui donavit, recipiet: vel si eum donationis postnitiisset, aut prior deceperit is, cui donationem sit. Haec mortis causa donationes ad exemplum legatorum redactae sunt per omnia: nam, cum prudentibus ambiguum fuerat, utrum donationis, an legati in eo eam obtinuere oporteret, (et utriusque causa quaedam habebat insignia,) et alii ad aliud genus eam retrahebant, a nobis constantum est, ut per omnia fere legatis connumeretur, et sic procedat, quemadmodum nostra constitutio eam formavit. Et in summa mortis causa donatio est, cum magis se quis velit habere, quam eum, cui donat; magisque eum, cui donat, quam hae sedem suum. Sic et apud Homerum Telemachus donat Pirea.

Πείρα, ἄγαρ τ’ ἰδίμεν ὡς ἔταν ταίδε ἐργά.

*Εἰ καί, ἐμε μνήσθησα ἀγνωσίας ἐκ μεγαροῦ:

Λαύθρη κτενίσαξε, πατρώια παιδός δασοῦσαι,

οὐον ἐχοῦσα σε βελοῦμεν ἐπαιρεμένο, ἢ τινα τῶν ἔδ.

Εἰ δὲ θ’ ἐγὼ τυτοις φονον ἣ νηρα φυτεύω,

Δὴ τοῦτο μοι χαίροι φερεῖν πρὸς δομίαν χαίροιν.

Hos verius sic vertere licebit.

Cum, Pireae, homines lateant secreta futuri,

Si me forte proci sceleratis ad Styga mittant

Infidissi, patriasque velint ericiere prædas;

Hæc ego præ reliquis multo tibi cedere malim:

Sin ego eos jusitis proflernam cladibus ulter,

Hæc mibi tu gaudens media inter gaudia reddas.

O 2 § 1.
§ I. A donation on account of death is that, which is made under an apprehension or suspicion of death: as when any thing is given upon condition, that, if the donor dies, the donee shall possess it absolutely; or that the thing given shall be returned, if the donor should survive the danger, which be apprehends; or should repent, that he had made the gift; or, if the donee should die before the donor. Donations mortis causa, are now reduced, as far as possible, to the similitude of legacies: for, when it was much doubted by our lawyers, whether a donation mortis causa ought to be reputed as a gift, or as a legacy, inasmuch as, in some things, it partakes of the nature of both, we then constituted and ordained, that every such donation should be considered as a legacy; and be made in the manner, which our constitution directs. But, in brief, a donation, mortis causa, is then said to be made, when a man so gives, as to demonstrate, that he would rather possess the thing given himself, than that the donee should possess it; and yet, at the same time, evinces, that he is more willing, that the donee should possess it, than his own heir.

The donation, which Telemachus makes to Pireus in Homer, is of this species.

He (when Pireus ask'd for slaves, to bring
The gifts and treasures of the Spartan king)
Thus thoughtfu answer'd;—those we shal not move,
Dark and unconscious of the will of Jove.
We know not yet the full event of all:
Stabb'd in his palace, if your prince must fall,
Us, and our house, if treason must o'erthrow,
Better a friend possess them than a foe.
But on my foes should vengeance heav'n decree,
Riches are welcome then, not else, to me;
'Till then, retain the gifts.

Quemadmodum nostra constitutio.] vid. Cod. lib. 17.

§ II. Aliae autem donationes sunt, quæ sine ulla mortis cogitatione finunt, quas inter vivos appellamus, quæ non omnino comparantur legatis: quæ, si fuerint perfectæ, temere revocari non possunt. Perfectionem autem, cum donator suam voluntatem scriptis aut scriptis manifestaverit. Et, ad exemplum venditionis, nostra constitutio eam etiam in se habere necessitatem traditionis voluit, ut, etiam si non tradatur, habeant plenissimum et perfectum robur, et traditionis necessitas incumbat donatori. Et, cum retro principium dispositiones insinuari eæ ad actis intervenientibus voleant, si majores fuerant ducentorum solidorum, constitutio nostra eam quantitatem usque ad quingentos solidos ampliavit, quam stare etiam fine insinuacione statuit: sed et quasdam donationes inventit, quæ penitus insinuacionem fieri minime desiderant, sed in se plenissimum habent firmatatem. Alia insuper multa ad uberiores exitum donationem invenimus, quæ omnia ex nostris constitutionibus, quas super his expofuimus, colligenda sunt. Sciendum est
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eft tamen, quod, et si plenissimae sint donationes, si tamen ingrati exsistent homines, in quos beneficium collatum est, donatoribus per nostram constitutionem licentiam praefitimus certis ex causis eas revocare; ne illi, qui suas res in alios contulerint, ab his quandam patiantur iuriam vel jacturam, secundum enumeratos in constitutione nostra modos.

§ 2. Donations, made without any thought or apprehension of death, we call donations inter vivos; and these admit of no comparison with legacies: for, when once they are perfect, they cannot afterwards be revoked without cause: and donations are then esteemed perfect, when the donor hath declared and manifested his will either in writing or otherwise. And it is appointed by our constitution, that a donation inter vivos shall, in imitation of a sale, necessarily enforce a delivery; for when things are given they become fully and perfectly vested in the donee, and it is incumbent upon the donor to deliver them: and, although it is enacted by the constitutions of our predecessors, that donations, amounting to the value of two hundred solidi, shall be publicly and formally enrolled and registered, we have yet thought it expedient to enlarge this sum to five hundred solidi by our ordinance, by which we permit all donations of less value to be firm and binding without infusion or enrollment; and there are likewise some donations, which, although they exceed five hundred solidi, are yet of full force without infusion. We have also, for the enlargement of donations, enacted many other rules, all which may be collected by perusing our constitutions, set forth for that purpose. It nevertheless remains to be observed, that, when a donation is fully and validly made, the donor may revoke it on account of ingratitude in the donee in some particular cases: and this may be done, lest he, who hath been liberal and kind to another, should in any of the instances, enumerated in our constitution, suffer either injury or damage from him, upon whom a benefit was conferred.

Nostra constitutione. [vid. Cod. 8. 1.54. l.35. Enumeratos in constitutione. [vid. Cod. 8. 1.56. l.10.

De donatione ante nuptias vel propter nuptias.

§ 3. Eft et aliud genus inter vivos donationis, quod veteribus quidem prudentibus penitus erat incognitum; postea autem a junioribus Divis Principibus introductum est, quod ante nuptias vocabatur, et tacitam in se conditionern habet, ut tunc ratum esse, cum matrimonium effecerat; id eoque ante nuptias vocabatur, quod ante matrimonium efficiebat; et nunquam post nuptias celebratas talis donatio procedebat. Sed primus quidem Divus Juffinus pater notissimae, cum augeri dotes et post nuptias fuerat permissum, si quid talia eveniret, et ante nuptias augerit donationem, et constante matrimonio, sua constitutione permisit: sed tamen nomen inconvenientes remanebat, cum ante nuptias quidem vocabatur, post nuptias autem tale accipiebat incrementum. Sed nos plenissimo fini tradere factiones cupientes, et consequentia nomina rebus esse studentes, constitui mus, ut tales donationes non augeantur tantum, sed etiam constante matrimonio initium accipiunt: et non ante nuptias, sed propter nuptias, vo centur: et dotibus in hoc exequentur, ut quemadmodum dotes constante matrimonio non solum augeantur, sed etiam fiunt, ita et initae donationes, quae
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quia propter nuptias introducæ sunt, non solum antecedant matrimonium, sed eo etiam contracho augeantur et constituantur.

§ 3. There is also another species of donations inter vivos, which was wholly unknown to the antient lawyers, being introduced by later emperors: this species of donations inter vivos was called ante nuptias, (i.e. before marriage,) and contained in it the following tacit condition: namely, that it should then take effect, when the marriage was performed; and these donations were properly called ante nuptias, because they could never be constituted after the celebration of matrimony. But, inasmuch as it was permitted by the antient law, that portions might be augmented after marriage, the emperor Justin, our father, both enacted by his constitution, that donations called ante nuptias might also be augmented at any time, whilst the matrimony subsisted: and, as it was improper, that a donation should be still termed ante nuptias, when it had received an augmentation post nuptias, i.e. after marriage, we therefore being defers, that our sanction might become as perfect as possible, and that names should be properly adapted to things, have ordained and constituted, that the above mentioned donations may be not only augmented, but may also receive their commencement at any time during matrimony, and that for the future they shall not be called donations ante nuptias, but donations propter nuptias; i.e. on account of marriage: and thus these donations are made equal with portions; for as portions may be augmented, and even made, when matrimony is subsisting and persons are actually married, so donations, which are introduced on account of matrimony, may now not only precede marriage, but be augmented, or even constituted, after the celebration of it.

Sua constitutionem. | vid. Cod. s. t. 3. l. 19.
Constitutum; | vid. Cod. s. t. 3. l. 20. beginning thus—Sanctus, nomine prius emendatu, ita

De jure accrescendi.

§ 4. Erat olim et alius modus civilis acquisitionis per jus accrescendi, quod est tale: si, communem servum habens aliquis cum Titio, solus libertatem ei impusuerit, vel vindicta vel testamento, eo casu pars ejus amittetur, et socior accrescebat. Sed, cum peffimum fuerat exemplo, et libertate servum defraudari, et ex eo humanioribus quidem dominis damnun inferri, servioribus autem dominis lucrum accedere, hoc, quasi invidia plenum, pio remedio per nostram constitutionem mederi necessarium duximus: et invenimus viam, per quam manumissor, et socior ejus, et qui libertatem accept, nostro beneficio fruantur, libertate cum effectu procedente, (cujuis favore antiquos legum latores multa etiam contra communes regulas statuisse manifestum est,) et eo, qui eam libertatem impusuit, sue libertatis stabilitate gaudente, et socior indemni confervato, pretiumque servi secundum partem dominii, quod nos definivimus, accipiente.

§ 4. There was formerly another manner of acquiring property by the civil law; namely by accretion; as for instance, if Primus had possessed a slave in common with Titius, and Primus had intrancisit that slave, either by the vindicta or by testament, then would the share of Primus in that slave be lost, and accrue to Titius. But, inasmuch as it affords a bad example, that a man should be defrauded of his liberty, and that those masters, who are most humane, should suffer los, whilst those, who are
Tit. VIII.

Quibus alienare licet, vel non licet.

De marito, qui, licet fundi dotalis dominus sit, alienare nequit.

Accidit aliquando, ut, qui dominus rei sit, alienare non posset: et contra, qui dominus non sit, alienanda rei potestatem habeat. Nam dotale prædium maritus, invita muliere, per legem Juliam prohibetur alienare; quamvis ipsius sit, dotis causa ei datum: quod nos, legem Juliam corrigentes, in meliorem statum deduximus. Cum enim lex in folis tan tummodo rebus locum habebat, que Italicæ fuerant, et alienationes inhbebat, que invita muliere fiebant, hypothecas autem earum rerum etiam volente ea, utrique remedium impoṣimus, ut etiam in eas res, quæ in pro vinciali foro polite sunt, interdecita fit alienatio vel obligatio, ut neutrum eorum neque confententibus mulieribus procedat: ne fexus muliebris fragilitas in perversum substantiae earum convertatur.

It sometimes happens, that the proprietor of a thing cannot alien it, and on the contrary that he, who is not the proprietor, may alien it: for example, by the law Julia an husband is prohibited to make an alienation of lands, which came to him in right of his wife, unless his wife consents to the alienation: and yet every man is deemed the proprietor of whatsoever is given to him, as a marriage portion. But, in this respect, we have corrected the law Julia, and brought it into a better state: for, having observed, that this law regards only those immoveable possessions, which are situated within the precincts of Italy, and that, although it inhibits the husband to make a mortgage of such possessions, even with the consent of his wife, yet it permits him, with the consent of his wife, to make an alienation, we have therefore provided a remedy by our imperial authority; so that now no husband can either alien or mortgage, even with the consent of his wife, any immoveable possession, whether provincial or Italian, obtained with her, as a marriage portion; and we have been induced to make these regulations, lest the frailty of women should occasion the ruin of their fortunes.

Remedium impoṣimus, vid. Cod. 5. t. 13. l.xi.
De creditore, qui, licet non sit dominus, tamen alienare pignus potest.

§ I. Contra autem creditor pignus, ex pactione, quamvis ejus ea res non sit, alienare potest. Sed hoc foritan ideo videtur fieri, quod voluntate debitoris intelligitur pignus alienari, qui ab initio contraestus pactus est, ut liceret creditor pignus vendere, si pecunia non solvatur. Sed, ne creditores jus suum perfecquiri impedirentur, neque debitores temere suarum rerum dominium amittere viderentur, nostra constitutione consultum est, et certus modus impositus est, per quem pignorum distraictio posset procedere; cujus tenore utrique partis creditorum et debitorum fatis abundeque provisum est.

§ 1. But a creditor, by virtue of a compact, may sell or alien a pledge, although it is not his own property; yet this seems to be allowable for no other reason, than because the pledge is understood to be aliened by the consent of the debtor, with whom it was covenanted from the commencement of the contract, that the creditor might be permitted to sell the pledge, if the money borrowed was not paid at the time stipulated. But, left the creditors should be impeded from prosecuting, what is justly due to them, and left debtors, on the contrary, should lose the property of their possessions too soon, we have in our ordinance, promulgated for this purpose, instituted certain methods, by which the sale of pledges may be warrantably made: and, through the whole tenor of our constitution, a sufficient caution hath been taken in regard to both creditors and debtors.

Constitutione consultum est. vid. Cod. 1. 134. 1.3.

De pupillo, qui, licet dominus, non tamen fine tutoris auctoritate alienare potest.

§ II. Nunc admonendi sumus, neque pupillum, neque pupillam, ullam rem fine tutoris auctoritate alienare posse: ideoque, si mutuum pecuniam fine tutoris auctoritate alicui dederit, non contrahit obligationem: quia pecuniam non facit accipientis: ideoque vindicari nummi possunt, sicubi extant. Sed, si nummi, quos mutuo minor dederit, ab eo, qui accepit, bona fide consumpti sunt, condici possunt: si mala fide, ad exhibendum de his agi potest.

§ 2. It must now be observed, that no pupil, whether male or female, hath power to alien any thing without the authority of a tutor: and therefore, if a pupil, without the authority of his tutor, shall lend money to any man, such pupil contrahit no obligation: for he is incapable of vesting the property of his money in the borrower; and therefore the money may be claimed by vindication, (that is, by a real action,) if it exists entire and unspent. But if money, lent by a minor, is consumed by the borrower, bona fide, (i.e. believing that the lender was of full age) it may be recovered from such borrower by condition, that is, by a personal action. And, if such money is consumed by the borrower mala fide, an action ad exhibendum will lie against him.

§ III.
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Continuatio.

§ III. At ex contrario omnes res pupillo et pupillae fine tutoris auctoritate recte dari possunt: ideoque, si debitor pupillo solvat, necessaria est debitori tutoris auctoritas; alienus non liberabitur. Sed hoc etiam evidenter, fima ratione statutum est in constitutione, quam ad Caesaris advocatos ex suggestionem Tribonian, viri eminentissimi, quaestoris sacri palatii nostrri, promulgavimus: qua dispotitione, ita licere tutori vel curatori debitorem pupillarem solvere, ut prius judicialis sententia sine omni damno celebrata hoc permittat: quod subsecuto, si et judex pronunciaverit, et debitor solverit, sequatur huicmodi solutionem plenissima securitas. Sin autem aliter, quam dispotitionem, solutio facta fuerit, pecuniam autem salva habeat pupillus, aut ex ea locupletior fit, et adhuc eandem pecunia summa petat, per exceptionem doli mali potest submoveri. Quod si male consumperit, aut furtu aut vi amiserit, nihil proderit debitori doli mali exceptione, sed nihilominus condemnabitur: quia temere fine tutoris auctoritate, et non secundum nostram dispotitionem, solverit. Sed ex diverso pupillae vel pupillae solvere sine tutoris auctoritate non possint: quia id, quod solvunt, non fit accipientiis: cum scilicet nullius rei alienatio eis fine tutoris auctoritate concessa sit.

§ 3. But, on the contrary, the property of any thing may be transferred to pupils, whether male or female, without the authority of their tutors: yet, if a debtor makes a payment to a pupil, it is necessary, that the debtor should be warranted by the authority of the pupil's tutor; otherwise he will not be acquitted of the debt: and this, for a most evident reason, was ordained by a constitution, which we promulged to the advocates of Caesar, at the suggestion of that most eminent man Tribonian, the questor of our sacred palace: and by this constitution it is enacted, that the debtor of a minor may lawfully pay any sum to his tutor or curator, if a judicial decree, permitting the payment, is previously obtained without expense to the minor: for, when the payment of a debt is warranted by, and subsequent to, the decree of a judge, it is always attended with the fullest security. But, although money hath been paid to a pupil, otherwise than we have ordained, yet, if he should afterwards require, that the money should be paid him again, and demand it by action, he might be deprived of his plea by an exception of fraud, if it could be proved, that he had become richer by the increase of this money; or even that he had preserved it safely. But, if the pupil hath squandered and consumed the money paid to him, or lost it either by theft or violence, an exception of fraud will be of no benefit to the debtor, who will be compelled to make a second payment, because the first was made inconsiderately, without the authority of the tutor, and not according to our ordinance. Pupils are also incapacitated to pay money without the authority of their tutors; because, money, when paid by a pupil without such authority, does not become the property of him, to whom it is paid: for the alienation of no one thing is granted to a pupil without the authority of his tutor.

Statutum est in constitutione.] vid. Cad. 5. t. 37. ii. 25, 27.
Titulus Nonus.

Per quas personas cuique acquiritur.

C. iv. T. 27.

Summa.

Acquiritur vobis non solum per vosmetipfos, sed etiam per eos, quos in potestate habetis: item per servos, in quibus usufructum habetis: item per homines liberos, et per servos alienos, quos bona fide possidetis: de quibus singulis diligentius dispiciamus.

Things may be acquired not only by ourselves, but also by those, who are under our power; and also by slaves, of whom we have the usufruct only—acquisitions may also be made for us by free-men—and even by slaves, whom we possess bona fide, although they are the property of another. Let us therefore inquire diligently concerning all these persons.

De liberis in potestate.

§ 1. Igitur liberi vestri utriusque sexus, quos in potestate habetis, olim quidem quicquid ad eos pervenerat, (exceptis videlicet cæstrensis peculii, hoc parentibus suis acquisita finem uella distinctione: et hoc ita parentum siebat, ut etiam esset uis licentia quod per unum vel unam eorum acquisitionem esset, alii filio, vel extraneo donare, vel vendere, vel, quocumque modo voluerant, applicare: quod nobis inhumanum visum est: et generali constitutione etius, et liberis pepercimus, et parentibus honorem debeatum reservavimus: sanctum etenim ab obvieniat, hoc secundum antiquam observationem totum parenti acquiratur: Quae enim invidia est, quod ex patris occasione prosectum est, hoc ad eum reverti? Quod autem ex alia causa sibi filius futurus acquisivit, hujus usufructum patri quidem acquirat, dominium autem apud eum remaneat: ne, quod ei suis laboribus vel prospera fortuna accesserit, hoc, in alium perveniens, luctuosum ei procedat.

§ 1. It was antiently the law, that whatever estate came to children, whether male or female, who were under the power of their parents, it was acquired for the parents of such children without any diminution, if we except the peculium castrense: and these estates were so absolutely vested in the parents, that what was acquired by one child might have given to another child, or to a stranger; or might have sold it, or applied it in what manner, and to what purpose they thought proper: but this seemed to be inhuman: and we have therefore, by a general constitution, mitigated the rigor of the law in regard to children, and have, at the same time, maintained that honor, which is due to parents; having ordained, that, if any thing accrues to the son by means of the father's fortune, the whole shall be acquired for the father, according to antient practice: (for can it be unjust, that the wealth, which the son hath obtained,
De emancipatione liberorum.

§ II. Hoc quoque a nobis dispositum est et in ea specie, ubi parens, emancipando liberos suos, ex rebus, quae acquisitionem effugiebant, sibi tertiam partem retinere (si voluerat) licentiam ex anterioribus constitutionibus habebat, quafi pro pretio quodammodo emancipationis: et inhumatum quiddam accidebat, ut filius rerum suarum ex hac emancipacione dominio pro tertia parte defraudaretur; et, quod honoris ei ex emancipatione additum erat, quod sui juris effectus esset, hoc per rerum diminutionem decresceret. Ideoque statuimus, ut parens pro tertia parte dominii, quam retinere poterat, dimidiam non dominii rerum, sed usufructus, retineat. Ita etenim res intaece apud filium retinanebunt, et pater ampliore summa fruetur, pro tertia, dimidia potiturus.

§ 2. We have also regarded the interest of children in respect to emancipation: for a parent, when emancipated his children, might, according to former constitutions, have taken to himself, if he was so inclined, the property of the third part of those things, which were excepted from paternal acquisition, retaining it as the price of emancipation. But it appeared to be inhuman, that the son should be thus defrauded of the third part of his property, and that the honor, which he had obtained by becoming independent, should be decreased by the diminution of his estate; and we have therefore decreed, that the parent instead of the third part of the property, which he formerly might have retained, shall now be intituled to an half-share, not of the property, but of the usufruct, so that the property will, for the future, remain intire in the son, and the father will enjoy a greater share; namely, half instead of a third part.

Ex anterioribus constituitionibus.] vid. II. 2. Isteque statuimus.] vid. Cod. t. 6. 16. 16.
Cod. Theod. de maternis bonis.

De servis nostris.

§ III. Item vobis acquiritur, quod servi vestri ex traditione nanciscuntur, sive quid stipulentur, sive ex donatione, vel ex legato, vel ex qualibet alia causa, acquirant. Hoc enim vobis et ignorantibus et invitis obvenit; ipsi enim servi, qui in potestate alterius essent, nihil suum habere poterant. Sed, si hæres institutus sit, non alias, nisi vestro jusfu, hæreditatem adire potest, et, si vobis jubentibus adierit, vobis hæreditas acquiritur, perinde ac si vos ipsi hæredes instituti essetis: et convenienter scilicet vobis legatum per eos acquiritur. Non folum autem proprietas per eos, quos in potestate habetis, vobis acquiritur, sed etiam posseßio: cujuscunque enim rei possessionem adepti fuerint, id vos posseßionem videmini. Unde etiam per eos usucapio, vel longi temporis posseßio, vobis accidit.
§ 3. Whatever our slaves have at any time acquired, whether by delivery, stipulation, donation, bequest, or any other means, the same is reputed to be acquired by ourselves, and we thus acquire things, although we are ignorant of, or even averse to, the acquisition; for he, who is a slave, can have no property. And, if a slave is instituted an heir, be cannot otherwise take upon himself the inheritance, than at the command of his master; but, if the slave is commanded to do this, the inheritance is as fully acquired by the master, as if he had been himself made the heir; and consequently a legacy, left to a slave, is acquired by his master. It is farther to be observed, that masters acquire by their slaves not only the property of things, but also the possession; for whatever is possessed by a slave, the same is deemed to be possessed by his master, who may therefore found a prescription to it by means of his slave.

De fructuariis et bona fide possessor.

§ 4. In regard to those slaves, of whom the possessor has the usufruct only, it is an established rule, that, whatever they acquire by means of his goods, or by their own work and labor, it appertains to their usufructuary master: but whatever is obtained by a slave, otherwise than by those means, it belongs to him, who had the property of the slave: and therefore, if a slave is instituted an heir, or has received a legacy, or a gift, the inheritance, legacy, or gift, will not be acquired for the usufructuary master, but for the proprietor.

Continuatio.

§ 5. The same rule is observed in regard to him, who is possessed as a slave bona fide, whether he is a free-man, or the slave of another: for the law concerning an usufructuary master prevails equally in relation to a bona fide possessor, and therefore whatever is acquired otherwise, than by the two causes aforesaid, is either belongs to the person possessed, if he is free; or to the proprietor, if the person possessed,
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is the slave of another. But a bona fide possessor, who hath gained a slave by usu-
capion or prescription, (inasmuch as he thus becomes the absolute proprietor,) can ac-
cquire by virtue of such slave, by all manner of ways. But an usufructuary master
cannot prescribe; first, because he can never be strictly said to possess, having only
the power of using: and farther, because he knows, that the slave belongs to another.
We nevertheless may acquire not only property, but also possession, by means of the slaves,
w hom we possess bona fide, or of whom we have only the usufruct; and even by means
of a free person, of whom we have a bona fide possession. But, in saying this, we
adhere to the distinction, which we have before explained, and speak of these things
only, of which a slave may acquire the possession, either by means of the goods of his
master, or by his own industry.

De reliquis personis.

§ VI. Ex his itaque apparent, per liberos homines, quos neque vestro juri subjiciendorum habetis, neque bona fide possidetis, item per alienos servos, in quibus neque usufructum habetis, neque possessionem justam, nulla ex causa vobis acquiri posse. Et hoc est, quod dicitur, per extraneam personam nihil acquiri possit; excepto eo, quod per liberam personam (veluti per procuratorem) placet non solum scientibus, sed et ignorantibus, vobis acquiri possessionem, secundum Divi Severi constitutionem; et per hanc possessionem etiam dominium, si dominus fuerit, qui tradidit; vel usucapionem aut longiori temporis praescriptionem, si dominus non sit.

§ 6. It is apparent from what has been said, that we can by no means make ac-
quistions by free persons, who are not under our subjection, nor possessed by us bona
fide: neither can we acquire property by another's slave, of whom we have neither
the usufruct, nor the just possession. And this is meant, when it is said, that nothing
can be acquired by means of a stranger; which we must understand with an exception,
for it hath been determined according to the constitution of the emperor Severus, that
possession may be acquired for us by a free person, as for instance by a proctor, not on-
ly with, but even without our knowledge; and, by this possession, the property may
be gained, if the delivery was made by the proprietor; and an usucapion or prescrip-
tion may be acquired, although the delivery was made by one, who was not the pro-
pritor.

Divi Severi constitutionem.] vid. Cod. 7. 13. 11.

Transitio.

§ VII. Haec enim tantisper admonuisset sufficiat, quemadmodum singu-
læ res vobis acquirantur: nam legatorum jus, quo et ipso singulæ res vo-
bis acquiruntur, item fidicomissorum, ubi singulæ res vobis relinquuntur, opportunius inferiori loco referemus. Videamus itaque nunc, quibus modis per universitatem res vobis acquirantur. Si cui ergo hæredes facti sitis, sive cujus bonorum possessionem petitoris, vel si quem adrogaveritis, vel si cujus bona, libertatum conservandarum causa, vobis addita fuerint, ejus res omnes ad vos transseunt. Ac prius de hæreditatibus dispisciamus, quarum duplex conditio est; nam vel ex testamento, vel ab intestato, ad vos.
vos pertinent. Et prius est, ut de his dispiciamus, quae ex testamento vobis obveniunt; qua in re necessarium est initium de testamentis ordinandi exponere.

§ 7. The observations, which we have already made, concerning the acquisition of particular things, may suffice for the present; for we shall treat more opportune hereafter in another place of the rights of legacies and trusts. We will now proceed to show, how things may be acquired per universtitatem, that is, wholly and in gross by one single acquisition: for example; if Titius is nominated an heir, or seeks the possession of the goods of another, or arrogates any one as his son, or if goods are adjudged to him for the sake of preserving the liberty of slaves; in all these cases, the intire inheritance passeth to Titius. Let us now therefore inquire into the inheritances, which are of a twofold nature; for they proceed either from a testament, or an intestacy. We will first treat of those, which come to us by testament; and, in doing this, it will be necessary to begin by explaining the manner of making testaments.

**Titulus Decimus.**

De testamentis ordinandi.


**Etymologia.**

Testamentum ex eo appellatur, quod testatio mentis sit.

A testament is so called from the Latin word testatio, because it bears witness or testimony to the determination of the mind.

Testamentum ex eo.] The writers on the civil law give various definitions of a testament. Modestinus calls it voluntatis nostrar jussa sententia de eo, quod quis post mortem suam fieri velit. — Ulpian defines it to be mentis nostrar jussa contentatio, in id sollemniter fata, ut post mortem nostram valent. — But others, with a greater degree of exactness, define a testament "to be the appointment of an executor or testamentary heir, made according to the formalities, prescribed by law. Domat. lib. 1. t. 1. sect. 1." For in reality the constitution of an heir, or an executor, is the essence of a testament, and that, which distinguishes it from a codicil, or donation mortis causa. Quinque verborum sunt quae faciunt testamentum, ut dicitur, LUCIUS TITIUS MINER HABET ESTO. Æt. 2. 15. 13. S. 33, 34, 5.

De antiquis modis testandi civilibus.

§ I. Sed, ut nihil antiquitatis penitus ignoretur, fisciendum est, olim quidem duo genera testamentorum in usu suisse; quorum altero in pace et otiue utebantur, quod calatis comitiis appellabant; altero, cum in praemium exituri effrent, quod prorsum dicebatur. Accedit deinde tertium genus testamentorum, quod dicebatur per æs et libram, scilicet quod per emancipationem, id est, imaginariam quandam venditionem agebatur, quinque testibus et libripende, civilibus Romanis puberibus, præsentibus, et eo, qui familiae emport dicebatur. Sed illa quidem priora duo genera testamentorum ex veteribus temporibus in defuetudinem abierunt; quod vero
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vero per æs et libram fiebat, licet diutius permanerit, attamen partim et
hoc in usu esse desit.

§ 1. But, lest the ancient usage should be forgotten, it is necessary to observe, that
two kinds of testaments were formerly in use; the one was practiced in times of peace,
and named calatis comitiis; because it was made in a full assembly of the people,
and the other was used, when the people were going forth to battle, and was made
procinctum testamentum. But a third species was afterwards added, which was
called per æs et libram, because it was effected by emancipation, which was an alien-
nation, made by an imaginary sale in the presence of five witnesses, and the libripen
or ballance-bolder, all citizens of Rome, above the age of fourteen; and also in the
presence of him, who was called the emptor familiaris or purchaser. The two former
kinds of testaments have been disused for many ages, and that, which was made per
æs et libram, although it continued longer in practice, bali now ceased in part to be
observed.

Per æs et libram.] Caecianus is of opinion, that
this species of testaments was abrogated by Cae-
ceanus. Cod.6. t.23.1.15.
Attamen partim.] It is said to have ceased in
part only, because the same number of witnes-
ses were still necessary; for though the civil law
required but five, yet the ballance-holder and
the purchaser in reality made seven; and it was
to supply the place of these, that the praetorian
law added two witnesses to the number requisite
by the civil law; so that in effect both the civil
and the praetorian law required the presence of
the same number of persons.

De antiqua testandi ratione praetoria.

§ II. Sed predicta quidem nomina testamentorum ad jus civile refere-
bantur: postea vero ex eisdem prætoris forma alia faciendorum testamento-
rum introducetur. Jure etenim honorario nulla manipatio desiderabatur,
tot septem testimonia signa sufficiebant: cum jure civili signa testimonia non ef-
fert necessaria.

§ 2. The three kinds of testaments before mentioned all took their rise from the ci-
vil law; but afterwards another species was introduced by the edict of the prætor; for,
by the honorary or praetorian edict, the signature of seven witnesses was decreed
sufficient to establish a will without any emancipation or imaginary sale; but this sig-
nature of witnesses was not required by the civil law.

De conjunctione juris civilis et prætorii.

§ III. Sed, cum paulatim, tam ex usu hominum quam ex constitutio-
num emendationibus, cepit in unam consonantiam jus civil et prætorium
jungi, constitutum est, ut, uno eodemque tempore, quod jus civile quodam-
modo exigebat, septem testibus adhibitis, et subscriptione testium, quod
ex constitutionibus inventum est, et ex edicto prætoris, signacula testamen-
tis imponerentur: ita ut hoc jus tripertitum esse videatur: et testes quidem,
corumque præsentia, uno contextu, testamenti celebrandi gratia, a jure
civili descendat: subscriptiones autem testatores et testium, ex sacrarum
constitutionum observatione adhibeantur: signacula autem et testium nu-
merus ex edicto prætoris.

§ 32
§ 3. When the civil and praetorian laws began to be blended together partly by usage, and partly by the emendation, made by the imperial constitutions, it became an established rule, that all testaments should be made at one and the same time according to the civil law; that they should be sealed by seven witnesses according to the praetorian law, and that they should also be subscribed by the witnesses, in obedience to the constitutions. Thus the law concerning testaments seems to be tripartite: for the civil law inflicts the necessity of having witnesses to make a testament valid, who must all be present at one and the same time without interval; the sacred constitutions ordain, that every testament must be subscribed by the testator and the witnesses; and the praetorian edit requires sealing, and fixes the number of witnesses.

Quod ex constitutionibus.] The subscription of witnesses was in use from the time of the first emperors, as appears from Ulpian. D. 28. t. 1. l. 22. But the subscription of the testator was introduced by the following constitution of Theodosius. Hac consulti fima legi f omnium, littere per scripturam conficientibus testamentum, iijii nummum scribere volamur ea, quae in eo scripta sunt, confirmantam, vel legis, vel tantum clausam inviolatamque proferre scripturam, vel ipsius testatoris, vel eis suum alterius manus conficiemus, eaque regatis testibus septem numero, civilibus Romanis, pubilibus, omnibus sinu sole offerre signandum et subscribens: dum tamen testibus praeventibus testator suum esse testamentum dixerit, quod offeritur, eique ipsi erat testibus sua manus in religia parte testamenti subscrieri; quod facere, et testibus unum omissum dixit ac tempore subscribentibus et confirmantibus, testamentum valere: nec ido informari, quod testis notabilis, qui in eo scripta sunt testamento. Quod si litteras testator ignorat, vel subscriberet nequeat, octavo subscribere pro eo adhibito, eodem servari determinatum, et. et. et. Dat. id. Septemb. Theodosio A. et Felto Coflf. 439.— Cod. 6. t. 23. l. 21.

Ex editio pratoris.] In England it is not necessary that the witnesses to a will should affix their seals to it; for, if they subscribe their names, as witnesses, it is sufficient. And, when a testament disposes only of personal estate, we follow the canon law, which never requires more than two witnesses with the ministrer of the parish, and in some cases only two witnesses; quoniam scriptum est, in ore duorum vel trium testium fiat omne verbum. Decret. Greg. IX. lib. 3. t. 26. l. 10. 41. Nor are even two witnesses necessarily required by the law of England, if there are circumstances to supply the want of them. Cornw. in 1s. l. 10. 4. et 2. And this practice in England is not wholly without a precedent, even among the Romans— for the emperors Theodosius and Valentinian, by a novel constitution, allowed every holograph testament to be of full force, though made without witnesses. Si holographa manus testamentum condantur, testes necessarios non putamus. Scriptum enim taliter sufficient hæresi, afferte etiam fine testibus fidem rerum, dummodo reliquia congruere demonstraret, quæ in testamenti defere servari tam uterum principium quam nostræ præcipitent functionis, ut in hereditarium corpusum jussi eisjussem probata scriptura servaretur. Cum tamen testium praeventiam testator elegisset, legitimum numerum fæperiportabilis adhiberi. Novel. Theod. lib. 2. tit. 4. In England lands and tenements in general are not deurable by the common law of the realm; they have however been made deurable by the 53d of Hen. the 8th. And, by a statute of the 2oth of Charies the 2d, it is enacted, "that all devises of lands, deurable either by the statute of wills, or by this statute, or by custom, shall be in writing, signed by the party devising, or by some other in his presence and by his express direction, and shall be attested and subscribed, in the presence of the devisor, by three or four credible witnesses, or else they shall be void."

Solemnitas addita a Justiniano.

§ IV. Sed his omnibus, nostra constitutioe propter testamentorum sinceritatem, ut nulla fraud multum adhibatur, hoc additum est, ut, per manus testatoris vel testamentum, nomen haeredis expressum, et omnia secundum illius constitutionis tenorem procedant.

§ 4. To all these solemnities we have made an addition for the better security of testaments and the prevention of frauds, having enacted by our constitution, that the name of the heir shall be expressed, by the hand-writing either of the testator, or of the
De annulis, quibus testamenta signantur.

§ V. Possunt autem omnes testes et uno annulo signare testamentum; (quid enim si septem annulii una sculptura fuerint?) secundum quod Papiniano visum est. Sed et alieno quoque annulo licet signare testamentum.

§ 5. Every witness to a testament, according to Papinian, may use the same signet; for otherwise, what must be the consequence, if seven seals should happen all to bear the same device? It is also allowable to seal with the signet of another.

Qui testes esse possunt.

§ VI. Testes autem adhiberi possunt ii, cum quibus testamenti factio est. Sed neque mulier, neque impubes, neque servus, neque furiosus, neque mutus, neque furtus, neque is, cui bonis interdictum est, neque ii, quos leges jubent improbos inestimabiles esse, possunt in numerum testium adhiberi.

§ 6. These persons are allowed to be good witnesses, who are themselves legally capable of taking by testament: but yet no woman, slave, or interdicted prodigal, no person under puberty, mad, mute, or deaf, nor any one, whom the laws have reprobated and rendered inestimable, can be admitted a witness to a testament.

Sed neque mulier.] Women may be admitted witnesses, by the civil law, in all matters, whether civil or criminal, when the nature of the case is such, that other evidence can not be obtained: but, when the choice of witnesses is altogether voluntary, as in making testaments, and doing many other acts, the civil law will not receive the testimony of a woman. Domat. lib. 3. t. 11. The Romans had also another reason for rejecting women as witnesses to wills; namely, because women were never sufficed to be present at public assemblies, where all wills and testaments were formerly made. But to use the words of Suinburn: "Whatsoever diversie do write, that a woman is not without all exception, because of the inconspicuity and frailty of the feminine sex, whereby they may the sooner be corrupted; yet I take it, that their testimony is good, that a testament may be proved by two women alone, being otherwise without exception. Swin. of Testaments, part IV. sect. 24." And, by the laws of England in general, women may be witnesses, sureties, guardians, &c. in all cases, as well as men.

De servo, qui liber existimabatur.

§ VII. Sed, cum aliquis ex testibus, testamenti quidem faciendo tempore, liber existimabatur, postea autem servus apparuit, tam Divus Adrianius Catoni, quam postea Divi Severus et Antoninus rescripsissent, subvenire se ex sua liberalitate testamento, ut sic habeatur firmum, ac si, ut optimebat, factum esset; cum, eo tempore, quo testamentum signaretur, omnium consensu hic testis liber loco fuerit, nec quisquam esset, qui status ei questionem moveret.

§ 7. If a witness, at the time of attesting, was reputed to have been a free person, but afterwards appeared to have been a slave at that time, the emperor Adrian, declared in his rescripts to Cato, and afterwards the emperors Severus and Antoninus by their rescript decreed in a similar case, that they would aid such a defect in a testament,
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textament, and cause it to be accounted equally firm, as if it had been made, as it ought; if the witnesses, at the time of sealing, was, in the estimation of all men, taken to be a free person, no one having made a question of his condition.
Adrianus Catoni.] vid. Cod. 6. t. 23. l. 1.

De pluribus testibus ex eadem domo.

§ VIII. Pater, nec non is, qui in potestate ejus est; item duo fratres, qui in ejusdem patris potestate sunt, utique testes in uno testamento fieri possunt: quia nihil nocet, ex una domo plures testes alieno negotio adhiberi.

§ 8. A father and a son under his power, or two brothers, under the power of the same father, may be made witnesses to a testament: for nothing binders, but that several persons may be admitted witnesses, out of the same family, to a business, in which that family is not interested.

De bis, qui sunt in familia testatoris.

§ IX. In testibus autem non debet esse is, qui in potestate testatoris est. Sed, si filiusfamilias de caftrensi peculio post missionem faciat testamentum, nec pater ejus recte adhibetur testis, nec is, qui in potestate ejusdem patris est. Reprobatum est enim in ea re domesticum testimonium.

§ 9. No person can be a witness to a testament, who is under the power of the testator. And, if the son of a family gives away his military estate by testament after his commission from the army, neither his father, nor any one under the power of his father, can be admitted a witness to it. For, in this case, the law does not allow of a domestic testimony.

De haerede.

§ X. Sed neque heres scriptus, neque is, qui in ejus potestate est, neque pater ejus, qui eum habet in potestate, neque fratres, qui in ejusdem patris potestate sunt, testes adhiberi possunt, quia hoc totum negotium, quod agit teftamenti ordinandi gratia, creditur hodie inter testatores et haeredom agi. Licet autem totum jus tale conturbatum fuerat, et veteres quidem familiae emptorem, et eos, qui per potestatem ei conjuncti fuerant, a testamentariis testimoniois repellebant; haeredi autem, et is, qui per potestatem ei conjuncti fuerant, concedebant testimonium in testamentis praetare: licet ii, qui id permittebant, hoc jure minime abuti eos debere iudebant: tamen nos eandem observationem corrigerentes, et, quod ab illis suatum est, in legis neceditatem transferentes, ad imitationem pristini familiae emptoris, merito nec haeredi, qui imaginem vetustissimi familiae emptoris obtinet, neque aliiis perfonis, qui eis, (ut dictum est,) conjuncta sunt, licentiam concedimus sibi quodammodo testimonio praetare: ideoque nec ejusmodi veteres constitutiones nostro codici infera permisimus.

§ 10.
§ 10. No heir can be admitted a witness to that testament, by which he is appointed heir; neither can the testimony of any one be admitted, who is in subjection to such heir, nor the testimony of his father, to whom he is himself under subjection; nor the testimony of his brothers, if they are under the power of the same father, for this whole business, which is performed for the sake of completing a testament, is now always transmitted between the executors, and the real or very heir. But formerly there was great confusion; for altho' the antients would never admit the testimony of the cemtor familiaris, or the supposed heir, nor of any one allied to him by subjection, yet they admitted that of the real heir, and of those, who were connected with him by subjection; and the only precaution taken was to exhort and persuade those persons not to abuse their privilege. But we have corrected this practice, preventing by the coercion of law that, which the antient lawyers indulged to prevent by persuasion only; for we permit neither the real heir, who represents the cemtor familiaris of the antients, nor any person allied to such real heir, to be a witness to the testament, by which he was nominated. And it is for this reason, that we have not suffered the old constitutions to be inflected in our code.

De legataris et fideicommissariis, et bis, qui sunt in eorum familia.

§ XI. Legataris autem et fideicommissariis, quia non juris successores sunt, et alii peronis eis conjunctis, testimonium non denegamus: imo in quodam nostra constitutione et hoc specialiter eis concessimus: et multo magis isis, qui in eorum potestate sunt, vel qui eos habent in potestate, humilissimi licentiam damus.

§ XII. But we refuse not the testimony of legates and trustees, and of those, who are allied to them; because such persons are not universal heirs or successors: and, by virtue of our constitution, we have even specially granted to all legates and trustees the liberty of bearing testimony; and therefore we grant this permission much more readily to those, who are in subjection to them, and to those, to whom they are subject.

Legataris autem. Altho' it was a general rule in the Roman law, that no one should be permitted to bear testimony in his own cause; Cod. 4. 120. 110. yet legates were allowed to give evidence upon this distinction; that they were particular, and not universal successors; and that a testament would be valid without legates. The difficulty also, which must frequently have occurred, in obtaining so great a number of witnesses, as seven, might probably induce the Romans to be less strict, as to the persons, whom they admitted upon this occasion. Quis testamentum horum inhibuerit, says Ulpius, in eodem testamento testis ejet non potest: quad in legataris, et in eo, qui tutor scriptis eft, contra subtestis. Erit enim testis posse adhiberi, si alius eum nubit impedit. 128. 11. 120. But by the practice of the ecclesiastical courts of this kingdom, which have the sole cognizance of the validity of all wills, as far as they relate to personal estate, no legatee, who is a subscribed witness to the will, by which he is benefited, can be admitted to give his testimony in foro contradictorio, as to the validity of that will, 'till either the value of his legacy hath been paid to him, or he hath renounced it; and, in case of payment, the executor of the supposed will must release all title to any future claim upon such supposed legatee, who might otherwise be obliged to refund, if the will should be set aside; and a release in this case is always made, to the intent, that the legatee may have no shadow of interest at the time of making his deposition. Suitb. 357. The same practice also prevailed at common law in regard to witnesses, who were benefited under wills, disposing of real estate. And, if a legatee, who was a witness to a will, had refused either to renounce his legacy, or to be paid a sum of money in lieu of it, he could not have been compelled by law, to divest himself of his interest; and, whilst his interest continued, his testimony was useless; and this was determined in the case of Ashby vert. Dowling, in ejector term, 19 Gro. 2. the brief state of which case was, as follows.

Q. 2

James
De materia, in qua testamenta scriptur.

§ XII. Nihil autem intereft, testamentum in tabulis, an chartis, membranive, vel in alia materia fiat.

§ 12. It is immaterial, whether a testament is written upon a tablet of wax, upon paper, parchment, or any other substance.

De pluribus codicibus.

§ XIII. Sed et unum testamentum pluribus codicibus conficere quis potest, secundum obtinentem tanen observationem omnibus factis: quod interdum etiam neceffarium est; veluti si quis navigaturus et fucum ferre et domi relinquere judiciorum fuorum contestationem velit: vel proper alias innumerabiles causas, que humanis necessitatibus imminet.

§ 13. Any person may commit the same testament to diverse tablets, each of which will be an original, if the requisite forms are observed. And this sometimes is necessary; as when a man, who is going a sea-voyage, is desirous to carry his will with him, and at the same time to leave a counter-part of it at home for his better security. Innumerable other reasons for doing this may arise, according to the various necessities of mankind.

Propter alias innumerabiles.] Some persons, for their better security, have deposited their own wills in the prerogative office of the archbishop of Canterbury: and this is certainly a wise precaution, against either fraud or accidents.

De testamento nuncupativo.

§ XIV. Sed haec quidem de testamentis, quae scriptis conficiuntur, sufficiunt. Si quis autem sine scriptis voluerit ordinare jure civili testamentum, septem testibus adhibitis, et sua voluntate coram eis nuncupata, sciat, hoc perfectissimum testamentum jure civili firmumque constitutum.
§ 14. What we have already said concerning written testaments, is sufficient. But if any man is willing to dispose of his effects by a nuncupative testament; i.e. by a testament without writing, let him be assured, if, in the presence of seven witnesses, he declares his will by word of mouth, that such verbal declaration will be a complete and valid testament according to the civil law.

Si quis sine scriptis] Nuncupative testaments are certainly the most antient, and the great formalities enjoined by the civil law, in regard to wills, took their rise originally from that liberty, which the Romans always enjoyed of making testaments without writing; for, as it was necessary, that the remembrance of the testator’s will should be preferred, it was but reasonable not to suffer so serious an act to be made but in the most solemn manner. It was ordained by Theodosius, that there should be seven witnesses, citizens of Rome, called on purpose, and that they should be present during the whole time of making a nuncupative testament. Per nuncupationem, hoc est, sine scriptura, testamenta non alias valemus sanctim, quam si sepem testem, singul uno eodemque tempore collecti, testatoris voluntatem ut testamentum sine scriptura facientis, audiverint. Cod. 6. t. 23. l. 21. sect. 2. In England it is enabled by 29 Car. 2. cap. 3. that no nuncupative will shall be good, where the estate bequeathed shall exceed the value of 30 L. if it is not proved by the oaths of three witnesses, who were present at the making; nor unless it be proved, that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased, or in the house of his habitation, or where he hath been resident ten days next before the making of such will, except where such person was taken sick, being from his own home, and died before his return. And that, after six months passed, after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the testimony, or the substance thereof, were committed to writing within six days, after the making of the will.” 29 Car. 2. cap. 3.

TITULUS UNDECIMUS.

De militari testamento.


In militum testamentis solemnitates remissae.

Supradicta diligens observatio in ordinandis testamentis militibus, propter nimiam imperitiam eorum, constitutionibus principalibus remissa est. Nam, quamvis essent neque legitiimum numerum testium adhibuerint, neque aliam testamentorum solemnitatatem observaverint, recte nihilo minus testatur, videlicet cum in expeditionibus occupati sunt: quod merito nostra constitutione introduxit. Quoquo enim modo voluntas ejus suprema inveniatur, sine scripta, sine fine scriptura, valet testamentum ex voluntate ejus. Illis autem temporibus, per quae citra expeditionum necessitatem in aliis locis, vel fuis edibus, degunt, minime ad vindicandum tale privilegium adjuvantur. Sed testari quidem, et si filii-familiarum sint, propter militiam conceduntur: jure tamen communi, eadem observatione et in eorum testamentis adhibenda, quam in testamentis paganorum proxime expofuimus.
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The before-mentioned strict observation of formalities, in the construction and formation of testaments, is dispensed with by the imperial constitutions, in regard to all military persons, on account of their unskillfulness in these matters. For, altbo' they neither call the legal number of witnesses, nor observe any other solemnity, yet they may make a good testament, if they are actually upon service against an enemy. This was introduced by our own ordinance with good reason; and thus, in whatever manner the testament of a military person is conceived, whether in writing, or not in writing, it prevails according to his intention: but, when soldiers are not upon an expedition, and live in their own houses or elsewhere, they are by no means intitled to claim this privilege: but a soldier, who is upon actual service against an enemy, may make a testament, altbo' he is the son of a family, and consequently under power, but, according to the common and general law, he must observe all the formalities, which are required of others, who are not soldiers, when they make their testaments.

Quod nostra constitution.] vid. Cod. 6. t. 21. l. 17.

Rescriptum Divi Trajani.

§ 1. Plane de testamentis militum Divus Trajanus Catilio Severo ita rescripsit. Id privilegium, quod militantibus datum est, ut quoquo modo facta ab his testamenta rata sint, sic intelligi debet, ut utique prius consilie debeat, testamentum factum esse: quod et fine scriptura, et a non militantibus quoque, fieri potest. Si ergo miles, de cujus bonis aquis te quaeritur, vocatus ad hoc comminibus, ut voluntatem suam testaretur, ita locutus est, ut declararet quem vellet ibi heredem esse, et cui libertatem tribueret; poteft videri fine scripto hoc modo esse testamentum, et voluntas ejus rata babenda est. Ceterum, si (ut plerumque heremonibus fieri solet) dixit alicui, ego te heredem facio, aut, bona mea tibi relinquuo, non oportet hoc pro testamento observari. Nec illorum magis interest, quam ipsum, quibus id privilegium datum est, ejusmodi exemplum non admitti. Alioqui non difficiler posset mortem alicujus militis teftes existenter, qui affererent, se audisse dicentem aliquid relinquere se bona, cui visum est: et per hoc vera judicia subverterentur.

§ 1. The emperor Trajan wrote, as follows, in his rescript to Catilius Severus concerning military testaments. The privilege, which is given to military persons, that their testaments, in whatever manner made, shall be valid, must be understood with this proviso, that it ought first to be apparent, that a testament was made in some manner: and here observe, that a testament may be made without writing, even by a person, who is not in the army. And therefore, if it appears, that the soldier, concerning whose goods question is now made before you, did, in the presence of witnesses, purposely called, declare what person should be his heir, and upon what slave, or slaves, he would confer the benefit of liberty, he shall be reputed to have made his testament without writing, and his will shall be ratified. But, if it is only proved, that he said to some one, as it often happens in discourse, I appoint you my heir — or — I leave you all my estate, such words do not amount to a testament. Nor are any persons more interested than the soldiery, that words so spoken should not amount to a will; for, if this was once
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once allowed, witnesses might without difficulty be produced after the death of any military man, who would affirm, that they had heared him bequeath his estate, to whomever they please; and thus the true intentions of many would be defeated.

Trajanus Catilin. 

§ II. Quinimo et mutus et surdus miles testamentum facere potest.

§ 2. A soldier, who is mute and deaf, may yet make a testament.

Mutus et surdus miles.] This was a privilege which granted this liberty to all his subjects in peculiar to soldiers, till the reign of Justinian, general. Cod. 6. l. 22. l. 10.

De militibus et veteranis.


§ 3. The privilege of making testaments without the usual formalities was granted by the imperial constitutions to military men, to be enjoyed only during the time of actual service, and whilst they lived in their tents. For, if veterans after dismission, or even soldiers, if not upon service against the enemy, would make their testaments, they must not omit the forms required to be observed in common by all the citizens of Rome. And, if a testament is made by a soldier, even in his tent upon an expedition, yet, if the solemnities of the law are not adhered to, such testament will continue valid only for one year after his dismission from the army. Suppose therefore, that a soldier should die in his tent within a year after his dismission, and the event of the condition, upon which his heir is instituted, should not happen, till after the expiration of the year, would the testament of such soldier be valid? We answer, that it would prevail as a military testament.

De facto ante militiam testamento.

§ IV. Sed et, qui quis ante militiam non jure fecit testamentum, et miles factus, et in expeditione degens, resignavit illud, et quodam adjicit sive detraxit, vel alius manifesita est militia voluntas hoc valere volentis, dicendum est, valere hoc testamentum, quasi ex nova militia volunate.

§ 4. If a man, before his entrance into the army, should make his testament without observing the requisite formalities, and afterwards, when he became a soldier, and was upon an expedition, should open his testament for the sake of adding to it, or of subtracting something from it, or if he should cause it to appear manifestly by any other means, that he was willing that his testament should be valid, we pronounce, that it would be valid, by virtue of this new act, amounting to a republication of his will.

§ V.
De milite arrogato vel emancipato.

§ V. Denique, et si in arrogationem datus fuerit miles, vel filius-familias emancipatus est, testamentum ejus quasi ex nova militis voluntate vellet: nec videtur capitis diminutione irritum fieri.

§ 5. If a soldier is given in arrogation, or, being the son of a family, is emancipated, his testament is nevertheless good, having the same effect, as if he had republished it by a new declaration: for it is by no means invalidated by his change of state.

Capitis diminutione.] From the military privileges it is observable, how far the Romans found it necessary to dispense with the strictness of their laws in many cases. The canon law therefore, with good reason, hath reformed this nicety of circumstantials in regard to wills, and hath reduced the number of living witnesses to three, (the parish priest being one,) and in some cases to two witnesses, returning again to the law of God and the law of nations, by which two witnesses are sufficient. But in England, where there is not any use of solemn testaments, the soldiery stand in no need of testamentary privileges, for wills of personal estate are made with all liberty and freedom, according to the jus gentium; which requires but two witnesses: and it is certain and undoubted, that, if a testament was written or subscribed with the testator's own hand, the testimony of witnesses is not at all necessary, but the proof may be from several circumstances; as that the testator was heared to say, that he had made his testament; or, if such testament was found in the testator's custody, among his other writings, and papers of consequence. See of test. part 1. sect. 10. — part 4. sect. 27. But, as it has been before observed, 'all devises of lands in England must be in writing, signed by the testator, or some other in his presence, and by his direction, and must be attested and subscribed in the presence of the testator, by three witnesses at least, or else such devises are utterly void.' See 29 Car. 2. cap. 3.

De peculio quasi castrensi.

§ VI. Sciem dom tam en eft, quod, cum ad exemplum castrensis peculii, tam anteriores leges, quam principales constitutiones, quibusdam quasi castrenfia dederaent peculiu, et horum quibusdam permittiuerat etiam in potestate degentibus testari, nostra constituimus, et latius extendens, permiserit omnibus in hujuscemodi peculiiis testiari quidem, sed jure communi. Cujus constitutionis tenere perpsecto, licentia est nihil eorum, quae ad prestatum jus pertinent, ignorare.

§ 6. We must here make it known, that, since the ancient laws, as well as the later constitutions, have, in imitation of the peculia castrensi, or military estates, given to some persons peculia quasi castrensi, or quasi military estates, and have indulged some of these in the liberty of making testaments, whilst they were under power, we therefore, extending this privilege still farther, have by our ordinance permitted all persons, who possesse these estates, to make their testaments, on condition, that they observe the common solemnities of the law. But whoever thoroughly inspects our constitution, will have an opportunity of informing himself of every point, which relates to the before-mentioned privilege.

Cujus constitutionis.] vid Cod. 3. t. 28. l. 37.
TITULUS DUODECIMUS.

Quibus non est permittum facere testamentum.


De filio-familias.

NON tamen omnibus licet facere testamentum: statim enim ii, qui alieno juri subjecti sunt, testamenti faciendi juss non habent: adeo quidem ut, quamvis parentes eis permiserint, nihil magis jure testari possint: exceptis iis, quos ante enumeravimus, et precipue militibus, qui in potestate parentum sunt; quibus de eo, quod in castris acquisierunt, permittum est ex constitutionibus principum testamentum facere. Quod quidem jus ab initio tantum militantibus datum est, tam ex auctoritate Divi Augusti, quam Nervae, nec non optimi imperatoris Traiani: postea vero subscriptione Divi Hadriani etiam dimissis a militia, id est, veteranis, concessum est. Itaque, sicut quidem fecerint de castris peculio testamentum, pertinebit hoc ad eum, quem hereditem relicturerunt: si vero intestati descesserint, nullis liberis vel fratribus superfistibus, ad parentes eorum jure communi pertinebit. Ex hoc intelligere possimus, quod in castris acquirerit miles, qui in potestate patris est, neque ipsum patrem adimere posse, neque patris creditorum id vendere, vel aliter inquietare, neque patre mortuo cum fratribus commune esse; sed scilicet proprium esse ejus, qui in castris acquirerit: quonquam jure civili omnium, qui in potestate parentum sunt, peculia perinde in bonis parentum computentur, ac servorum peculia in bonis dominorum numerantur: exceptis videlicet iis, quae ex facris constitutionibus, et precipue nostris, propter diversas causas non acquiruntur. Praeter hos igitur, qui castrenh peculium vel quasi castrenh habent, si quis alius filius-familias testamentum fecerit, inutile est; licet suae potestatis factus descesserit.

The right of making a testament with effect is not granted to all persons alike: for those, who are under the power of others, have not this right: insomuch that, although parents have given permission, their children will not be the more enabled by it to make a testament legally valid; if we except such, whom we have already mentioned, and principally those, who, on account of their being in the army, have permission by virtue of our constitutions to dispose by testament of whatsoever they have acquired by military service, although they are still under the power of their parents. This permission was at first granted by Augustus, Nerva, and that excellent prince Trajan, to actual soldiers only; but afterwards it was extended by the emperor Adrian to the veterans, that is, to those, who had received their dismission: and therefore, if the son of a family bequests his castrenhian or military estate, it will pass to him, who
who is instituted the heir: but, if such son dies intestate without children or brothers, hist estate will then pass of common right to his father, or other paternal ascendants. We may from hence infer, that whatsoever a soldier, alto by under power, hath acquired by military service, it cannot be taken from him even by his father; and that the creditors of the father can neither sell it, or otherwise disturb the son in his possession; and that what is thus acquired is not liable to be shared in common with brothers, upon the demise of the father; but that it remains the sole property of him, who acquired it: alto by the civil law the peculium of estates of those, who are under power, are reckoned among the wealth of their parents; in the same manner as the peculium of a slave is esteemed the property of his master. But those estates must be excepted, which by the constitution of the emperors, and chiefly by our own, are prohibited for diverse reasons to be acquired for parents. Upon the whole, if the son of a family, who is neither possessed of a military or quasi-military estate, makes a testament, it will not be valid, even alto he be is afterwards emancipated, and becomes lui juris before his death.

De impubere et furioso.

§ 1. Præterea testamentum facere non possunt impuberes; quia nullum eorum animi judicium est. Item furioi; quia mente carent. Nec ad rem pertinent, si impubes postea pubes, aut furiosis postea componit, factus fuerit, et decesserit. Furiosi autem, si per id tempus secerint testamentum, quo furor eorum intermissus est, jure testati esse videntur; cetero quo, quod ante furem secerint, testamentum valente: nam neque testamentum recte factum, neque ullum aliud negotium recte gestum, postea furio interventiens perimit.

§ 1. A person, within the age of puberty, can by no means make a good testament; because he is not judged to possess that judgment of mind, which is requisite; and the same holds true of a madman, insomuch as he is deprived of his senses. And the testament of a minor under puberty will not become valid, alto he be arrives at puberty before his death; neither will the testament of a madman become valid, alto he be afterwards regains his senses, and then dies. But, if he makes his testament, during a lucid interval, be is a legal testator, since it is certain, that the testament, which a man hath made, before the malady of madness be seized upon him, is good: for a subsequent fit of frenzy can neither destroy the force of a regular testament, nor the validity of any other transaction, in which the rules of the law have been punctually observed.

Non possunt impuberes.] The rules of the civil law take place in England, in regard both to the capacity and incapacity of minors to make wills, as far as those wills relate only to personal estate: so that, if a boy, not arrived at the age of fourteen, or a girl, not arrived at the age of twelve, makes a will of personal estate, it will not be good; alto such boy, or girl, was dux capax at the time of making the will, and capable of discerning right from wrong: neither will a testament, made by a male infant under fourteen, or a female under twelve, become good, without a republication, alto such infant should afterwards arrive at the proper age. But it hath been allowed in the case of Hide and Hide, that a male infant of 14, and a female of 12, might make a will of personal estate; and it was said to have been so agreed by lord keeper Wright, in the case of Sharpes and Sharpes, in which the court followed the civil law of Justinian, which permits minors to consent to marriage at such their respective ages. Gilbert’s Reports, page 17. But, in regard to a will of real estate, it was enacted in the reign of Hen. 8. “that wills or testaments made “of any manors, lands, tenements, or other “hereditaments, by any woman covert, or per “son within the age of one and twenty years, “idiot, or insane, shall not be good or effectual “in law.” 34 H. 8. cap. 5. sect. 14.

And
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And it hath been adjudged, that, if a minor under twenty-one makes his will, and deviies his lands, and afterwards attains the full age of twenty-one years, but dies without making any new publication of his will, the will is void.

§ 2. A prodigal also, who is under an interdiction, and prohibited from having the management of his own affairs, can not make a testament: but, if he hath bequeathed his estate before interdiction, his testament will be valid.

De furdo et muto.
§ III. Item surdus et mutus non semper testamentum facere possunt. Utique autem de eo surdo loquimur, qui omnino non audit, non qui tarde exaudat. Nam et mutus is intelligitur, qui eloqui nihil potest, non qui tarde loquitur. Saepem enim etiam literati homines variis casibus et auditendi et loquendi facultatem amittunt. Unde nostra constitutio etiam his subvenit, ut certis caibus et modis, secundum normam ejus possint testariri, aliaque facere, quae eis permissa sunt. Sed, si quis post testamentum factum, adversa valetudine aut quolibet alio casu mutus aut surdus esse coeperit, ratum nihilominus manet ejus testamentum.

§ 3. A man deaf and dumb is not always capable of making a testament: but we would be understood to mean this of him, who is so deaf as to be unable to bear at all, and not of him, who is afflicted only with a thickened of hearing; and of him, who is so dumb, as to be totally deprived of utterance, and not of him, who only labours under a difficulty of speech: for it often happens, that the most literate persons lose the faculty of hearing and speaking by various misfortunes; we have therefore published a constitution, which aids all such persons; so that in certain cases they may make testaments, if they observe the rules of our ordinance, and may do many other acts, which are there permitted. But, if any man, after making his testament, becomes either deaf or mute by reason of ill health or any other accident, his testament will notwithstanding this remain good.
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De caeco.

§ IV. Cæcus autem non potest facere testamentum, nisi per observationem, quam lex Divi Justiniani patris nostri introduxit.

§ 4. A blind man is not allowed to have the power of making a testament, unless he observes those rules, which the law of the emperor Justin, our father, has introduced.

Cæcus autem.] "He, who is blind, may make a nuncupative testament, by declaring his will before a sufficient number of witnesses; but he cannot make his testament in writing, unless the same be read before witnesses, and in their presence acknowledged by the testator for his last will. And therefore, if a writing were delivered to the testator, and he, not hearing the same read, acknowledged it for his will, this would not be sufficient; for it may be, that, if he should hear the same, he would not own it." Scilicet. part 2. sect. 15.

De eo, qui est apud hostes.

§ V. Eius, qui apud hostes est, testamentum, quod ibi fecit, non valet, quamvis redierit: sed quod, dum in civitate fuerat, fecit, sive redierit, valet jure postliminii; sive illic decesserit, valet ex lege Cornelia.

§ 5. The testament of him, who is in the bands of an enemy, is not valid, if it was made during his captivity; even albo he lives to return. But a testament, made by a man in the city, or before captivity, is good, either by virtue of the jus postliminii, if the prisoner returns; or by virtue of the law Cornelia, if he dies a captive.

Ex lege Cornelia.] "Quo tempore, ant quo auctore, lata sit, non licet." Vmnr.

TITULUS DECIMUS-ERTIUS.

De exhaeredatione liberorum.


Jus vetus de liberis in potestate.

NON tamen, ut omnino valeat testamentum, sufficit hæc observatio, quam supra exposuimus: sed, qui filium in potestate habet, curare debet, ut eum hæredem instituat, vel exhaeredem eum nominatim faciat. Aliqui, si eum silentio præterierit, inutiliter testabitur: adeo quidem ut, si vivo patre filius mortuus sit, nemo hæres ex eo testamento existere poterit: quia scilicet ab initio non constiterit testamentum. Sed non ita de filiabus, et aliis per virilem sexum descendentibus liberis utrinque sexus, antiquitat auter observatum: sed, si non fuerant scripti hæredes scriptæve, vel exhaeredati exhaeredataeve, testamentum quidem non infirmabatur, jus tamen accrescendi eis ad certam portionem praebabatur. Sed nec nominatim eas personas exhaeredare parentibus necesse erat, sed licebat inter ceteros.
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cæteros hoc facere. Nominatim autem quis exhaeredari videtur, five ita
exhaeredetur, Titius filius unus exhaeres esto, five ita, filius unus exhaeres esto,
non adjecto proprio nomine; scilicet, si alius filius non extet.

The solemnities of law, which we have before explained, are not alone sufficient to
make a testament valid. For be, who has a son under his power, should take care either
to institute him bis heir, or to disinberit him nominally: for, if a father, in bis testa-
ment, pretermits or passess over bis son in silence, the testament will have no effect.
And even if the son dies, living the father, yet no one can take upon himself the
heirship by virtue of that testament, inasmuch as it was null from the very beginning.
But the antients did not observe this rule in regard to daughters and grand-children
of either sex, tho' descended from the male line; for altho' these were neither instit-
tuted heirs, nor disinherited, yet the testament was not invalidated; because a right of
accretion intili them to a certain portion of the inheritance: parents were therefore
not necessitated to disinberit these children nominally, but might do it inter cæteros.
A child is nominally disinherited, if the words of the will are, let Titius my son be
disinherited; or even thus—let my son be disinherited, without the addition of
any proper name, on supposition, that the testator bad no other son living.

Sed qui filium. | " In England the liberty of a
" testator is so large and ample, that altho' he
" hath children of his own, naturally and law-
" fully begotten, yet, by the laws and customs

De poshumis.

§ 1. Posthumus quoque liberis vel hæredes institui debent vel exhaer-
dari: et in eo par omnium conditio est; quod et filio posthumo, et quo-
libet ex cæteris liberis, fives femininis sexus five masculinis, præterito, valet
quidem testamentum, sed postea, agnatione posthumi five posthuma, rum-
pitur, et ea ratione totum infirmatur. Ideoque, si mulier, ex sua posthu-
mus aut posthuma iperabatur, abortum fecerit, nihil impedimento est
scriptis hæredibus ad hæreditatem adeundam. Sed femininis quidem sexus
persona vel nominatim vel inter cæteros exhaeredari solent: dum tamen,
i inter cæteros exhaeredarentur, aliquid eis legaretur, ne viderentur præ-
terita esse per oblivionem. Masculos vero posthemos, id est, filios et de-
inceptis, placuit non aliter recte exhaeredari, nisi nominatim exhaereda-
rentur, hoc scilicet modo, quicunque mibi filius genitus fuerit, exhaeres
esto.

§ 1. Also posthumous children should either be instituted heirs, or disinherited:
and in this the condition of all children is equal: but, if a posthumous son, or any pos-
thumous descedent in the right line, whether male or female, is pretermitted in a testa-
ment, such testament will nevertheless be valid at the time of making; but, by the
subsequent birth of a child of either sex, it will be annulled. And therefore, if a
maiden, from whom there is reason to expect a posthumous child, should miscarry, noth-
ing can prevent the written heirs from entering upon the inheritance. But female
posthumous children may be either nominally disinherited, or inter cæteros by a genear
clause: yet, if they are disinherited inter cæteros, something must be left them to show,
that they were not omitted thro' forgetfulness. But male posthumous children, i. c.
sons, and their descendents in the direct line, cannot be disinherited otherwise, than
nominally.
nominally in this form—whenever son is hereafter born to me, I disinherit him.

Agnatione posthumi.] The rights of posthumous children seem to be regulated by the rights of those, who are born in the life-time of their parents. Thus the civil law permits the birth of a posthumous child to annul a testament; because it is by that law in the power of any child, who hath been either omitted in his father's testament, or disinherited nominally without cause, to set that testament aside; and where preterition is a sufficient reason to destroy a will, at the instance of a child born in the life-time of his father, it would be extremely hard not to allow this reason at least an equal force in regard to a posthumous child. But by the law of England the birth of a posthumous child does not affect the testament of the father in any degree; which is in appearance a very rigid doctrine; but with us the testament of a parent can not be annulled on account of the preterition, or cautels disinherition of a child, born in his life-time; for the law permits every man to dispose of his own fortune, as he pleases: and therefore, if a posthumous child was allowed to annul a will, it must follow, that such child would have a greater right, than if he had been born in his father's life-time; namely, the right of annulling his father's will on account of preterition. And, if the law was to pursue a middle way, and admit a posthumous child to take a share of the deceased's estate without annulling the whole testament, this would be in effect to make a new will for the deceased, and to remedy a less evil by the introduction of a greater, in counteracting a practice so very dangerous, and contrary to that established rule of law, which gives every man an uncontrolled power in the disposition of his own fortune. What has been here said is intended only in regard to wills of personal estate; for, in respect to the wills of real estate, there are, besides the statute of frauds, many other reasons, which might be urged to evince, that the birth of a posthumous child can not be allowed to operate as a revocation.

De quas posthumis.

§ II. Posthumorum autem loco sunt et hi, qui in sui heredis locum sucedendo, quasi agnascendo, sunt parentibus sui heredes: ut ecce, si quis filium, et ex eo nepotem neptemve, in potestate habeat, quia filius gradu praeceit, est solus jura sui heredis habet; quamvis nepos quoque et nepis ex eo in eadem potestate sint. Sed, si filius ejus vivo co moriatur, aut qualibet alia ratione exeat de potestate ejus, incipit nepos neptive in ejus locum sucedere, et cum modo jura suorum heredum quasi agnacione nanciscitur. Ne ergo eo modo rumpatur ejus testamentum, sicut ipsum filium vel heredem instituere vel nominatim exhaeredere debet, ne non jure faciat testamentum; ita et nepotem neptemve ex filio necesse est ei vel heredem instituere vel exhaeredere, ne forte eo vivo, filio mortuo, sucedendo in locum ejus nepos, neptive, quasi agnascendo, rumpat testamentum. Idque lege Julia Velleia provinum est: in qua similia exhaereditationis modus ad similitudinem posthumorum demonstratur.

§ 2. Thoae also are reckoned in the place of posthumous children, who, succeeding in the stead of proper heirs, become, by a quasi-birth, proper heirs to their parents: for example, if Titius has a son under his power, and by him a grandfon, or grand-daughter, then would the son, because he is first in degree, have the sole right of a proper heir, alfo the grandfon, or grand-daughter by that son, is under the same parental power. But, if the son of Titius should die in his father's lifetime, or should by any other means cease to be under his father's power, the grandson or grand-daughter would succeed in his place, and would thus, by what may be called a quasi-birth, obtain the right of a proper heir. Therefore, as it behoves a testator for his own security, either to institute or disinherit his son, left his testament should be deemed not legal, so it is equally necessary for him either to institute or disinherit
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in herit his grandson or grand-daughter by that son, lest, if his son should die in his (the testator’s) life-time, his grandson or grand-daughter, succeeding to the place of his son, should make void his testament by a quasi-agnation. And this has been introduced by the law Julia Velleia, in which is set forth a form of disinheriting quasi-polluxious children, similar to that of disinheriting posthumous children.

Lege Julia Velleia.] vid. fl. 28. t. 2. l. 29. Gallus Sic pessi inquit posthumos nepotes induxit, &c.

De emancipatis.

§ III. Emancipatos liberos jure civili neque hæredes instituere, neque exhaeredere, necesse est: quia non sunt sui hæredes. Sed prætor omnes, tam féminines sexus quam masculinis, si hæredes non instituantur, exhaerederi jubet; viriles sexus nominatim, féminines vero inter cæeros: quia, si neque hæredes instituti fuerunt, neque ita (ut diximus) exhaerediti, præmissit eis prætor contra tabulas testamenti bonorum possessionem.

§ 3. In regard to emancipated children, the civil law does not make it necessary, either to institute them heirs or to disinherit them in a testament; inasmuch as they are not sui hæredes, i. e. proper heirs. But the prætor commands, that all children in general, whether male or female, if they are not instituted heirs, shall be disinherited; the males nominally; the females inter cæros: for, if children have neither been instituted heirs, nor properly disinherited in the manner, which we have mentioned, the prætor gives them the possession of the goods, contrary to the disposition of the testament.

De adoptivis.

§ IV. Adoptivi liberi, quædiu sunt in potestate patris adoptivi, ejusdem juris habentur, cujus sunt juftis nuptis quaësiti: itaque hæredes instituendi vel exhaeredandi sunt, secundum ea, quæ de naturalibus expolui- mus. Emancipati vero a patre adoptivo neque jure civilis, neque eo jure, quod ad edictum prætoris attinet, inter liberos connumerantur. Qua ratione accidunt, ut ex diverso, quod ad naturalèm parentem attinet, quædiu quidem sunt in adoptiva familia, extraneorum numero habeantur, ut eos neque hæredes instituere, neque exhaeredere, necesse fit: cum vero emancipati fuerint ab adoptivo patre, tunc incipient in ea causa esse, in qua futuri essent, si a naturali patre emancipati fuissent.

§ 4. Adopted children, as long as they continue under the power of their adoptive father, are intitled to the same rights, as children born in lawful matrimony: and therefore they may either be instituted heirs, or disinherited, according to the rules laid down in regard to natural and lawful children. But it is neither enabled by the civil law, nor enjoined by prætorian equity, that children emancipated by an adoptive father, should be numbered among his natural children, so as to partake of their rights: whence it happens, that adopted children, as long as they continue in adoption, are reputed strangers to their natural parents, who are not necessitated either to institute them heirs, or to disinherit them: but, when they are emancipated by their adoptive father, they are then in the same state, in which they would have been, if they bad been emancipated by their natural father.
Jus novum.

§ V. Sed hæc quidem vetustas introducet. Nostra vero constitutio, inter masculos et feminas in hoc jure nihil interesse existimans, quia utraque persona in hominum procreatione simili naturæ officio fungitur, et lege antiqua duodecim tabularum omnes similiter ad sucessionem ab in fletato vocabantur, quod et pretores postea secuti esse videntur, ideo simplex ac simile jus, et in filiis et in filiabus et in ceteris descendendibus per virilem sexum personis, non solum jam natis, sed etiam posthumis, introduxit; ut omnes, sive fui sive emancipati sint, vel hæreses instituantur, vel nominatim exhaereditur: et eundem habeant effectum circa testamento parentum suorum in firmanda, ethæreditatem auferendam, quem filii fui vel emancipati habent, sive jam nati sint, sive, adhuc in utero constituti, postea nati sint. Circa adoptivos autem filios certam inducimus divisionem, quæ in nostra constitutione, quam super adoptivis tulimus, continetur.

§ 5. These were the rules, which the antient lawyers introduced. But we (not thinking, that any distinction can reasonably be made between the two sexes, insomuch as they both contribute alike to the procreation of the species, and because, by the antient law of the twelve tables, all children, male as well as female, were equally called to the succession ab intestato, which law the pretors seem afterwards to have followed) have by our constitution introduced the same law in regard both to sons and daughters, and to all the other descendents in the male line, whether in being, or posthumous: so that all children, whether they be proper heirs or emancipated, must either be instituted heirs or nominally disinherited. And, in regard to adopted children, we have introduced certain regulations, which are contained in our constitution of adoptions.


De testamento militis.

§ VI. Sed, si in expeditione occupatus miles testamentum faciat, et liberos suos jam natos vel posthumos nominatim non exhaereditavit, sed silentio prætererit, non ignorans, an habeat liberos, silentium ejus pro exhaeredatione nominatim facta valere, constitutionibus principum caustum est.

§ 6. If a soldier makes bis testament, wbbllk be is upon a military expedition, and neither nominally disinherited bis children already born, nor bis posthumous children, but passes them over in silence, altho' it is known to him, that be has such children, or that bis wife was enceinte, it is provided by the constitutions of the emperors, that such silence shall be of equal force with a nominal disinherence.

De testamento matris, aut avi materni.

§ VII. Mater vel avus maternus necesse non habent liberos suos aut hæreses instituire, aut exhaereditare, sed possum unt cos silentio omittere: nam silentium matris aut avi materni, et cæterorum per matrem ascendentium, tantum
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tantum facit, quantum exhaereditio patris. Neque enim matre filii fili-
amve, neque avo materno nepotem neptemve ex filia, si eum eamve haer-
dem non instituat, exhaereditur necesse est, five de jure civili quaramus,
five de edicto praetoris, quo praetor praetoris liberis contra tabulas bonorum
possessionem promittit; sed aliud eis adminiculum servatur, quod paulo
post vobis manifestum fiat.

§ 7. Neither a mother, nor a grandfather on the mother’s side, is under any
necessity of either instituting their children heirs, or of disinheriting them, but may pass
them by in silence; for the silence of a mother, a maternal grandfather, and of all
other ascendants on the mother’s side, works the same effect, as an actual disinheri-
son by a father. For a mother is not obliged to disinherit her children, if she does not
think proper to institute them her heirs; neither is a maternal grandfather under a
necessity either of instituting or disinheriting his grandson or grand-daughter by a daugh-
ter; inasmuch as this is not required either by the civil law, or the edict of the pre-
tor, which gives the possession of goods contra tabulas (i.e. contrary to the disposi-
tion of the testament) to those children, who have been passed over in silence. But chil-
dren, in this case, are not without a remedy against the testament of their mother or
maternal grandfather, which shall be shewed hereafter.

Titulus Decimus-quartus.

De haeredibus instituendis.


Qui possunt haereses institui.

Haereses instituere permissum est tam liberos homines quam ser-
 vos; et tam proprios, quam alienos. Proprios autem olim quidem
secundum plurium sententias non alter, quam cum libertate, recte insti-
tuere licebat: hodie vero etiam fine libertate ex nostra constitutione eos
haereses instituere permissum est. Quod non per innovationem induximus,
se quoniam aequius erat, et Atilicino placuiffe Paulus suis libris, quos tam
ad Maturium Sabinum quam ad Plautum scriptis, refert. Proprius au-
tem servus etiam est intelligitur, in quo nudam proprietatem testator habet,
alius ususfructum habente. Est tamen casus, in quo nec cum libertate uti-
liter servus a domina haeres instituitur, ut constitutione Divorum Severi et
Antonini cavetur, cujus verba haec sunt. Servum, adulterio maculatum, non
jure testamento manumissum ante sententiam ab ea muliere videri, quae rea-
ferat ejusdem criminis postulata, rationis est. Quare sequitur, ut, in eun-
dem a domina collata, haeresis instituto nullius momenti habeatur. Alienus
servus etiam is intelligitur, in quo ususfructum testator habet.
A man may appoint slaves, as well as freemen, to be his heirs by testament; and may nominate the slaves of another as well as his own: yet, according to the opinion of many, no master could formerly institute his own slaves to be his heirs, without giving them their liberty: but, at present, by virtue of our constitution, masters may appoint their proper slaves to be their heirs, without making even any mention of liberty: and this we have introduced, not for the sake of innovation, but because it seemed most just; and because Paulus, in his commentaries upon Sabinus and Plautius, affirms, that this was also the opinion of Attilicinus. Here note, that we call a slave proprius servus, if the testator had only a nude property in him, the usufruct being in another. But, in a constitution of the emperors Severus and Antoninus, there is a case, in which a slave was not permitted to be instituted an heir by his owner, albeit his liberty was expressly given to him. The words of the constitution are these—
It is consonant to right reason, that no slave, accused of adultery with his mistress, shall be allowed, before a sentence of acquittal, to be made free by that mistress, who is alleged to be a partner in the crime. It therefore follows, that, if a mistress institutes such a slave to be her heir, the institution is of no avail.—The expression alienus servus (i.e. the slave of another,) is also sometimes used to denote him, of whom the testator had the usufruct, but not the property.

Ex nostra constitutione. [vid. Cod. 6. t. 27. l. 5.]

Si servus hæres institutus in eadem causa manerit, vel non.

§ I. Servus autem a domino suo hæres institutus, siquidem in eadem causa manerit, sit ex testamento liber, hæresque ei necessarius. Si vero a vivo testatore manumissus fuerit, suo arbitrio adire hæreditatem potest; quia non sit hæres necessarius, cum utrumque ex domini testamento non confequatur. Quod si alienatus fuerit, jussu novi domini adire hæreditatem debet, et ea ratione per eum dominus sit hæres: nam ipse alienatus neque liber, neque hæres, esse potest; etiam si cum libertate hæres institutus fuerit: deflsitse enim a libertatis datione videtur dominus, qui eum alienavit. Alienus quoque servus hæres institutus, si in eadem causa duraverit, jussu ejus domini adire hæreditatem debet. Si vero alienatus fuerit ab eo, aut vivo testatore, aut post mortem ejus, antequam adeat, debet jussu novi domini adire. At, si manumissus est vivo testatore, vel mortuo, antequam adeat, suo arbitrio adire potest hæreditatem.

§ 1. When a slave hath been instituted by his master, and remains in the same state, he will obtain his freedom at the death of his master, by virtue of the testament, and become his necessary heir. But, if that slave is manumitted in the lifetime of his master, it is in his power either to accept or refuse the inheritance; for he will not become a necessary heir, as he can not be said to have obtained both his liberty and the inheritance, by virtue of the testament. But, if such instituted heir should be aliened, he can not then enter upon the inheritance but at the command of his new master, who by means of his slave may become the heir of the testator. For a slave, who hath been aliened, can not afterwards obtain his liberty, or take an inheritance to his own use, by virtue of the testament of that master, who made the alienation, albeit his freedom was
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was expressly given by such testament; because a master, who has aliened his slave, seems to have departed from having any intention to infranchise him. And, when the slave of another is appointed an heir, but remains in the same condition, he can not take the inheritance, but by his master's order: and, if the slave is aliened in the lifetime of the testator, or even after his death, at any time before he has actually taken the inheritance, he must then either accept, or refuse it, at the command of his new master. But, if the slave is infranchised, living the testator, or after his death, before he has accepted the heirship, be either may, or may not, enter upon the inheritance at his own option.

De servio hæreditario.

§ II. Servus etiam alienus post domini mortem recte hæres instituitur: quia et cum hæreditariis servis testamenti factio est. Nondum enim adita hæreditas personae vicem sustinet non hæredis futuri, sed defuncti: cum etiam ejus, qui in utero est, servus recte hæres instituat.

§ 2. The slave of another may legally be instituted an heir, after the death of his master; for the slaves of an inheritance, not entered upon, are intitled to the factio passiva testamenti, i.e. are capable of taking, the no: of giving, by testament: and the reason of this is, because an inheritance, which is open, and not as yet entered upon, is supposed to represent the person of the deceased, and not the person of the future heir: and thus the slave even of a child in the womb may be constituted an heir.

De servio plurium.

§ III. Servus autem plurium, cum quibus testamenti factio est, ab extraneo instituitus hæres, unicuique dominorum, cujus jus dixer aderit, pro portione domini acquirit hæreditatem.

§ 3. If the slave of many masters, who are all capable of taking by testament, is instituted an heir by a stranger, then that slave acquires a part of the inheritance for each master, who commanded him to take it, according to their several proportions of property.

De numero hæredum.

§ IV. Et unum hominem, et plures, usque in infinitum, quot quis hæredes velit, facere licet.

§ 4. A testator may appoint one heir, or as many heirs as he pleases in infinitum.

De divisione hæreditatis.

§ V. Hæreditas plerunque dividitur in duodecim uncias; quae asfis appellatione continentur. Habent autem et hæ partes propria nomina ab uncia usque ad assem; ut puta hæc, sextans, quadrans, triens, quincunx, femis, septunx, bes, dodrans, dextans, deunx. Non autem utique semper duodecim uncias esse oportet: nam tot unciae assem efficient, quot testator voluerit: et, si unum tantum quis ex femis (verbi gratia) haereditatem scripserit, totus as in femisse erit; neque enim idem ex parte testatus, et ex parte intestatus, decedere potest, nisi sit miles, cujus sola volun-

\[\text{\footnotesize \(\frac{1}{2}\)}\]
Bis in testando spectatur. Et e contrario potest quis in quantas uncinas vocuerit plurimas uncias suam hereditatem dividere.

§ 5. An inheritance is generally divided into twelve unciae, that is, parts or ounces, all which are comprehended under one total, termed an As: and each of these parts, from the uncia to the As, has its peculiar name; viz.

Sextans — a sixth part, or two ounces.
Quadrans — a fourth, or three ounces.
Triens — a third, or four ounces.
Quincunx — five ounces.
Semis — a moiety, or six ounces.
Septunx — seven ounces.
Bes — two thirds, or 8 ounces; quafi, bis triens.
Dodrans — nine ounces, or three fourths; quafi, dempto quadrante, As.
Dextans — ten ounces; quafi, dempto sextante, As.
Deunx — eleven ounces out of twelve; quafi, dempta uncia, As.

But it is not necessary, that an As, or total, should always be divided into twelve parts; for an As may consist of whatever parts the testator pleases; and, if a man names but one heir, and appoints him ex femine, i.e. the heir of six parts; yet the whole As will be included, for no man can die partly testate and partly intestate, except a soldier, whose intention is solely to be regarded. And a testator may also divide his estate into as many parts, as he thinks convenient.

Ex parte testatus, et ex parte inextatus.] In England, if a man disposes of only the half of his personal estate by testament, he will nevertheless die intestate, as to the other half, which will be disposed of among his next of kin, as the statute of distributions directs.

De portionibus singulorum heredum. Si testator asemiss non divisserit, aut partes in quorundam persona non ultra asemiss expresserit.

§ VI. Si plures instituantur heredes, ita demum in hoc caso partium distributio necessaria est, si nolit testator, eos ex aequo partibus heredes esse. Satis enim constat, nullis partibus nominatis, ex aequo partibus cos heredes esse. Partibus autem in quorundam personis expressis, si quis aequus fine parte nominatus erit, si quidem aequus pars asse decert, ex ea parte heres fit. Et, si plures fine parte scripti sunt, omnes in eandem partem concurrunt. Si vero totus as complettis sic ii, qui nominatim expressas partes habent, in dimidiam partem vocantur, et ille, vel illi omnes, in alterum dimidiam. Nec intereit, primus an medius, an novissimus, fine parte hæres scriptus fit: eae enim pars data intelligitur, quæ vacat.

§ 6. When a testator hath instituted many heirs, it is incumbent upon him to make a division of his effects, if he does not intend, that all his heirs should share his inheritance in equal portions: for, if no distribution is made by the testator, it is evident, that all his heirs must be equal shareurs. But, if the shares of some of the nominated heirs in a testament should be expressed, and the share or shares of one or more should be
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Si pars vacet, aut exuperet.

§ VII. Videamus, si pars aliqua vacet, nec tamen quisquam sine parte fit hæres institutus, quid juris sit, velut si tres ex quattuor partibus hæredes scripti sunt. Et confit, vacantem partem singulis tacet, pro hæreditaria parte accedere, et perinde haberi, ac si ex tertius partibus hæredes scripti essent: et ex diverso, si plures hæredes scripti in portionibus sint, taceat singulis decrecere; ut si (verbi gratia) quatuor ex tertius partibus hæredes scripti sunt, perinde habeatur, ac si unusquisque ex quarta parte hæres scriptus fuisset.

§ 7. Let us now inquire, what the law would direct, if a part of an inheritance should remain unbequeathed, and yet a certain portion of it should be given by testament to every nominated heir: as if three should be instituted, and a fourth given to each. It is clear in this case, that the undisposed part would vest in each of them in proportion to the share bequeathed to him, and that each would be reputed the written heir of a third. And, on the contrary, if many are nominated heirs in certain portions, so as to exceed the A3, than each heir must suffer a defalcation proportionally — for example, if four are instituted, and a third is given to each, then this disposition would work the same effect, as if each of the written heirs had been instituted to a fourth only.

Si plures unciae quam duodecim distributae sunt.

§ VIII. Et, si plures unciae, quam duodecim, distributae sint, ets qui sine parte institutus est, quod dupondio deest, habebit. Idemque erit, si dupondius expletus sit. Quæ omnes partes ad assem postea revocantur, quamvis sint pluriem unciarum.

§ 8. If more parts or ounces, than twelve, are bequeathed, then be, who is instituted without any prescribed share, shall be intitiled to what remains of a dupondius; that is, of twenty-four parts: and, if more than twenty-four parts are bequeathed, then the heir, who is nominated without any determinate share, is intitiled to the remainder of a triponduis, i. e. of thirty-six parts or ounces. But all these parts are afterwards reduced to twelve.

De modis instituendi.

§ IX. Hæres et pure et sub conditione instituti potest; ex certo tempore, aut ad certum tempus, non potest: veluti, post quinquennium, quam moriar.
moriar; vel, ex calendis illis; vel, usque ad calendas illas haeres esto. De-
nique diem adjecet haberi pro supervacuo placet, et perinde esse, ac si
pure haeres institutus esset.

§ 9. An heir may be constituted simply, or conditionally——but not from or to
any certain period: as if a testator should say to Titius, be thou my heir after five
years to be computed from my death——or——from the calends of such a month
——or——’till the calends of such a month. For time, thus added, is in law
deemed surplus; and such an institution takes place immediately, as if it was a
simple appointment.

Ad certum tempus non potest.] Altho’ by the
civil law an heir can not be instituted either
from a certain time or ’till a certain time, left the
deceased should seem to die partly testate and partly
intestate; yet, in England, an executor, who is
quaest-haeres, may be appointed either from or un-
til a certain time: and the ordinary may com-
mit the administration of the goods of the de-
ceased to the next of kin in the mean time,
during which time the act of the administrator
is good; and can not afterwards be avoided by
the executor. Swin. 310.

De conditione impossibili.

§ X. Impossibilis condition in institutionibus et legatis, nec non in se de-
commissis et libertatis, pro non scripta habetur.

§ 10. An impossible condition in the institution of heirs, the dispo-
sition of legacies, the appointment of trustees, or the confering of liberty, is treated as unwritten or
void.

Impossibilis condition.] “Altho’ impossible
“conditions, whether they are fo by nature or
“by law, do not hinder the effect of the dispo-
sition, being reputed as if they were not writ-
ten or uttered; yet, if a testator supposes a
“condition to be possible, which is in reality
“impossible or illegal, then such condition is
“not void, but will render the disposition void,
“to which it is added: as for instance; if the
“testator makes Titius his executor, or gives
“him an hundred pounds, if he marries his
“the testator’s daughter; supposing her to be
“living, when she is dead: in this case, the
“condition is impossible; and yet Titius can
“not become executor, or obtain the legacy;
“because it is not probable, that the testator
“would have made him executor, or given
“him an hundred pounds, if he had known,
“or believed, his daughter to have been dead.”
Swinb. part 4. sect. 6.

De pluribus conditionibus.

§ XI. Si plures conditiones in institutionibus adscriptae sunt, sicutem
conjunctim, ut puta, si illud et illud factum fuerit, omnibus parendum
est: si separatim, veluti, si illud aut illud factum erit, cui libet conditioni
obtemperare satiis est.

§ 11. If many conditions are jointly required in the institution of an heir; as thus,
if this thing and that thing be done, then both must be complied with. But, if
the conditions are placed separately and in the disjunctive, as thus, if this, or that
be done, it will then be sufficient to obey either.

De his, quos nunquam testator vidit.

§ XII. Si, quos nunquam testator vidit, haereses institutis possunt, veluti
si fratri filios peregrinantes, ignorans qui essent, haereses instituerit: igno-
rantia enim testatoris inutilia institutionem non facit.

§ 12.
§ 12. A testator may appoint persons, whom he hath never seen, to be his heirs. He may, for example, institute his brother's sons, who are in a foreign country, although he does not know where they are; for the want of this knowledge, in a testator will not vitiate the institution of an heir.

**Titulus Decimus Quintus.**

De vulgari substitutione.


De pluribus gradibus heredum.

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 substituere potest: ut novissimo loco in subsidium vel servum necessarium heredem instituere posset.

A man by testament may appoint many degrees of heirs; as thus—if Titius will not be my heir, let Seius be my heir. And he may proceed in such a substitution as far as he shall think proper; and lastly, in default of all others, he may constitute a slave to be his necessary heir.

De numero heredum in singulis gradibus.

§ 1. Et plures in unius locum possunt substitui, vel unus in plurium, vel singuli in singulorum, vel invicem ipsi, qui heredes instituunt sunt.

§ 1. A testator may substitute many in the place of one, or one in the place of many, or one in the place of each, or be may substitute even his instituted heirs reciprocally to one another.

Plures in unius locum.] This kind of substitution, which is called ordinary or vulgar, is of no small use in England, and we do therein, for the most part, follow the precepts and rules of the civil law: for it is nothing else but the adding a condition, which we commonly call tail in the case of lands; namely, a limitation of heirs, to whom a testator intends, that his lands should descend. Strabo on Domat. vol. 2. p. 221. Cowel's Inst. tit. 15.

Quam partem singuli substituti accipient, si partes in substitutione expressae non sint.

§ II. Et, si ex disparibus partibus heredes scriptos invicem substituerit, et nullam mentionem partium in substitutione habuerit, eas videtur in substitutione partes dedisse, quas in institutione expressit: et ita Divus Pius rescriptit.

§ 2. If a testator, having instituted several co-heirs in unequal portions, substitutes them reciprocally the one to the other, and makes no mention of their shares of the inheritance in the substitution, he seems to have given the same shares by the substitution, which he gave by the institution; and this is agreeable to the rescript of the emperor Antoninus.

Et,
Lib. II. Tit. XV.

Et, si ex disparibus. — For example, if a testator should bequeath to Primus one twelfth of his estate — to Sempronius eight twelfths, and to Tertius three twelfths; adding, that he substitutes them all, the one to another reciprocally — then if Primus, for instance, should at the death of the testator refuse to take his twelfth, it must be subdivided into eleven equal parts, of which eight must be given to Sempronius, and three to Tertius. Ferrierius, 2. 1.

Ita Divus Pius. — vid. Cod. 6, t. 14, l. 1. f. 28, t. 6, l. 24.

Si cohaeredi substituto alius substituatur.

§ III. Sed, si instituto heredi, cohaerede substituto dato, alius ei substitutos fuerit, Divi Severus et Antoninus sine distinctione rescripterunt, ad utramque partem substituitorum admissi.

§ 3. If a co-heir is substituted to an instituted heir, and a third person is substituted to that co-heir, the emperors, Severus and Antoninus, have by rescript ordained, that such substituted person shall be admitted to the portions of both the co-heirs without distinction.

Cohæredē substituto dato. — Syphasis gave six twelfths of his estate to Tertius, and six to Caius; making them co-heirs; he then substituted Titius to Caius and Sempronius to Titius: but, Titius and Caius dying, or declining the inheritance, it became a question, to what share Sempronius should be admitted; and it was determined, that the emperor or treasury should take no share of the deceased's effects in this case, but that Sempronius the substitute should be admitted without distinction as well to the share of Caius as to that of Titius. Myrigenes, 6. 1. f. 28, t. 6, l. 27.

Si quis servo, qui liber existimabantur, instituto substitutos fuerit.

§ IV. Si servum alium quis, patrem-familias arbitratus, heredem scripsisset, et, si hæres non esset, Mævium ei substituerit; idque servus justi domini adierit hereditatem, Mævius substitutus in partem admissus.

Ilia enim verba, si hæres non esset, in eo quidem, quem alieno juri subjectum esse testator scit, sic accipiantur, si neque ipse hæres esset, neque aliun hæredem effecerit: in eo vero, quem patrem-familias arbitratur, illud significat, si hæreditatem fisci, vel et, cuius juri postea subjicisse cuperit, non acquiserit. Idque Tiberius Caesar in persona Parthenii servi fui constituit.

§ 4. If a testator constitutes the slave of another to be his heir, supposing him to be free, and adds — if he does not become my heir, I substitute Mævius in his place — then, if that slave should afterwards enter upon the inheritance at the command of his master, Mævius, the substitute, would be admitted to a moiety. For the words, if he does not become my heir, in regard to him, whom the testator knew to be under the dominion of another, are taken to mean, if he will neither become my heir himself, nor cause another to be my heir: but in regard to him, whom the testator supposed to be free, they imply this condition; viz. if my heir will neither acquire the inheritance for himself, nor for him to whose dominion he may afterwards become subject. But it was determined by Tiberius, the emperor, in the case of his own slave Parthenius, that a substitute in such a case should be admitted to a moiety.

Titulus Decimus-sextus.

De pupillari substitutione.


Forma, effectus, origo, et ratio pupillaris substitutionis.

Liberis suis impuberibus, quos in potestate quis habet, non solum ita, ut supra diximus, substituere potest, id est, ut, si haeredes ei non extiterint, alius sit ei haeres: sed eo amplius, ut, si haeredes ei extiterint, et adhuc impuberes mortui fuerint, sit eis aliquis haeres: veluti si quis dicat hoc modo: Titius filius haeres mibi es: et, si filius mibi haeres non erit, five haeres erit, et prius moriatur, quam in suam tutelam venerit, id est, antequam pubes factus sit, tunc Seius haeres es. Quo casu, siquidem non extiterit haeres filius, tunc substitutus patri sit haeres: si vero extiterit haeres filius, et ante pubertatem decesserit, ipfi filio sit haeres substitutus. Nam moribus institutum est, ut, cum ejus aetatis filii sint, in qua ipfi sibi testamentum facere non possint, parentes eis faciant.

A parent can substitute his children, who are within puberty, and under his power, not only in the manner before-mentioned, which is thus——if my children will not be my heirs, let some other person be my heir——but be may write——if my children actually become my heirs, but die within puberty, let another become their heir: for example; let Titius, my son, be my heir; and, if he either does not, or does, become my heir, and dies before he ceases to be under tutelage, [i.e. before he arrives at the age of puberty,] let Seius be my heir. And, in this case, if the son does not enter upon the inheritance, the substitute becomes heir to the father; and, if the son takes the inheritance, and dies a pupil before the age
Lib. II. Tit. XVI.

Age of puberty, the substitute is then heir to the son. For custom has ordained, that parents may make wills for their children, when their children are not of age to make wills for themselves.

De substitutione mente capti.

§ I. Qua ratione excitati, etiam constitutionem posuimus in nostro codice, qua prospectum est, ut, si qui mente captos habeant filios, vel nepotes, vel pronepotes, cujuscunque sexus vel gradus, liceat eis, etiopheuberes sint, ad exemplum pupillaris substitutionis, certas personas substituere: si autem resipuerint, eandem substitutionem infirmari fancimus: et hoc ad exemplum pupillaris substitutionis, quae, postquam pupillus adoleverit, infirmatur.

§ 1. Excited by humanity, and the reasonableness of the foregoing usage, we have inferred a constitution into our Code, by which it is provided, that, if a man has children, grand-children, or great-grand-children, who are mad or disordered in their senses, he may make a substitution of certain persons to fight children, in the manner of a pupillary substitution, alibo’ they are arrived at the age of full puberty. But we have decreed, that this species of substitution shall be void, as soon as they shall have recovered from their disorder; and this we have done in imitation of pupillary substitution, which ceases to be in force, when the minor attains to puberty.


Proprium pupillaris substitutionis.

§ II. Igitur in pupillari substitutione secundum præstum modum ordinata duo quodammodo sunt testamenta, alterum patris, alterum filii: tanquam si ipse filius sibi hæreditem instituisset: aut certe unum testamentum est duarum causarum, id est, duarum hæreditatum.

§ 2. In a pupillary substitution, made after the form before-mentioned, there are in a manner two testaments, the one of the father, the other of the son; as if the son had instituted an heir for himself: at least there is, in such a substitution, one testament containing a disposition of two inheritances.

Alia forma substituendi pupillariter.

§ III. Sin autem quis ita formidolosus sit, ut timeat, ne filius suus pupillus adhuc ex eo, quod palam substitutum acceperit, post obtum ejus pericul0 infidiarum subjacet, vulgarem quidem substitutionem palam facere, et in primis testamenti partibus ordinare, debet: illum autem substitutionem, per quam, si hæres extiterit pupillus et intra pubertatem decesserit, substitutus vocatur, separatim in inferioribus partibus scribere debet, eamque partem proprio lino propriaque cera constringere: et in priore parte testamenti cavere, ne inferiorum tabulæ, vivo filio et adhuc impubere, aperiantur. Illud palam est, non ideo minus valere substitutionem impuberis filii, quod in iisdem tabulis scripta
Lib. II. Tit. XVI.

scripta fit, quibus sibi quisque hæredem instituisset; quamvis pupillo hoc periculorum sit.

§ 3. If a testator is apprehensive, lest, at the time of his death, his son, being as yet a pupil, should be liable to fraud and imposition, if a substitute should be publicly given to him, he ought to insert a vulgar substitution in the first tablet of his testament; and to write that substitution, in which a substitute is named, if his son should die within puberty, in the lower tablet, which ought to be separately tied up and sealed: and it also behoves the testator to insert a clause in the first part of his testament, forbidding the lower part to be opened, whilst his son is alive, and within the age of puberty. But, alibi it is certain, that a substitution to a son within puberty is not itself valid, because it is written on the same tablet, in which the testator hath appointed him to be his heir; it is however unsafe and dangerous.

Quibus substituitur.

§ IV. Non solum tamen hæredibus instituitis impuberibus liberis ita substituere parentes possunt, ut, si hæredes eis extiterint, et ante pubertyatem mortui fuerint, fit eis hæres is, quem ipsi voluerint; sed etiam exhaeredatis. Itaque eo cafu, si quid exhaeredato pupillo ex hæreditatisibus, legatis et donationibus, propinquorum atque amicorum acqui- situm fuerit, id omne ad substitutum pertinebit. Quæcumque diximus de substitutione impuberum liberorum, vel haeredum institutorum, vel exhaeredatorum, eadem etiam de posthuminis intelligimus.

§ 4. Parents are not only allowed to give a substitute to their children within puberty, if such children become their heirs, and die within puberty; but parents are also permitted to give a substitute to their disinherited children; and therefore, whatever a disinherited child, within the age of puberty, may have acquired by inheritances, by legacies, or by the gift of relations and friends, the whole will become the property of the substitute. All, which we have hitherto said concerning the substitution of pupils, whether they are instituted heirs, or disinherited children, is understood to extend also to posthumous children.

Pupillare testamentum sequela paterni.

§ V. Liberis autem suis testamentum nemo facere potest, nisi et sibi faciat; nam pupillare testamentum pars et sequela est paterni testamenti: adeo ut, si patris testamentum non valeat, nec illius quidem valebit.

§ 5. No parent can make a testament for his children, unless he hath made a testament for himself: for the testament of a child within puberty is a part and consequence of the testament of the parent, insomuch that, if the testament of the father is not valid, the testament of the son will not take effect.

Quot liberis substituitur.

§ VI. Vel singulis autem liberis, vel ei, qui eorum novissimus impubes morietur, substitui potest. Singulis quidem, si neminem eorum intef-
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intestatum decedere voluerit: novissimo, si jus legitimarum hæreditatun integrum inter eos custodiri velit.

§ 6. A parent may make a pupillary substitution to each of his children, or to him, who shall die the last within puberty. He may substitute to each of his children, if he is unwilling, that any of them should die intestate; and he may substitute to the last, who shall die within puberty, if he is willing, that they should preserve among themselves the entire right of succession.

De substitutione nominatim aut generaliter facta.

§ VII. Substituitur autem impuberi aut nominatim, veluti, Titius hæres esto: aut generaliter, ut, Quisquis mibi hæres erit. Quibus verbis vocantur ex substitutione, impubere mortuo filio, illi, qui et scripti sunt hæredes, et extiterunt, et pro qua parte hæredes facti sunt.

§ 7. A substitution may be made to a child within puberty, either nominally; as for example —— If my son becomes my heir, and dies a pupil, let Titius be my heir; — or generally thus —— Whoever shall be my heir, let the same person be a substitute to my son, if he dies within puberty. And, by these general words, all, who have been instituted, and have taken upon them the inheritance of the father, must be called, by virtue of the substitution, to the inheritance of the son, if he dies within puberty; each being intituled to a part of the son’s inheritance, in proportion to the share, which he had in the father’s.

Quisquis mibi hæres erit.] This general form must be understood to be of use, either when a parent hath appointed many to be his heirs with his son, or hath disinherited his son, and instituted others. But, for the better explanation of this section, it will be proper to set down the words of Theophras, whole paraphrase of the text is a work of great authority, and will always be in full force in explaining the institutions. “Præterea nominatim impuberis substitutum possum, et dies, si filius meus hæres mihi fuerit, et impubes est, Titius et hæres esto. Possum et generaliter ei substitutum, ut erit gratia, multis una cum filio.”

Quomodo substitutio pupillaris finitur.

§ VIII. Masculo igitur usque ad quattuordecim annos substitutui potest: feminae usque ad duodecim annos. Et, si hoc tempus excederit, substitutio evanescit.

§ 8. A pupillary substitution may be made to males, till they arrive at fourteen complete; and to females, till they have completed their twelfth year: and, when either of these ages, the substitution becomes extinct.

Quibus pupillariter non substitutur.

§ IX. Extraneo vero vel filio puberi hæredi instituto ita substituere nemo potest, ut, si hæres extiterit, et intra aliquod tempus deceperit, alius ei fit hæres: sed hoc solum permittum est, ut eum per fideicommissum
miflum teftator obliget alii hæreditatem ejus vel totam vel pro parte restituere: quod jus quae sit, suo loco trademus.

§ 9. A pupillary substitution cannot be made with effect, either to a stranger, who is instituted, or even to a son, who is instituted, if his age exceeds that of puberty. But a testator may oblige his heir to give to another either a part, or even the whole of the inheritance, by virtue of a fidei-commiflum, or gift in trust; which we will treat of in its proper place.

TITULUS DECIMUM-SEPTIMUM.

Quibus modis testamenta infirmantur.

D. xxviii. T. 3.

Quibus modis testamenta infirmantur.

Testamentum jure factum usque eo valet, donec rumpatur, irritumve fiat.

A testament, legally made, remains valid, until it is either broken, or rendered ineffectual.

Quando testamentum dicatur rumpi. Primum de adoptione.

§ I. Rumpitur autem testamentum, cum, in eodem fìatu manente testatore, ipsius testamenti jus vitiatur. Si quis enim post factum testamentum adoptaverit fìbi filium per imperatorem eum, qui est fìi juris, aut per prætorem, secundum nostram constitutionem, eum, qui in po-testate parentis fuerit, testamentum ejus rumpitur quasi agnatione fìi hæredis.

§ 1. A testament is said to be broken, or revoked, when the force of it is destroyed, whilst the testator still remains in the same state. For, if a testator, after making his testament, should arrogate an independent person, by licence from the emperor, or, in the presence of the prætor, should adopt a child under the power of his natural parent, by virtue of our constitution, then that testament would be broken by this quasi-birth of a proper heir.

Secundum nostram constitutionem.] eis. Cod. 9. t. 48. l. 10.

De
De posteriore testamento.

§ H. Posteriores quoque testamentos, quod jure perfectum est, superius rumpitur; nec interest, exiterit aliquis heres ex eo, an non; hoc enim estum spectat, an aliquo cau eisitere potuerit. Ideoque, si quis aut noluerit heres esse, aut vivo testatore, aut post mortem ejus, antequam hereditatem adiret, decesseit, aut conditione, sub qua heres institutus est, defecessit, in his casibus pater-familias intestatus moritur. Nam et prius testamentum non valet, ruptum a posteriore; et posterius aequ incididunt habet, cum ex eo nemo heres exitiret.

§ 2. A former testament, aliquo legally perfect, if broken or revoked by a subsequent testament; nor is it material, whether the heir, nominated in the later testament, can or will take the heirship at the death of the testator; for the only thing regarded is, whether he might have been the heir: and therefore, if an intestate heir should refuse to take the heirship, or should die, living the testator, or after his death, and before he could enter upon the inheritance, or if he should die, before the condition is accomplished, upon which he was instituted, then, in any of these cases, the testator would die intestate; for the first testament would be invalid, being broken or revoked by the second, and the second would be of as little force, for want of an heir.

De posteriore, in quo heres certae rei institutus.

§ III. Sed, si quis, priore testamento jure perfecto, posserius aequo jure fecerit, etiam si ex certis rebus in eo heredem instituerit, superius aenem testamentum sublatum esse, Divi Severus et Antoninus Augusti refpresserunt; cujus constitutionis verba et hic inferi jussimus, cum aliud quoque praeterea in ea constitutione expressum fit. Imperatores Severus et Antoninus Augusti Cocceio Campano. Testamentum secundo loco factum, licet in eo certarum rerum heres scriptus sit, perinde jure valere, ac si rerum mentio falsa non esset: sed et teneri heredem scriptum, ut contentus rebus fidei datis, aut suppleta quaestus ex leges Falcidia, hereditatem refitiuat bis, qui in priore testamento scripti fuerant, propter infra falsa-conmissa verba, quisquis ut colorat prius testamentum expressum esset, dubitari non oportet. Et ruptum quidem testamentum hoc modo efficitur.

§ 3. If a man, who has already made a testament legally perfect, should make a subsequent testament equally good, and institute an heir in it to some particular things only, the emperors Severus and Antoninus have by rescript declared, that, in this case, the first will shall be broken or revoked, as a testament. But we have commanded the words of this constitution to be here inserted. The emperors Severus and Antoninus to Cocceius Campanus. We determine, that a second testament, although the heir named in it is not universal, but instituted to particular things only, shall be as good in law, as if no mention had been made of particular things; yet it is not to be doubted, but that the written heir shall be obliged to content himself either with the things given him, or with the fourth part, allowed by the Falcidian law, and shall be bound to restore the rest of the inheritance to
Lib. II. Tit. XVII.

to the heirs instituted in the first testament, on account of the words, denoting a truf,{\textsuperscript{a}} inferred in the second testament, by which words it is expressly declared, that the first testament shall subsist.—And, in this manner, a testament may be said to be broken or cancelled.

In ea constiuitio.] \textit{vid.} \textit{ff.} 36. 1. 1. 29.
Ex lege Falcidia.] \textit{vid.} titulam 22. boiis libri.

De testamento irrito; et quibus modis fit irritum.

§ IV. Alio autem modo testamenta jure facta infirmantur; veluti cum is, qui fecit testamentum, capite diminutus fit: quod, quibus modis accidat, primo libro retulimus.

§ 4. Testaments, legally made, are also invalidated, if the testator suffers diminution, that is, changes his condition: and, in the first book of our institutions, we have shewed by what means diminution, or a change of state, may happen.

Cur dicatur irritum.

§ V. Hoc autem caus irita fieri testamenta dicuntur; cum aliquoi, et quae rumpuntur, irrita sunt, et ea, quae statim ab initio non jure sunt, irrita sunt. Sed et ea, quae jure facta sunt, et postea per capitis diminutionem irrita sunt, possumus nihilominus rupta dicere. Sed, quia sane commodius erat, singulas causas singulis appellationibus distingui, ideo quaedam non jure facta dicuntur, quaedam jure facta rumpi vel irrita fieri.

§ 5. In the case of diminution, testaments are said to become irrita, i. e. ineffectual; atibo those, which are broken or revoked, and those, which, from the beginning, were not legal, do all equally become ineffectual [or irrita] in reality. We may also term those testaments broken, which are at first legally made, but are afterwards rendered ineffectual, by diminution, or change of state. But, as it is proper, that every particular defect should be distinguished by a particular appellation, those testaments, which are illegal, are termed null;—those which were at first legal, but afterwards lose their force, by some revocatory act of the testator, are said to be rupta; or broken; and those, since the making of which, the testator hath suffered a change of state, are said to be irrita, or ineffectual.

Quibus modis convalescit.

§ VI. Non tamen per omnia inutilia sunt ea testamenta, quae, ab initio jure facta, per capitis diminutionem irrita facta sunt: nam, si septem testamentum signis signata sunt, potest scriptus haeres, secundum tabulas testamenti, bonorum possessionem agnosco, si modo funis et cives Romanus, et suae potestatis, mortis tempore fuerit. Nam, si ideo irritum factum sit testamentum, quia civitate vel etiam libertatem testator anisset, aut quia in adoptionem se dedit, et mortis tempore in adoptivi patris potestate sit, non potest scriptus haeres secundum tabulas bonorum possessionem petere.

§ 6.
§ 6. But a testament, which was at first legally made, and hath afterwards been rendered void by diminution, is not always without effect; for the written heir is intitled to the possession of the goods, by virtue of the testament, if it appears, that it was sealed by seven witnesses, and that the testator was a Roman citizen, and not under power, at the time of his death: but, if a testament became void, because the testator had lost the right of a citizen, or his liberty, or had given himself in adoption, and, at the time of his death, still continued under the power of his adoptive father, then the written heir could not demand the possession of the goods, in consequence of the testament.

De nuda voluntate.

§ VII. Ex eo autem solo non potes infirmari testamentum, quod potes testator id noluerit valere: usque adeo ut, si quis, post factum prius testamentum, poterit facere coeperit, et, aut mortalitate praeventus, aut quam eum ejus rei paterint, id non perfererit, Divi Pertinacis oratione cautum fit, ne alias tabulæ priores, jure factâ, irritâ sint, nisi sequentes jure ordinatae et perfectae fuerint: nam imperfectum testamentum sine dubio nullum est.

§ 7. A testament can not be invalidated solely, because the testator was afterwards unwilling, that it should subsist; so that, if a man, after making one testament, should begin another, and by reason of death, or change of mind, should not proceed to perfect that testament, it is provided by the oration or ordinance of the emperor Pertinax, that the first testament shall not be revoked, unless the second is both legal and perfect; for an imperfect testament is undoubtedly null.

Pertinacis oratione.] The emperors were accustomed to speak orations in the Senate, or send them to the Senate in writing; and the decrees were afterwards drawn up according to the tenor of those speeches or orations. •§ 23. 1. 2. 1. 16. Vinn.

Si princeps liti causâ, vel in testamento imperfecto insti- tutus fuerit.

§ VIII. Eadem oratione expressit, non admisserum sè hæreditatem ejus, qui liti causâ principem reliquerit hæredem: neque tabulas non legitime factas, in quibus iple ob eam causam hæres institutus erat, probaturum; neque ex nuda voce hæredis nomen admisserum: neque ex illa scriptura, cui juris auctoritas defit, aliquid adoptatum. Secundum hoc Divi Severus et Antoninus sapientes restipserunt. Licet enim, inquitn, legibus soluti simus, attamen legibus vivimus.

§ 8. The emperor Pertinax hath declared by the same ordinance, that he would not take the inheritance of any testator, who left him his heir, because a law-fact was depending; — that he would never establish a will, deficient in point of form, if he was upon that account instituted the heir; — that he would by no means suffer himself to be nominated an heir by the mere word of mouth of a testator; and that he would never take any emoluments by virtue of any writing whatever, not authorized by the strict rules of law. The emperors Severus and Antoninus have
Titulus Decimus-Octavus.

De inofficioso testamento.


Ratio hujus querelae.

quia plerunque parentes fine causa liberos suos exhaeredant vel
omittunt, inducunt eft, ut de inofficioso testamento agere possint
liberi, qui queruntur, aut inique se exhaeredatos, aut inique preteritos:
hoc colore, quasi non sanc mensis fuerint, cum testamentum ordinarent.

Sed hoc dicitur, non quasi vere furiosus fit; sed recte quidem testamentum
fecerit, non autem ex officio pietatis. Nam, si vere furiosus fit, nullum
testamentum esset.

Inasmuch as parents often disinberit their children without cause, or omit to mention
them in their testaments, it has therefore been introduced, as law, that children, who
have been unjustly disinherited, or unjustly omitted in the testaments of their parents, may
complain, that such testaments are inofficious, under color, that their parents were
not of sane mind, when they made them: but, in these cases, it is not averred to be
strictly true, that the testator was really mad or disordered in his senses, but it is urged
as a mere fiction only; for the testament is acknowledged to have been well made, and
the only exception to it, is, that the testament is not consistent with the duty of a parent.

For, if a testator was really not in his senses at the time of making his testament, it is
certainly null.

quia plerunque parentes. The plaint, or
action, in the case of an unjustful testament,
which civilians call testamentum inofficiosum, is not
in use in England; where, by the common law,
all persons intitled to make a will, have ever
had a free power of bequeathing their goods
and chattels, in whatever manner they thought
best; and it was only by the particular custom
of some places, that this power was restrained:
so that the writ called breve de ratiobus paris
honorum, which the wife or children of the
decesed had against the executors for the recov-
ery of part of the goods, was not general
throughout the kingdom, but peculiar to certain
countries, where the custom was, that, debts
being paid, the remainder should be divided into
three equal parts; viz. one to the wife, another
to the children, and a third to attend the will of
the testator. Caveel lib. 2. t. 18.

The custom of referring a reasonable part of
the goods for the widows and children of tes-
tators is still in force in the city of London, as
to the widows and children of freemen; but in
other parts of the kingdom, where this custom
did formerly prevail, it has been abolished by
act of parliament; see 4 and 5 Will. and Mary,
cap. 6. The inhabitants of the province of York
are also impowered to dispose of their personal
estates by their wills, notwithstanding the custom
of that province, as to the reasonable part claimed
by
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by widows and children; but the act excepts the cities of York and Chester; yet the same liberty was afterwards extended to the freemen of the city of York, by the statute of the 2d and 3d of Queen Anne. And by the 7th and 8th of William the 3d, cap. 38. the same custom was abolished in the principality of Wales. See Dr. Strahan’s notes on Domat, vol. 2. p. 109. But, by the law of Scotland, a tsettator cannot by tsettament deprive his wife or children of their legitime or reasonable part. Stair’s inst. lib. 3. t. 8. Mackenzie’s inst. lib. 3. t. 9. p. 251.

Hoc color.] This pretext was made use of to avoid the appearance of impugning the testament of a man in his lifetime, contrary to the authority of the 12 tables, which give all persons capable of making a will, a free and uncontrolled power of bequeathing their effects just as they think proper. “Verbis legatis 12 tabularum bis, uti legabitur fuerit, si aequum esse, latissima potestas tributur, et heredibus infuturis, et legata et libera et donae, tutelas quoque confitentur endi; sed id interpretationes coaguntur et.”

“f. 50. t. 16. l. 120. de verb. figum.”

Qui de inofficio agunt.

§ I. Non autem liberis tantum permissum est testamentum parentum inofficiisum accufare, verum etiam liberorum parentibus: foror autem et frater turbibis personis scriptis hereditibus ex factis constitutionibus praebati sunt; non ergo contra omnes heredes agere possunt. Ultra fratres igitur et forores cognati nullo modo aut agere possunt, aut agentes vincere.

§ 1. Children are not the only persons allowed to complain; that testaments are inofficious, for parents are in like manner permitted to make the same complaint. Also the brothers and sisters of a tsettator are, by virtue of the imperial constitutions, preferred to infamous persons, if any such have been instituted by the deceased to be his heirs; but brothers and sisters are not therefore allowed to make a complaint against any heir, whom the testator shall have instituted. And collaterals, beyond brothers and sisters, can by no means complain of the undutifulness of a testament, if their right to complain is opposed; but if their right of complaining is not disputed, and the testament is annulled, yet those only can be benefited, who are the nearest in succession upon an intestacy.

Constitutionibus.] vid. ‘Cod. 3. t. 28. H. 21. 27.

Aut agentes vincere.] Si quis, ex iiis personis que ad successionem ab intestato non adimitisurum de inofficio agerit, [inveniet enim quem repellit] et confutabitur, non et propterea, sed bis, qui habet ab intestato succussionem. "f. 5. t. 2. l. 6.

Qui alio jure veniunt, de inofficio non agunt.

§ II. Tam autem naturales liberi, quam secundum nostra constitutionis divisionem adoptati, ita dum de inofficio testamento agere possunt, si nullo alio jure ad deuncti bona venire possunt: nam, qui ad hereditatem totem vel partem ejus alio jure veniunt, de inofficio agere non possunt. Posthumi quoque, qui nullo alio jure venire possunt, de inofficio agere possunt.

§ 2. Adopted children, according to the distinction taken in our constitution, are admitted, as well as natural children, to complain against a testament, as inofficious, if they can obtain the effects of the deceased in another way; but if they can get the whole or a part of the inheritance by any other means, they then can not bring a complaint of undutifulness against the testament. Posthumous children also, who are unable to recover their inheritance by any other method, are allowed to bring this complaint.
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Secundum nostrum constitutionis divisionem. [vid. Cod. 8. t. 48. l. 10.]

Si nullo alici jure. [When a complaint against a testament, as inofficious, is well founded, it
affects the character and memory of the deceased, who can not be thought to have acted as became
him: this complaint therefore was regarded as an extraordinary remedy, and never allowed to
be made, but by those, who had no other: and thus emancipated children, who had been pre-
terminated in the testament of their father could not complain of that testament as inofficious,
because the Praetorian law gave them another remedy; to wit, the possession of the goods,
contrary to the letter of the testament. vid. Finm. b. 1.

De eo, cui testator alicui reliquit.

§ III. Sed haec ita accipienda sunt, si nihil eis penitus a testatoribus
testamento reliquit: quod nostra constitutio ad Verecundiam nature
introduxit. Sin vero quantacunque pars hæreditatis, vel res, eis fuerit
reliqua, de inofficio querela quiescente, id, quod eis deceat, ufque ad
quartam legitima partis replatur, licet non fuerit adiectum, boni viri ar-
bitratu debere eam compleari.

§ 3. What we have bisberto said must be understood to take place only, when no-
thing has been left by the will of the deceased; [and this hath been introduced by our
constitution, out of reverence to parents and the ties of nature:] for, if any single
thing, or the least part of an inheritance, hath been bequeathed to those, who have a
right to a fourth part or legitimate portion of the testator's estate, they are barred from
bringing a querele or complaint against the testament, as undutiful, but are initiated
by action to recover whatever sum is wanting to complete their legitime, alioque it was
not added by the testator, that their legitimate portion should be completed ac-
cording to the arbitration of some person of an approved character.

Constitutio ad Verecundiam. [vid. Cod. 3. t. 28. l. 50.

Si tutor, cui nihil a patre reliquum, pupilli nomine legatum
acceperit.

§ 4. Si tutor nomine pupillii, cujus tutelam gerebat, ex testamento
patris sui legatum acceperit, cum nihil erat ipsi tutori reliquum a patre
fuo, nihilominus poterit nomine suo de inofficio patris testamento
agere.

§ 4. If a tutor should accept a legacy in the name of his pupil, in consequence of a
bequest made in the testament of such tutor's father, who left nothing to his son; the
tutor may nevertheless complain in his own name against the testament of his father,
as undutiful.

Si de inofficio nomine pupilli agens succubuerit.

§ 5. Sed, si e contrario pupilli nomine, cui nihil reliquum fuerat, de
inofficio egerit et superatus esset, ipse tutor, quod sibi in testamento codern
reliquum esset, non amittit.

§ 5. And, on the contrary, if a tutor should bring a complaint of undutifulness in
the name of his pupil, against the testament of his pupil's father, who left nothing to
his son, and this testament should be confirmed by sentence, yet the tutor would not af-

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...wards be barred, on account of this proceeding, from taking whatsoever was left him in that testament, which be controverted only for the benefit of his pupil and by virtue of his office.

De quarta legitimae partis.

§ VI. Igitur quartam quis debet habere, ut de inoffició agere non possit, five jure hæreditario, five jure legati vel fidei-commissi, vel si mortis causa ei quarta donata fuerit, vel inter vivos in iis tantummodo caebus, quorum mentionem nostra facit constitutio, vel aliis modis, qui in nostris constitutionibus continentur. Quod autem de quarta diximus, ita intelligendum est, ut, five unus fuerit, five plures, quibus agere de inoffició testamento permittitur, una quarta eis dari posse, ut ea pro rata eis distribuat, id est, pro virili portione quarta.

§ 6. No person, who hath right, can be hindered from bringing a complaint of undutifulness, unless he hath in some manner received his fourth or legitimate part, as by being appointed heir, by having a legacy, or by means of a trust for his use; or unless his legitimate part hath been given him by donation propter mortem, or even inter vivos, [in those cases, of which our constitution makes mention,] or by any other means set forth in our ordinances. What we have said of the fourth or legitimate is to be so understood, that, if there are more persons than one, who have a right to bring a plaint of undutifulness against a testament, yet one fourth will be sufficient, divided among them all in equal portions.

Facit constitutio.) vid. Cad. 3. t. 28. l. 35.

Titulus Decimus-nonus.

De hæredum qualitate et differentia.


Divisio hæredum.

Hæredes autem aut necessarii dicuntur, aut sui et necessarii, aut extranei.

Heirs are divided into three sorts, called proper, proper and necessary, and strangers.

De hæredibus necessariis.

§ 1. Necessarii hæres est servus hæres institutus; ideoque sic appellatur, quia, five velit, five nolit, omnino post mortem testatoris protinus liber.
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liber et necessarius haeres sit. Unde, qui facultates suas suscequet habent, solent servum suum primo aut secundo aut etiam ulteriore gradu haerestem instituere; ut, si creditoribus fatis non fiat, potius ejus haeredis bona, quam ipsius testatoris, a creditoribus possideantur, vel dissipantur, vel inter eos dividandum. Pro hoc tamen incommodo illud ei commodum praestatur, ut ea, quae post mortem patroni sui sibi acquisierit, ipsi referantur. Et quamvis bona defuncti non sufficiant creditoribus, iterum tamen ex ea causa res ejus, quas sibi acquisierit, non vaneunt.

§ 1. A slave, instituted by his master, is a necessary heir; and he is so called, because at the death of the testator he becomes instantly free, and is compellable to take the heirship; be therefore, who suscequet his circumstances, commonly institutus bis slave to be bis heir in the first, second, or some other place; so that, if he does not leave a sum equal to bis debts, the goods, which are seized, sold, or divided among bis creditors, may rather seem to be those of bis heir, than bis own. But a slave, in recompense of this disburse, is allowed to refer to himself whatever be bought acquired after the death of bis patron; for such acquisitions are not to be sold, although the goods of the deceased are ever so insufficient for the payment of bis creditors.

De suis haeredibus.

§ II. Sui autem et necessarii haeredes sunt, veluti filius sili, nepos neptive ex filio, et deinceps ceteri liberi, qui in potestaate morientis modo fuerint. Sed, ut nepos neptive sui haeredes sint, non sufficit eum eamve in potestaate avi mortis tempore suisse: sed opus est, ut pater ejus, vivo patre suo, desierit suis haeres esse, aut morte interceps, aut qualibet alia ratione liberatus a patria potestaate; tunc enim nepos neptive in locum patris sui succedit. Sed sui quidem haeredes ideo appellantur, quia domestici haeredes sunt, et vivo quoque patre quodammodo domini exiltantur. Unde etiam, si quis intestatus moritur, prima causa est in succeSSIONe liberorum. Necessarii vero ideo dicuntur, quia omnino, five velint, five nolint, tam ab intestato quam ex testamento, ex lege duodecim tabularum haeredes sunt. Sed his praeor permittit volentibus abstinere haereditate, ut potius parentis quam ipfiorum bona fimiliter a creditoribus possideantur.

§ 2. Proper and necessary heirs are sons, daughters, grandsons or grand-daughters by a son or any other descendants in the direct line, who were in the power of the deceased at the time of his death. But, in order to constitute grandchildren proper or domestic heirs, it does not suffice, that they were in the power of their grandfather at the time of his decease; but it is requisite, that their father should have ceased to be a proper heir in the life-time of his father, by having been freed, either by death or some other means, from paternal authority; for when it is, that the grandson or grand-daughter succeeds in the place of their father. And note, that heirs are called sui or proper, because they are domestic; and in the very life-time of their father are reputed masters or proprietors of the inheritance in a certain degree. Hence it is, that, if a
man dies intestate, his children are preferred before all others to the succession; and are called necessary heirs, because, willing or unwilling, they become the heirs of their parent according to the law of the 12 tables, either by virtue of a testament or in consequence of an intestacy. But, when children request it, the praelector permits them to abstain from the inheritance, that the effects of their parents, rather than their own, may be seized by the creditors.

De extraneis.

§ III. Caeteri, qui testatoris juri subjici non sunt, extranei hæredes appellantur; itaque liberi nostri, qui in potestate nostra non sunt, hæredes a nobis instituti, extranei hæredes nobis videntur. Qua de causa et qui hæredes a matre instituuntur eodem numero sunt: quia fœminæ in potestate liberos non habent. Servus quoque hæres a domino institutus, et poëf factum testamentum ab eo manumissit, eadem numero habetur.

§ 3. But all other heirs, not subject to the power of the testator at the time of his death, are called strangers: thus even children, who are not under the power of their father, but yet are constituted his heirs, are reckoned strangers in a legal sense: and, for the same reason, children, instituted heirs by their mother, are also reputed strangers; for a woman is not allowed to have her children under her own power. A slave also, whom his master hath instituted by testament and afterwards manumitted, is numbered among those heirs, who are called strangers.

De testamenti factione.

§ IV. In extraneis hæredibus illud observatur, ut sit cum eis testamenti factio, five hæredes ipsi instituantur, five ii, qui in potestate eorum sunt. Et id duobus temporibus inspicitur; testamenti quidem facti tempore, ut constiterit institutio; mortis vero testatoris, ut effectum habeat. Hoc amplius, et, cum adit hæreditatem, effe debet cum eo testamenti factio, five pure five sub conditione hæres institutus sit. Nam jus hæredis eo maxime tempore inspicendum est, quo acquirit hæreditatem. Medio autem tempore, inter factum testamentum et mortem testatoris vel conditionem institutio existentem, mutatio juris non nocet hæredi: quia, ut diximus, tria temporis inspicio debent. Testamenti autem factionem non solum is habere videtur, qui testamentum facere potest; sed etiam, qui ex alio testamento vel ipse capere potest, vel alii acquirere, licet non posse facere testamentum. Et ideo furiosus, et mutus, et poëf-humus, et infans, et filius-familias, et servus alienus, testamenti factionem habere dicuntur. Licet enim testamentum facere non posset, attamen ex testamento vel sibi vel alii acquirere possunt.

§ 4. In regard to strangers, it is requisite, that they should be capable of the faction of a testament, whether they are instituted heirs themselves, or whether those, under their power, are instituted. And this qualification is required at two several times.
De jure deliberandi, et de beneficio inventarii.


§ 5. Strangers, who are appointed heirs, have the power of deliberating whether they will, or will not, enter upon an inheritance. But, if even a proper or domestic heir, who has the liberty of abstaining, should intermeddle, or, if a stranger, who is permitted to deliberate, should once take an inheritance, it will not afterwards be in his power to renounce it, unless he were under the age of 25 years: for the praetor, who in all other cases relieves minors, who have been deceived, affords them also his assistance, when they rashly take upon themselves an injurious inheritance. And here it must be noted, that the emperor Adrian once gave permission to a major, or person of full
full age, to relinquish an inheritance, when it appeared to be incumbered with a great debt, which had been concealed, till the heir had taken upon himself the administration. But this permission was granted as a very special instance of beneficence. The emperor Gordian afterwards promulgated a constitution for the indemnification of heirs, yet confined the force of it to those only, who were of the sordidry. But our extended benevolence hath rendered this benefit common to all our subjects in general, having dilated a constitution both just and noble, which, if heirs will strictly observe, they may enter upon their inheritance, and not be made farther chargeable, than the value of the estate will extend; so that they are under no necessity of praying a time for deliberation, unless they omit to observe the tenor of our ordinance, abusing rather to deliberate and submit themselves to the danger attending the acceptance of an inheritance according to the ancient law.

Sed nostra benevolentia.] The power of deliberating was obtained after the following manner:—the heir, who was called to a succession, either by virtue of a testament or by a right to succeed ab intestato, made application to a magistrate for a time to deliberate, upon which a delay was always granted him of at least an hundred days, in which he might examine the circumstances of the deceased; and, by the ancient law, the testator himself might have fixed a certain time, in which his appointed heir must either take the inheritance, or, by suffering that time to elapse, entirely exclude himself. This appointment of a certain time was called Cretion, [from crevi a cornere to decrees] and was afterwards forbidden by the emperors Arcadius, Honorius, and Theodosius, in these words. "Scutum...pulchrum Cretionem solemnitatem habe legem pestitus 'ampullari decernimus.' Cod. 6. t. 30. l. 17."

"This power of deliberating was of no other use than to give the heir time to examine the affairs of the deceased; at the expiration of which, the heir was obliged either to accept the inheritance simply, or renounce it, without being at liberty so chuse any middle way; and from hence followed many inconveniences to legatees and creditors, as well as to heirs. — The law however continued the same, and heirs were without remedy, except that given by the emperor Gordian to the sordidry, till the reign of Justinian, who established, in favor of heirs in general, a liberty of accepting an inheritance with the benefit of an inventory; i.e. on condition, that they shall not be liable to actions beyond the value of the goods, of which an inventory ought to be made by a public officer; the intention of which is, that creditors, legatees, and other persons concerned, may have a just account of all the goods; and that the heir may not engage his own estate, but oblige himself only to be answerable for what is contained in the inventory; yet the benefit of an inventory has not abolished the use of deliberating. Cod. 6. t. 30. l. 17."

In England all executors and administrators are allowed the benefit of an inventory of course, and are supposed to accept the succession always under that benefit; so that, if they exhibit an inventory upon oath, they are no farther accountable than for what is contained in that inventory, unless the creditors or legatees can prove, that there are more goods belonging to the succession, then are set down in the inventory, in which case the executors or administrators will be obliged to charge themselves; but, if an executor will make no inventory, the executor may all over his whole legacy; for, in this case, the law presumes, that there are sufficient effects to pay all the legacies, and that the executor hath fraudulently subtracted them; whereas, when an inventory is given, the executor is presumed not to have any more of the testator's goods in his possession, than were described in the inventory, if lawfully made. Swin. part. 3. sec. 17. page 228.

Et constitutionem tam quin illam perliteram] vid. Cod. 6. t. 30. l. 22.

De acquirenda vel omittenda hereditate.

§ VI. Item extraneus hæres testamento institutus, aut ab intestato legitimam hereditatem vocatus, potest aut pro hærede gerendo, aut etiam nuda voluntate sucipienda hereditatis, hæres fieri. Pro hærede autem gerere quis videtur, si rebus hereditariis tanquam hæres utatur, vel vendendo res hereditarias, vel prædia colendo, locandove, et quo-
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quoquo modo voluntatem suam declarat, vel re, vel verbo, de adeunda hæreditate; dummodo sciat, eum, in cujus bonis pro hærede gerit, testatum intestatumve obiisse, et se ci hæredem esse. Pro hærede enim gerere est pro domino gerere: veteres enim hæredes pro dominis appellabant. Sicut autem nuda voluntate extraneus hæres fit, ita contraria destinatione statim ab hæreditate repellitur. Eum, qui furdus vel mutus natus vel poëtea factus est, nihil prohibet pro hærede gerere, et acquirere sibi hæreditatem; si tamen intelligit, quod agit.

§ 6. A strænger, who is instituted by testament, or called by law to take a succession in case of an intestacy, may make himself accountable as heir, either by doing some act as such; or by barely signifying his acceptance of the heirship. And a man is deemed to act as heir, as the heir of an inheritance, if he treats it as his own, by selling any part of it, by cultivating the ground, or by tilling it; or even if he declares his consent to accept it in any manner, either by act or speech; when he knows, at the same time, that the person, with whose estate he intermeddles, is dead intestate or intestate, and that he himself is the heir: for to act as heir is to act as proprietor; and the antients frequently used the term heir, when they would denote the proprietor of an estate. But as a stranger may become an heir by a bare consent only, so on the contrary, by a mere dissent, he may bar himself from an inheritance. And nothing prevents, but that a person, who was born deaf and dumb, or became so by accident, may, by acting as heir, either acquire the advantages or bring upon himself the disadvantages of an inheritance, if he was sensible of what he was doing, and that he was acting in the capacity of an heir.

Item extraneus hæres.] The law of England takes no notice of proper or domestic heirs, and therefore can make no distinction between sui hæredes and extranei; but, in England, if an executor [who may be regarded as the heir of personal estate] once intermeddles with the estate of the testator, he will not afterwards be permitted to renounce his executorship; and yet he is not liable de bonis propriis to pay more than he has received, unless in some particular cases, as when he hath wafted the estate of the deceased, or acted otherwise improperly and dishonestly—and even an executor de bono tort will in general be charged only to the amount of the goods wrongfully administered by him. 1 Mod. 213. Parvin v. Bajden. — Swinb. 337.
POST hæc videamus de legatis; quæ pars juris extra propofitam qui-dem materiam videtur: nam loquimur de iis juris figuris, quibus per universitatem res nobis acquiruntur: fed, cum omnino de testamentis et de hæreditibus, qui in testamento instituuntur, loquuti simus, non sine causa sequenti loco potest hæc juris materia tractari.

After what has been said, we will make some observations upon the doctrine of legacies; although a discussion of this part of the law may not seem exactly to fall in with the subject proposed; for we are treating only of those legal methods, by which things may be acquired universally: but, as we have already spoken at large of testaments and testamentary heirs, it is not without reason, that we intend to treat of legacies in the following paragraphs.

Definitio.

§ I. Legatum itaque est donatio quædam a defuncto relictâ, ab hærede praestanda.

§ 1. A legacy is a species of donation, which is left or ordered by the deceased; and, if possible, must be performed by his heir.

De antiquis generibus legatorum sublatis.

§ II. Sed olim quidem erant legatorum genera quattuor; per vindicationem, per damnationem, finendi modo, per preceptioinem: et certa quædam verba cuique generi legatorum assignata erant, per quæ singula genera legatorum significabantur: sed ex constitutionibus Divorum principium solenmitas hujusmodi verborum sublata est. Nostra autem constitutione, quam cum magna fecimus lucubratione, de functorum voluntates validiores esse cupientes, et non verbis sed voluntatibus eorum faveentes, dispositit, ut omnibus una sit natura, et, quibuscuque verbis aliquid relictum sit, liceat legatarii id persequi, non solum per actiones personales, sed etiam per in rem et per hypotheciam. Cujus constitutionis perpenenum modum ex ipsius tenore perfectissime accipere possibile est.

§ 2.
§ 2. Antiently there were four kinds of legacies in use; namely—per vindicationem—per damnationem—sinendi modo—and per preceptionem. And to each of these was assigned a certain form of words, by which their different species were signified; but these fixed forms have been wholly taken away by the imperial ordinance of the latter emperors, Constantinus, Constantius, and Constans. And we also, being deferss'd, that the wills of deceased persons might be corroborated, and that their intentions should be more regarded than their words, have with great care and study composed a constitution, which enacts, that the nature of all legacies shall be the same; and that legates, by whatever words they are constituted, may sue for what is left them, not only by a personal, but by a real or hypothecary action. But the reader may most perfectly comprehend the well weighed matter of this constitution, by perusing the tenor of it.

Sed ex constitutionibus. [vid. Cod. 6. t. 37. l. 21.
Non ut autem constitution. [vid. Cod. 6. t. 43. l. 11.

Collatio legatorum et fidei-commissorum.

§ 3. Sed non usque ad eam constitutionem standum esse existimavit: cum enim antiquitatem invenimus legata quidem stricte condicentem, fidei-commissis autem, quae ex voluntate magis descendent, destructorum, pingueorem naturam indulgentem, necessarium esse duximus, omnia legata fidei-commissis exaequare, ut nulla sit inter ea differentia, sed, quod deest legatis, hoc repeatur ex natura fidei-commissorium: et, si quid amplius est in legatis, per hoc crescat fidei-commissorum natura. Sed, ne in primis legum cunabilis, permittim de his exponendo, studiose adolescentibus quandam introducamus difficultatem, operâ preti um esse duximus interim separatim prius de legatis et postea de fidei-commissis tractare; ut, natura utrisque juris cognita, facile possint permissionem eorum erudiri subtilioribus auribus accipere.

§ 3. But we have judged it expedient, that our constitution should not rest here, but extend still further: for, when we observed, that the ancients confined legacies within very strict rules, and yet were extremely favourable to gifts in trust, it was thought necessary to make all legacies equal to gifts in trust, that no difference in effect should remain between them; so that whatever is deficient in the nature of legacies may be supplied by the nature of trusts, and whatever is abundant in the nature of legacies may become an accession to the nature of trusts.——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 things promiscuously, we have esteemed it worth our pains to treat separately first of legacies and afterwards of trusts, that, the nature of both being known, the student, thus instructed, may more easily understand their relation and intermixture.

Necessarium esse duximus. [Cod. 6. t. 43. Communia de legatis, &c.
De re legata. Et primum de re testatoris, hæredis, aliena, cujus non est commercium.

§ IV. Non solum autem testatoris vel hæredis res, fed etiam aliena legari potest, ita ut hæres cogatur redimere eam et praestare; vel, si eam non potest redimere, aestimationem ejus dare. Sed, si talis sit res, cujus commercium non est, vel adipisci non potest, nec aestimatio ejus debetur; veluti si quis campum martium, vel basilicas, vel templum, vel, quæ publico ulius destinata sunt, legaverit: nam nullius momenti tale legatum est. Quod autem diximus, alienam rem posse legari, ita intelligendum est, si defunctus sciebat, alienam rem esse, non si ignorabat. Fortetamen, si scivisset alienam rem esse, non legasset; et ita Divus Pius rescriptit. Et verius est, ipsum, qui agit, id est, legatarium, probare oportere, scivisse alienam rem legare defunctum, non hæredem probare oportere, ignorasse alienam: quia semper necessitas probandi incumbit illi, qui agit.

§ 4. A testator may not only bequeath his own property, or that of his heir, but also the property of others; and, if the thing bequeathed belongs to another, the heir can be obliged either to purchase and deliver it, or to render the value of it, if it can not be purchased. But, if the thing bequeathed is not in commerce, and what the law will not permit to be purchased, the heir in this case can never be obliged to pay the value of it to the legatary, as if a man should bequeath to another the Campus Martius, the palaces of the prince, the temples, or any of those things, which appertain to the public: for such legacies can be of no moment or efficacy. But, when we said, that a testator might bequeath the goods of another man, we would be underflood to mean, that this can be done only, if the deceased knew, what he bequeathed belonged to another, and not, if he was ignorant of it; since, if he had known it, he probably would not have left such a legacy: and to this purpose is the rescript of the emperor Antoninus. And it is incumbent upon the party agent or legatary to bring proof, that the deceased knew, that what he left belonged to another; for the heir is by no means obliged to prove, that the deceased did not know it; because, by the general rule of law, the necessity of proving lies upon the complainant.

De re pignorata.

§ V. Sed et, si rem obligatam creditori aliquis legaverit, necesse habet hæres eam luere. Et in hoc quoque casu idem placet, quod in re aliena; ut ita demum luere necesse habeat hæres, si sciebat defunctus, rem obligatam esse: et ita Divi Severus et Antoninus reascripterunt. Si tamen defunctus voluerit legatarium luere, et hoc expresserit, non debet hæres eam luere.

§ 5. If a man bequeaths a thing, which he hath pledged to a creditor, the heir is under a necessity of redeeming it: but in this case, as in the former, concerning the goods of another, the heir cannot be obliged to redeem the thing bequeathed, unless the deceased
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deceased knew, that it was pledged; and this the emperors Severus and Antoninus have declared by their rescript. But nevertheless, whenever it appears to have been the express will of the deceased, that the legatary should himself redeem the thing left to him, then the heir is free from the obligation of doing it.

De re aliena post testamentum a legatario acquisita.

§ VI. Si res aliena legata fuerit, et ejs rei vivo testatore legatarius dominus factus fuerit, sicutem ex causa emptionis, ex testamento actione pretium conseqvi potest; si vero ex causa lucrativa, veluti ex donatione, vel ex alia simili causa, agere non potest: nam traditum est, duas lucrativas causas in eundem hominem et eandem rem concurrere non posse. Hac ratione, si ex duobus testamentis eadem res eidem debeatur, interesse, utrum rem, an estimationem, ex testamento consecutus sit: nam, si rem habet, agere non potest; quia habet eam ex causa lucrativa: si estimationem; agere potest.

§ 6. If a thing bequeathed is the property of another, and the legatee becomes the proprietor of it in the life-time of the testator, it is necessary to be known by what means the legatee became the proprietor; for, if he bought it, he may nevertheless recover the price given, by an action in consequence of the testament; but, if he obtained it as a gift, or by any such lucrative title, no action will lie, for it is a maxim, that two lucrative causes can never concur in the same person and thing. And therefore, if the same specific thing is left by two testaments to one and the same person, the question will be, when the legatary uses in virtue of one of the testaments, whether he hath obtained the thing itself, or the value of it, by virtue of the other? for, if he is already possessed of the thing itself, the suit is at an end, because he hath received it on a lucrative account; but, if he hath obtained the value of it only from the heir of one of the testators, he may bring an action for the thing itself, against the heir of the other.

Nam traditum est.] When it is said, that two lucrative titles can never concur in the same person on account of the same thing, this must be understood in regard only to something certain and determinate, as a particular purer of money, an horse, a diamond, &c. for the maxim does not hold in general with respect to things, which consist in quantity, and may be numbered, weighed or measured — Possunt enim duas causas lucrativas in eandem perbanam eandem quantitatem concurrere, quia quantitates per rerum naturam multiplicantur; licet enim eadem res rea justus fuerit non posset, eadem tamen quantitates possit quia res eadem non videtur. Cujusvis, Ferriere.

De his, quæ non sunt in rerum natura.

§ VII. Quoque res, quæ in rerum natura non est, si modo futura est, recte legatur; veluti fructus, qui in illo fundo nati erunt, aut quod ex illa ancilla natum erit.

§ 7. Things, which do not exist, may be rightly bequeathed, if there is but a possibility, that they may exist: thus a man may devise the fruits, which shall grow on such a spot of ground; or the offspring, which shall be born of a particular slave.

De
De eadem re duobus legata.


§ 8. When the same specific legacy is left to two persons either conjunctively or disjunctively, if they are both willing to accept it, it must be divided between them. But, if one of the legates dies in the life-time of the testator, dislikes his legacy, or is by any means prevented from taking it, the whole vests in his co-legatee. A legacy thus worded is in the conjunctive, I give and bequeath my slave STICHUS to TITIUS and SEIUS:—but a legacy, worded as follows, is in the disjunctive—I give and bequeath my slave STICHUS to TITIUS: I give and bequeath my slave STICHUS to SEIUS. And, alloque the testator should add, that he gives the same slave STICHUS to SEIUS, yet the legacy would nevertheless be understood to be left in the disjunctive.

Si legatarius proprietatem fundi alieni sibi legati emerit et usufructus ad eum perveniret.

§ IX. Si cui fundus alienus legatus sit, et emerit proprietatem deducto usufructu, et usufructus ad eum perveniret, et postea ex testamento agat, recte eum agere et fundum petere Julianus ait; quia usufructus in petitione servitutis locum obtinet: sed officio judicis continetur, ut deducto usufructu jubeat aetimationem praestari.

§ 9. If a man hath bequeathed the ground of another, and the legatary hath purchased the property of that ground without the usufruct, which hath also afterward accrued to him, it is said by Julianus, that the legatary may rightly bring an action by virtue of the testament, and demand the ground, because the usufruct is regarded as a service only. But it is the duty of a judge, in this case, to order the price of the property of the ground to be paid, the value of the usufruct being deducted.

De re legatarii.

§ X. Sed, si rem legatarii quis ei legaverit, inutile est legatum; quia, quod proprimum est ipsius, amplius ejus fieri non potest: et, licet alienaverit eam, non debitur, nec ipsa res, nec aetimation ejus.

§ 10. If a man bequeats to another what already belongs to him, the legacy is ineffectual; for that, which is already the property of a legatee, can by no means become more so. And, alloque the legates should, after the bequest, alien the thing bequeathed, neither the thing itself, nor even the value of it, would become due to him from the heir of the testator.
Si quis rem suam, quasi non suam, legaverit.

§ XI. Si quis rem suam quasi alienam legaverit, valet legatum: nam plus valet quod in veritate est, quam quod in opinione. Sed et, si legatarii esse putavit, valere constat; quia exitum voluntas defuncti habere potest.

§ XII. If a testator should bequeath what is his own, as if it was the property of another, the bequest would nevertheless be good; for truth is more prevalent than what is founded upon opinion only. But even suppose the testator to imagine, that what he bequeaths belongs already to the legatee, yet, if it does not, it is certain, that such a legacy would also be valid; because the will of the deceased can thus take effect.

De alienatione et oppignoratione rei legatae.

§ XII. Si rem suam legaverit testator, posteaque eam alienaverit, Celsus putat, si non adimendii animo vendidit, nihilominus debere: idemque Divi Severus et Antoninus rescripsierunt. Idem rescripsierunt, eum, qui post testamentum factum prædia, quae legata erant, pignori dedit, ademissi legatum non videri: et ideo legatarium cum hærede ejus agere posse, ut prædia a creditore luantur. Si vero quis partem rei legatae alienaverit, pars, quæ non est alienata, omnino debitur: pars autem alienata ita debitur, si non adimendii animo alienata sit.

§ XII. But, if a testator bequeaths what is his own property, and afterwards aliens it, it is the opinion of Celsus, that the thing bequeathed will nevertheless become due to the legatee, if the testator did not dispose of it, with an intention to own it. The emperor Severus and Antoninus have published their rescripts to this effect; and they have also signed by another rescript, that whoever has bequeathed a legacy, and hath afterwards pawned or mortgaged it, shall not be deemed to have retracted it; and that the legatee may therefore of course bring an action against the heir, and oblige him to redeem. And, if a testator shall have aliened but a part of the thing bequeathed, then all that part, which remains unaliened, is still due; and that, which is aliened, is only due, if it appears not to have been aliened by the testator with a design to retract the legacy.

De liberatione legata.

§ XIII. Si quis debitori suo liberationem legaverit, legatum utile est: et neque ab ipso debitore, neque ab hærede ejus, potest hæres petere, neque ab alio, qui hæreditis loco sit. Sed et potest a debitore conveniri, ut liberet eum. Potest etiam quis vel ad tempus jubere, ne hæres petat.

§ XIV. If a man by will bequeaths a discharge to his debtor, the bequest is effectual, and the heir can bring no suit against the debtor, or his heir, or any one, who represents him: but, on the contrary, the heir of the testator may be convened by the debtor, and obliged to give him his discharge. A man may also by testament command his heir not to sue a debtor, within a time limited.
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De debito legato creditori.

§ XIV. Ex contrario, si debitor creditori suo, quod debet, legaverit, inutile est legatum, si nihil plus est in legato, quam in debito: quia nihil amplius per legatum habet: quod si in diem, vel sub conditione, debitur ei pure legaverit, utile est legatum propter representationem. Quod si vivo testatore dies venerit, vel conditio extiterit, Papinianus scripsit, utile esse nihilominus legatum, quia femel confitit: quod et verum est. Non enim placuit sententia exstitimantium, extinctum esse legatum, quia in eam causam pervenerit, a qua incipere non potest.

§ 14. On the contrary, if a debtor bequeath by testament to his creditor the money, which he owes him, this legacy is ineffectual, if the value of the legacy amounts but merely to the value of the debt; for thus the creditor can receive no benefit from the legacy. But, if a debtor bequeath simply to his creditor a sum of money, which was to be paid at a day certain, or which he owed upon condition, the legacy will take effect on account of the representation, i.e. on account of the immediate payment, the legacy becoming due before the debt. — But, according to Papinian, if the day of payment should come, or the event of the condition happen in the life-time of the testator, the legacy would nevertheless be effectual, because it was once good, which is true. For we are by no means satisfied with the opinion of those who imagine, that a legacy once good, may afterwards become extinct, by falling into a state, from which it could not have taken a legal commencement.

De dote uxori legata.

§ XV. Sed, si uxori maritus dotem legaverit, valet legatum: quia plenus est legatum, quam de dote actio. Sed, si, quam non acceptit, dotem legaverit, Divi Severus et Antoninus rescipserunt, fiquidem simpliciter legaverit, inutile esse legatum: si vero certa pecunia, vel certum corpus, aut instrumenta dotis in praesentia demonstrata sunt, valere legatum.

§ 15. If a man gives back to his wife by legacy her marriage portion, the legacy is valid: for such a legacy is more beneficial to her than the action, which she might maintain for the recovery of her portion. But, if an husband bequeaths to his wife her marriage portion, and hath never actually received it, the emperors Severus and Antoninus have declared by their rescript, that, if it is left simply without any specification of a sum certain, the legacy is void; but that, if any certain sum, or thing is specified, or if the instruments, in which the exact value of the portion is mentioned, are referred to, the legacy is valid.

De interitu et mutatione rei legatae.

§ XVI. Si res legata sine facto hæreditis perierit, legatario decedit. Et, si servus alienus legatus sine facto hæreditis manumissus fuerit, non tenetur hæres. Si vero hæreditis servus legatus sit, et ipse cum manumisset, teneri eum, Julianus scripsit: nec intereft, sciverit, an ignoraverit, a le eum legatum esse. Sed et, si alii donaverit servum, et is, cui donatus est, eum
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eum manumiserit, tenetur hæres; quamvis ignoraverit, a se eum legatum effe.

§ 16. If a thing bequeathed should perish before delivery, otherwise than by the act or fault of the heir, the loss shall fall upon the legateary. And, if the slave of another, who is bequeathed, should be manumitted, and the heir hath not been privy to the manumission, he can be subject to no action. But, if a testator bequeaths the slave of his heir, who afterwards manumits that slave, it is the opinion of Julian, that the heir is answerable: nor is it at all material, whether he did or did not know of the legacy. And also, if the heir hath made a present of a slave bequeathed, and the donee hath manumitted him, the heir is liable to an action, albo he was ignorant of the bequest.

De interitu quarundam ex pluribus rebus legatis.

§ XVII. Si quis ancillas cum suis natis legaverit, etiam si ancillæ mortue fuerint, partus legato cedunt. Idem est et si ordinarii servi cum vicariis legati fuerint: quia, licet mortui sint ordinarii, tamen vicarii legato cedunt. Sed, si servus fuerit cum peculio legatus, mortuo servo, vel manumissio, vel alienato, peculii legatum extinguitur. Idem est, si fundus instructus, vel cum instrumento, legatus fuerit; nam, fundo alienato, et instrumenti legatum extinguitur.

§ 17. If a testator gives by legacy his female slaves and their offspring, albo' the slaves die, yet their issue will become due to the legateary: and the same obtains, if ordinary slaves are bequeathed together with vicarial; for albo' the ordinary slaves die, yet the vicarial slaves will pass by virtue of the bequest. But, if a slave is bequeathed with his peculium, and afterwards dies, or is manumitted, or aliened, the legacy of the peculium becomes extinct. And the consequences will be the same, if a piece of ground is bequeathed with the instruments for improving it; for, if the testator alienates the ground, the legacy of the instruments of business is of course extinguished.

De grege legato.

§ XVIII. Si grex legatus fuerit, et postea ad unam ovem pervenerint, quod superfuerit, vindicari potest. Grege autem legato etiam eas oves, quae post testamentum factum gregi adjiciuntur, legato cedere Julianus ait. Eft autem gregis unum corpus ex distantibus capitisbus, ficit ædium unum corpus est ex cohærentibus lapisdibus.

§ 18. If a flock is bequeathed, and afterwards reduced to a single sheep, that sheep is claimable; and, if a flock receives an increase or addition, after it hath been disposed of by testament, the increase or addition will also, according to Julian, become due to the legateary. For a flock is deemed one body, consisting of separate members, as an bouje is reckoned one body, composed of materials, joined together and adhering.
De ædibus legatis.

§ XIX. Ædibus denique legatis, columnas et marmora, que post testamentum factum adiecta sunt, legato dicimus cedere.

§ 19. And lastly, when an house is bequeathed, the marble or pillars, which are added after the bequest is made, will pass under the general legacy.

De peculio.

§ XX. Si peculium legatum fuerit, fine dubio quicquid peculio accedit vel decedit, vivo testatore, legatarii lucro vel damno est. Quod si post mortem testatoris ante aditam hereditatem aliquid servus acquirit, Julianus est, iuicidum ipsi manumissit peculium legatum fuerit, omne, quod ante aditam hereditatem acquisitum est, legatario cedere; quia hujusmodi legati dies ab adita hereditate cedit: sed, si extraneo peculium legatum fuerit, non cedere ea legato, nisi ex rebus peculiaribus auctum fuerit peculium. Peculium autem, nisi legatum fuerit, manusmissis non debetur: quamvis, si vivus manusmissit, sufficit, si non admitterat; et ita Divi Severus et Antoninus rescripsissent. Idem rescripsissent, peculio legato, non videri id reliquum, ut petitionem habeat pecunia, quam in rationes dominicas impenderit. Idem rescripsissent, peculium videri legatum, cum rationibus redditis liber esse jus est, et ex eo reliquum inferre.

§ 20. When the peculium of a slave is bequeathed, it is certain, that the increase or decrease of it, in the life of the testator, becomes the loss or gain of the legatee. And, if the peculium of a slave is left to him together with his liberty, and such slave makes an acquisition to the peculium, subsequent to the death of the testator, and before the inheritance is entered upon, it is the opinion of Julian, that whatever is acquired within that period, will pass to him as the legatee; for such a legacy does not become due, but from the day of the acceptance of the inheritance. But it is the opinion of the same Julian, that, if the peculium of a slave is bequeathed to a stranger, an increase, acquired within the period above-mentioned, will not pass under the legacy, unless the acquisition was made, by means of something appertaining to the peculium; for the peculium of a slave does not belong to him, after he is manumitted by testament, unless it is expressly given; alioquin, if a master in his lifetime manumissit his slave, his peculium will pass to him of course, if not excepted: and thus the emperors Severus and Antoninus have decreed by their rescript. And the same emperors have also declared, that, when a peculium is bequeathed to a slave, it does not seem to be the intention of the testator, that such slave should have the power of demanding what he may have expended for the use of his master. And the same princes have farther declared, that a slave seems to be intitled to his peculium, if his liberty is left him, on condition, that he will bring in his accounts, and supply any deficiency out of the profits of his peculium.
De rebus corporalibus et incorporalibus.


§ 21. Things incorporeal may be bequeathed as well as things corporeal: and therefore a debt, due to the testator, may be left as a legacy, and the heir be obliged to transfer his right of action to the legatary, unless the testator in his life-time received the money due to him; for in this case the legacy would become extinct. A legacy is also good, if conceived in the terms following: ——I command my heir to rebuild the house of Titius: or to free him from his debts.

De legato generali.

§ XXII. Si generaliter servus, vel res alia, legetur, electio legatarii est, nisi aliud testator dixerit.

§ 22. If a testator bequeath a slave, or any particular thing generally, the power of election is in the legatary, unless the testator hath declared otherwise.

De optione legata.

§ XXIII. Optionis legatum, id est, ubi testator ex servis suis vel aliis rebus optare legatarium jussisset, habebat olim in se conditionem: et ideo, nisi ipsa legatarius vivus optasset, ad haeresem legatum non transmissebat. Sed ex constitutione nostra et hoc in meliorem statum reformatum est, et data est licentia haeredi legatarii optare servum, licet vivus legatarius hoc non fecerit. Et, diligentiore tractatu habito, hoc in nostra constitutione additum est, five plures legatarii extiterint, quibus optio relict: est, et dissident in corpore eligendo; five unius legatarii plures haereses sint, et inter se circa optandum dissident, alio aliud corpus eligere cupiente, ne pereat legatum, (quod plerique prudentium contra benevolentiam introducebant,) fortunam esse hujus optionis judicem, et forte hoc esse dirimentum, ut, ad quem fors pervenerit, illius sententia in optione praecellat.

§ 23. The legacy of an option is made, when a testator commands his legatary to choose any slave whom he likes, from among his slaves, or any one thing, which be best approves of; from any certain class of things; and such a legacy was formerly presumed to imply this condition, that, if the legatee in his life-time did not make his election, the legacy could not be transmitted to his heir. But, by virtue of our constitution, this presumed condition is now taken away, and the heir of the legatary is permitted to make his option, aliis the legatary in his life-time hath neglected to do it. And, upon a more diligent inspection, we have further added to our constitution, that, if there are several legataries, to whom an option is left, and they differ in their choice, or if there are many heirs of one legatary, who are of divers sentiments, then Fortune must be
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the judge: for, left the lot of the legacy should infrue, (which loss the generality of the antient lawyers, contrary to all benevolence, would have permitted,) we have decreed, that such dispositions between heirs, or legataries, should be decided by lot; so that the opinion of him, to whom the lot falls, shall be prefered.

Sed ex constitutione.] vid. Cod. 6. t. 43. l. ult.

Quibus legari potest.

§ XXIV. Legari autem illis solum potest, cum quibus testamenti factio est.

§ 24. A legacy can not be left but to those, who have the capacity of taking by testament.

Jus antiquum de incertis personis.

§ XXV. Incertis vero personis neque legata neque fidei-commissia olim relinqui concessum erat; nam ne miles quidem incertae personae poterat relinquere, ut Divus Hadrianus escripsit. Incerta autem persona videbatur, quam incerta opinione animo suo testator subjiciabat, veluti, si quis ita dicat, quicunque filio meo filiam suam in matrimonium dederit, ei haeres eius illum fundum dato. Illud quoque, quod iis relinquebatur, qui possisset testamentum scriptum primi consules designati essent, aequo incertae personae legari videbatur: et denique multae aliae hujusmodi species sunt. Libertas quoque incertae personae non videbatur possedi; quia placebat, nominatum servos liberari. 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 haeres eius illum rem dato. Incertis autem personis legata vel fidei-commissia relieta, et per errorem soluta, repeti non posside, facris constitutionibus cautos erat.

§ 25. It was not formerly permitted, that either legacies, or gifts in trust, should be bequeathed to incertain persons; for even a soldier was prohibited to bequeath to incertain persons; as the emperor Adrian bath declared by his rescript: and an incertain person is reputed to be one, whom the testator hath figured only in his imagination, without any determinate knowledge of him: as if a testator should thus express himself: — whoever shall give his daughter in marriage to my son, to that person let my heir deliver up such a piece of ground. And, if a testator had made a bequest to the first consul designd after his testament was written, this also would have been esteemed a bequest to incertain persons; and of the same kind there are diverse other examples. Freedom likewise could not be conferred upon an incertain person; for it was necessary, that all slaves should be nominally infranchised: but a legacy might have been given to an incertain person under a certain demonstration; or, in other words, to an incertain person, if he was one of a number of persons certain; as for instance, if a testator should bequeath in the manner following — I command TITIUS my heir to give such a particular thing to any one of my present collateral relations, who shall think proper to take my daughter in marriage. But,
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But, if a legacy or fiduciary gift had been paid to incertain persons by mistake, it was provided by the constitutions, that such persons were not compellable to refund.

Sacris constitutionibus.] Thesef constitutions are not extant.

Jus antiquum de posthuno alieno.

§ XXVI. Posthuno quoque alieno inutiliter antea legabatur. Est autem alienus posthuminus, qui natus inter fuos hæredes testatoris futurus non est: ideoque, ex emancipato filio conceptus nepos, extraneus erat posthuminus avo.

§ 26. Formerly a legacy could not have been profitably or legally given to a posthumous stranger; and a posthumous stranger is he, who, if he had been born before the death of the testator, could not have been numbered among his proper heirs: and of consequence a posthumous grandson, by an emancipated son, was a posthumous stranger in regard to his grandfather.

Jus novum de personis incertis et posthuno alieno.

§ XXVII. Sed nec hujusmodi species penitus est fine justa emendatione relicta, cum in nostro codice constitutione posita sit, per quam et huic parti medemur, non solum in hæreditatibus, sed etiam in legatis et fidei-commisissis: quod evidenter ex ipsius constitutionis lectione clarescit. Tutor autem nec per nostram constitutionem incertus dari debet: quia certo judicio debet quis pro tutela sue pofteritati cavere.

§ 27. Such was the state of the antient law, which hath not been left without a proper emendation; for we have promulgated a constitution, by which we have altered the law concerning uncertain persons, not only in respect to inheritances, but in regard also to legacies and fiduciary bequests. But this alteration will evidently appear from a perusal of the constitution itself; which nevertheless gives no authority to the nomination of an uncertain tutor; for it is incumbent upon every parent to take care of his posterity in this respect, by a certain and determinate appointment.

Constitution posita.] Not extant.

De posthuno alieno hærede instituto.

§ XXVIII. Posthuminus autem alienus hæres instituit et ante poterat, et nunc potest; nisi in utero ejus sit, quæ jure nostro uxor effe non potest.

§ 28. A posthumous stranger could formerly have been instituted and may now be appointed an heir, unless it appears, that he was conceived by a woman, who could not have been legally married to his father.

Posthumus autem alienus.] Tho' the antient civil law would not suffer a posthumous stranger to be an heir, or a legatee, yet the Prætorian law allowed a posthumous stranger to be an heir in effect, by giving him the possession (scandum tabularis, i.e. according to the tenor of the testamen: and this is what is meant by saying, that a posthumous stranger could antiently have been instituted; but a posthumous stranger never had that power or capacity under the civil law, till it was given by Justinian's constitution.
De errore in nomine legatarii.

§ XXIX. Si quidem in nomine, cognomine, praenomine, agnomine, legatarii testator erraverit, cum de persona constat, nihilominus valet legatum; idemque in hereditibus servatur; et recte: nominum enim significandorum hominum gratia reperta sunt; qui si alio quolibet modo intelligantur, nihil interesse.

§ 29. Alia in nomine, cognomine, praenomine, or agnomine of a legateary, yet, if his person is certain, the legacy is good. The same rule of law is also observed in regard to heirs, and with great reason: for the use of names is but to point out persons; and, if person can be denoted by any other method, it will make no difference.

Si quidem in nomine. Charisius the grammarian gives the following brief but clear account of the Roman names. "Propria nomina in quarto taur species divinduntur, praenomen, nomen, cognomen, agnomine, ut Publius Cornelius Scipio Africanus; praenomen est, quod nominari praeponitur, ut Publius; nomen, quod familia originem declarat, ut Cornelius; cognomen, quod nominum subjungitur, ut Scipio; agnomine, quod extrinsecus adjici solet, ut Africanus." - vide Pline.

De falsa demonstratione.

§ XXX. Huic proxima est illa juris regula, falsa demonstratione legatum non perimi: veluti, si quis ita legaverit, Sticbum servum meum vernam de, lego. Licet enim non verna, sed emptus sit, si tamen de servo confitat, utile est legatum. Et convenienter, si ita demonstraverit, Sticbum servum, quem a Seio emi, sitque ab alio emptus, utile est legatum, si de servo confitat.

§ 30. The rule of law, which comes nearest to the foregoing, is, that a legacy is not rendered null by a false demonstration: suppose, for instance, that a bequest is thus worded: ——— I give and bequeath Stichus my slave, who was born in my family: ——— in this case, alia Stichus was not born in the family of the testator, but bought, yet, if there is a certainty of his person, the legacy is valid. And if a testator should write as follows ——— I bequeath Stichus my slave, whom I bought of Seius — yet, alia be he was bought of another, the legacy would be good, if there was no doubt as to the identity of the person of Stichus.

De falsa causa adiecta.

§ XXXI. Longe magis legato falsa causa adiecta non nocet: veluti cum quis ita dixerit: Titio, quia me absente negotia mea curaverit, Stichum de, lego: vel ita, Titio, quia patrocinio ejus capitali crimine liberatus sum, Sticbum de, lego. Licet enim neque negotia testatoris unquam gesserit Titius, neque patrocinio ejus liberatus sit, legatum tamen valet. Sed, si conditionaliter enunciata fuerit causa, aliud juris est; veluti hoc modo, Titio, si negotia mea curaverit, fundum meum de, lego.
§ 32. A fortiori a legacy is not rendered the less valid, altibo' a false reason is assigned for bequeathing it: as if a testator should thus express himself:—I give my slave STICHUS to TITIUS, because he took care of my affairs in my absence: or, because I was acquitted upon an accusation of a capital offense by his care and protection. For, altibo' TITIUS had never taken care of the affairs of the deceased, and altibo' the testator was never acquitted from any charge of a capital crime by means of TITIUS, the legacy will notwithstanding be good. But if the bequest had been declared to be conditional, as for example, if the testator had expressed himself as follows— I give to TITIUS such a piece of ground, if it shall appear, that he hath taken a proper care of my affairs, then the law would be different.

De servo hæredis.

§ XXXII. An servo hæredis recte legemus, quæritur: et constat, pure inutiliter legari, nec quicquam proficere, si vivo testatore de potestate hæredis exierit: quia, quod inutile foret legatum, si statim post factum testamentum decessisset testator, hoc non debet ideo valere, quia diutius testator vixerit. Sub conditione vero recte legatur servo, ut requiramus, an, quo tempore dies legatii cedit, in potestate hæredis non fit.

§ 32. It hath been a question, whether a testator can legally give a legacy to the slave of his heir; and it is certain, that a legacy, purely and simply given to such a slave, can avail him nothing; altibo' be should afterwards be freed from the power of the heir in the lifetime of the testator; for a bequest, which would have been null, if the testator had expired immediately after he had made it, ought not to become valid, merely because the testator happened to enjoy a longer life. But a testator may give a conditional legacy to the slave of his instituted heir, and such legacy will be good, if the slave is not under the power of the heir, when the condition is fulfilled.

Quæritur.] If a testator gives a legacy to the slave of his heir without annexing any condition, such a legacy is void; for a bequest, made to the slave, is in effect made to the heir; and it would be highly absurd in a testator to commend his heir to pay a legacy to himself. And altibo' the slave of the heir should afterwards cease to be under the power of his master in the lifetime of the testator, either by passing to another master, or by obtaining his freedom, yet this would give no force to the legacy; for it is laid down as a rule by Cato; quod, si testamento factum, itinerem esse tempore decessisset testator, inutile foret iuris legatum, quandocumque decessisset, non valeret. § 34. r. 7. But, when legacies are conditional, this rule is not observed; for in such bequests nothing is regarded but the event of the condition.

De domino hæredis.

§ XXXIII. Ex diverso hæredie instituto servo, quin domino recte etiam sine conditione legetur, non dubitat: nam, et si statim post factum testamentum decessisset testator, non tamen apud eum, qui hæres fit, dies legati cedere intelligitur; cum hæreditas a legato separata sit, et possit per eum servum alius hæres effici, si prius, quam iustiss domini adeat, in aliiuis potestate translatus sit; vel manumissus ipse hæres efficitur: quibus casibus utile est legatum. Quod si in eadem causa permaneant, et iustiss legatarii adierint, evanescit legatum.

§ 33.
§ 33. On the contrary it is not doubted, but that a slave may be appointed an heir, and that his master may take even a simple legacy by the same testament: for, albeit the testator should die instantly after making his testament, yet the legacy is not understood to become immediately due from the slave, who is the heir; for the inheritance is here separate from the legacy, and another may become heir by means of the slave, if he should be transferred to a new master, before he had entered upon the inheritance, at the command of his master, who is the legateary; or the slave himself may become heir in his own right by manumission; 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 his master, who is the legateary, the legacy would, as such, become extinct.

De modo et ratione legandi. De ordine scripturae.

§ XXXIV. Ante hæredis institutionem inutiliter antea legabatur; scilicet, quia testamenta vim ex institutione hæredis accipiunt, et ob id veluti caput atque fundamentum intelligitur totius testamenti hæredis institutio. Pari ratione nec libertas ante hæredis institutionem dari poterat. Sed, quia incivile esse putavimus, scripturae ordinem quidem fequei, (quod et ipsi antiquitati vituperandum fuerat vifum,) sperni autem testatoris voluntatem, per nostram constitutionem et hoc vitium emendavimus, ut liceat et ante hæredis institutionem et inter medias hæredum institutiones legatum relinquere, et multo magis libertatem, cujus usus favorabilior eff.

§ 34. A legacy could not formerly have been given with effect, till the heir was instituted; because a testament receives it's subtile force and efficacy from the institution of the heir, which is understood to be the basis and foundation of it: and by a parity of reasoning it was also necessary, that the institution of an heir should always precede the grant of freedom in a testament. But we have thought it to be wrong and absurd, that a prior regard should be paid to the mere order of writing, in direct opposition to the express intention of a testator: and the antients themselves seem to have been of this opinion in general: we have therefore, by virtue of our constitution, amended the law in this point; so that a legacy may now be given; and, a fortiori, a grant of liberty, which is always favored, may be bequeathed, before the institution of an heir, wherever there is but one; and, either before or between the institutions of heirs, where there are several.

De legato post mortem hæredis, vel legatarii.

§ XXXV. Post mortem quoque hæredis aut legatarii simili modo inutiliter legabatur: veluti, si quis ita dicat, cum hæres meus mortuis fuerit, do, lego: item pridie quam hæres aut legatarius morietur. Sed simili modo et hoc correximus, firmitatem hujusmodi legatis ad fidei-commissores similitudinem præstantes; ne in hoc causi deterior causa legatorum, quam fidei-commissores, inveniatur.

§ 35. A bequest, made to take place after the death of an heir or legatarly, was also ineffectual: for, if a testator had written, when my heir is dead, I give and bequeath
bequeath an hundred aurei to Titius,—or even thus, I give and bequeath an hundred aurei to be paid to Titius, on the day preceding the day of the death of my heir,—or, on the day preceding the day of the death of my legateary,—the legacies in any of these cases would have been void. But we have corrected the antient rule of law in this respect, by giving all such legacies the same validity, which is given to gifts in trust; lest trusts should be found to be more favored, than legacies.

Correximus.] vid. Cod. 8. t. 38. l. 11.

§ XXXVI. Penæ quoque nomine inutiliter antea legabatur, et admebatur, vel transferatur. Penæ autem nomine legari videtur, quod coercedi hæredis causa relinquitur, quo magis alicubi faciat, aut non faciat: veluti si quis ita scripsit, hæres meus si filiam suam in matrimonium Titio collocaverit; vel ex diverso, si non collocaverit, dato decem aureos Seio; aut si ita scripsit, hæres meus si servum Stichum alienaverit: vel ex diverso, si non alienaverit, Titio decem aureos dato. Et in tantum haec regula observabatur, ut quam plurimis principalibus constitutionibus significaretur, nec principem agnolcere, quod ei penæ nomine legatum fit: nec ex militis quidem testamento talia legata valebant: quamvis aliae militum voluntates in ordinandis testamentis valide observabantur: quinetiam nec libertates penæ nomine dari possie placebat: eo amplius, nec hæredem penæ nomine adjici possie, Sabinus existimabat: veluti si quis ita dicat, Titius hæres esto; si Titius filiam suam in matrimonium Seio collocaverit, Seius quoque hæres esto. Nihil enim intererat, qua ratione Titius coecercetur, utrum legati datione, an cohaeridis adjectione. Sed hujusmodi scrupulofitas nobis non placuit; et generaliter ea, quæ relinquuntur, licet penæ nomine fuerint relicta vel adempta, vel in alium translata, nihil differe a ceteris legatis conhuitimus, vel in dando, vel in adimendo, vel in transferendo: exceptis videlicet iis, quæ impossibilia sunt, vel legibus interdicta, aut alias probosa. Hujusmodi enim testamentorum dispositions valere fecit meorum temporum non patitur.

§ 36. Also formerly, if a testator had given, revoked, or transferred a legacy penæ nomine, he would have acted ineffectually: and a legacy is reputed to be bequeathed penæ nomine, [i.e. as a punishment or penalty,] when an heir is put under the necessity of doing or not doing something: as for instance, if a testator had thus written;—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 Seius; or thus—if my heir shall alien my slave Stichus; or, on the contrary, if my heir shall not alien my slave Stichus, let him pay ten aurei to Titius. And this rule was so far observed, that it was expressly ordained by many constitutions, that even the emperor could not receive a legacy, which was bequeathed penæ nomine; nor could a penal legacy be valid, even when it had been bequeathed by the testament of a soldier; altbo', in every other respect, the intention of a testator in a military testament was always scrupulously adhered to. And even freedom could not be
be bequeathed, nor, in the opinion of SABINUS, could an heir be added in a testament, sub poenae nomine: for, if a testator had said, let Titius be my heir, but if he gives his daughter in marriage to Seius, let Seius also be my heir, the appointment of Seius would have been void; for the manner, in which an heir was laid under coercion, whether it was by the gift of a legacy, or by the addition of another heir, worked no alteration in the general rule of law. But this scrupulosity hath been by no means agreeable to us, and we have therefore ordained, that in general the doctrine of the law in regard to any thing left, revoked, or transferred, in punishment of an heir, should not differ from the rules of law observed in relation to other legacies, when the performance of the condition of obtaining them is neither impossible, prohibited by law, nor contrary to good manners: for the morality, religion, and justice of the present times, will not suffer such testamentary dispositions to take place.

Consituitimus.] vid. Cod. 6. t. 41.

TITULUS VIGESIMUS-PRIMUS.

De ademptione legatorum et translatione.


De ademptione.

A DEEMPTIO legatorum, five eodem testamento adimantur, five codicillus, firma est. Sed et, five contrariis verbis fiat ademption, veluti si quod ita quis legaverit, do, lege, ita adimatur, non do, non lege: five non contrariis, sed aliis quibuscumque verbis.

A revocation of a legacy is valid, altho' it is inserted in the same testament or codicil, in which the legacy was given. And it is immaterial, whether the revocation is made in words contrary to the bequest; as when a testator gives a legacy in these terms, I give and bequeath to Titius, and revokes it by adding, I do not give and bequeath to Titius: or whether the revocation is made by any other form of words.

De translatione.

§ I. Transferri quoque legatum ab alio ad alium potest; veluti si quis ita dixerit, bonum Stichum, quem Titio legavi, Seio do, lege: five in eodem testamento, five codicillis, id fecerit; quo casu simul et Titio adimit videtur, et Seio dari.

§ I. A legacy may also be transferred from one person to another; as thus—I give to Seius my slave Stichus, whom I have bequeathed to Titius. This may be done in the same testament or codicil, in which the legacy was first given; and thus a legacy may be taken tacitly and by implication from Titius and transferred to Seius.

TITULUS
TITULUS VIGESIMUS-SECUNDUS.

De lege Falcidia.


Ratio et summa hujus legis.

Superest, ut de lege Falcidia dispiciamus, qua modus novissime legatis impositus est. Cum enim olim lege duodecim tabularum libera erat legandi potestas, ut liceret vel totum patrimonium legatis erogare; quippe, cum ea lege ita cautum esset, uti quisque legavit sua rei, ita jus esset, vidum esset hanc legandi licentiam coarctare; idque ipseorum testatorum gratia provisum esset, ob id, quodplerumque intefatii moriebantur, recufantibus scriptis hæredibus pro nullo aut minimo lucro hæreditates adire. Et, cum super hoc tam lex Furia quam lex Voconia late sunt, quorum neutra sufficiens ad rei confummationem videbatur, novissime lata est lex Falcidia, qua cavetur, ne plus legare liceat, quam dodrantem totorum bonorum; id est, ut, five unus hæres institutus sit, five plures, apud eum colse pars quarta remaneat.

It remains to speak of the law Falcidia, by which legacies have received their latest regulation. By the law of the 12 tables, — uti quisque legavit sua rei, ita jus esset, — a testator was permitted to dispose of his whole patrimony in legacies: but it was thought proper to restrain this licence even for the benefit of testators themselves, because they frequently died intestate, their heirs refusing to enter upon an inheritance, from which they could receive no profit, or but very little. And this occasioned the introduction first of the law Furia, and afterwards of the law Voconia: but, when neither of these was found adequate to the purpose intended, the Faldician law was at length enacted, which prohibits a testator to give more in legacies, than three fourths of all his effects; so that, whether there is one or more heirs, there must now remain to him, or them, an entire fourth part of the whole.

Ut de lege Falcidia.] This law was a plebi-fulum, made by P.t. Falcidius, tribune of the people, in the reign of Augustus, anno U. C. 745.

Tam lex Furia, quam lex Voconia.] The law Furia prohibited any testator to give more in legacies than one thousand affer; but notwithstanding this law a testator, who was worth only one thousand affer, might have bequeathed his whole estate, and left nothing for his heir.

The law Voconia [made by Voconius, tribune of the people anno U. C. 524.] abrogated the law Furia, and ordained, that no one legatory should be intided to more by virtue of his legacy, than would afterwards remain to the heir out of the effects of the testator; but this law alfo was in time found rather to multiply legataries, than benefit heirs, and was therefore abrogated by the law Faldicia.
De pluribus hæredibus.

§ I. Et, cum quæsitum esset, duobus hæredibus institutis (veluti Titio et Seio) si Titii pars aut tota exhausfa sit legatis, quæ nominatim ab eo data sunt, aut supra modum onerata, a Seio vero aut nulla relicta sint legata, aut quæ partem ejus duxent ax in partem diminuant, an, quia is quartam partem totius hæreditatis, aut amplius habet, Titio nihil ex legatis, quæ ab eo relicta sunt, retinere liceat, ut quartam partem suæ partis salutam habet? placuit posse retinere. Etenim in singulis hæredibus ratio legis Falcidiae ponenda est.

§ 1. When two heirs are instituted, for example, Titius and Seius, and Titius's moiety of the inheritance is wholly exhausted, or overcharged by legacies, which be is expressly ordered to pay; and on the other side Seius's moiety is either not incumbered, or is charged with legacies, which amount only to a part of his bare; it hath in this case been a question, whether, alto Seius hath a fourth or more of the whole inheritance, it may not nevertheless be lawful for Titius to make a stoppage out of the legacies, with which be is charged, so as to retain a fourth part out of his own moiety? and it hath been determined, that Titius may make such stoppage; for the reason and equity of the law Falcidia extends to each heir in particular.

Quo tempore spectatur quantitas patrimonii, ad quam ratio legis Falcidiae redigitur.

§ II. Quantitas autem patrimonii, ad quam ratio legis Falcidiae redigitur, mortis tempore spectatur. Itaque, (verbi gratia) si is, qui centum aureorum patrimonium in bonis habeat, centum aureos legaverit, nihil legatariis prodefit, si ante aditam hæreditatem per servos hæreditarios, aut ex partu ancillarum hæreditariarum, aut ex foetu pecorum, tantum accesserit hæreditati, ut, centum aureis legatorum nomine erogatis, hæres quartam partem hæreditatis habiturus sit: sed necesse est, ut nihilominus quarta pars legatis detrahatur. Ex ulterius, si septuaginta quinque legaverit, et ante aditam hæreditatem in tantum decreverint bona, (incendiis forte, aut naufragis, aut morte servorum) ut non amplius quam septuaginta quinque aureorum substantia vel etiam minus reliquatur, solida legata debentur. Nec ea res damnoa est hæredi, cui liberum est non adire hæreditatem: quæ res efficit, ut sit necessa legatariis, ne defititum testamento nihil consequantur, cum hærede in portione pacifici.

§ 2. But the law Falcidia hath regard only to the quantity of the estate at the time of the death of the testator; and therefore, if be, who is worth but an hundred aurei at his decease, bequeath them all in legacies, the legatees must suffer a defalcation; for they will receive no manner of advantage, alto the inheritance, after the death of the testator and before it is entered upon, should it increase by the acquisitions of slaves, the children of female slaves, or the product of cattle, that, after a full payment of the 100 aurei in legacies, an intire fourth of the whole estate might remain.
remain to the heir; for, notwithstanding the increase of the testator's estate, subsequent to his death, a fourth part of the hundred aurei would still be due to the heir, and the legacies would remain subject to a defalcation upon that account. But, on the contrary, if a testator hath bequeathed 75 aurei in legacies, and was worth an hundred aurei at his death, then alibis it should happen, that, before the entrance of the heir, the estate should so decrease by fire, shipwreck, or the loss of slaves, that the whole value of it should not be more than 75 aurei, and perhaps less, yet the legacies would still be due without defalcation: nor is this law prejudicial to an heir, who is always at his election either to refuse or accept an inheritance; but it obliges legataries to come to an agreement with the heir to take a part, lest they should lose the whole of their legacies by his defection of the testament.

Quae detrahuntur ante Falcidiam.

§ III. Cum autem ratio legis Falcidiae ponitur, ante deducitur as alienum, item funeris impena, et pretia servorum manumissorum: tunc demum in reliquo ita ratio habetur, ut ex eo quarta pars apud haeredem remaneat, tres vero partes inter legatarios distribuantur, pro rata scilicet portione ejus; quod cuique eorum legatum fuerit. Itaque, si fingamus, quadringentos aureos legatos esse, & patrimonii quantitatem, ex qua legata erogari oportet, quadringentorum esse, quarta pars singulis legatariis debebit detrahi. Quod si trecentos quinquaginta legatos fingamus, octava debebit detrahi. Quod si quingentos legaverit, initio quinta, deinde quarta, detrahi debebit. Ante enim detrahendum est, quod extra bonorum quantitatem est, deinde quod ex bonis apud haeredem remanere oportet.

§ 3. The Falcidian portion is not taken by the heir, till the debts, funeral expenses, and the price of the manumission of slaves, have all been previously deducted; and then the fourth part of the remainder appertains to the heir, and the other three parts are divided among the legataries in a ratabile proportion: for example, let it be supposed, that 400 aurei have been bequeathed in legacies, and that the estate, from which these legacies are intended to issue, is worth but exactly that sum; it follows, that a fourth must be subtracted from the legacy of each legatary; but, if the testator gave in legacies no more than 350 aurei, and there remained after debts paid 400, then an eighth only ought to be deducted from each legacy. And, if a testator hath bequeathed 500 aurei in legacies, and there remain clear in the hands of the heir but 400, then a fifth must first be deducted from every legacy, and afterwards a fourth: but that, which exceeds the real value of the goods of the deceased, must first be subtracted, and then follows the deduction of what is due to the heir.
Lib. II.    Tit. XXIII.

Titulus Vigesimus-tertius.

De fidei-commissariis hæreditatibus.


Continuatio.

Unc transeamus ad fidei-commissa. Sed prius est, ut de hæreditatibus fidei-commissariis videamus.

Let us now proceed to trusts; in treating of which, we will first speak of fiduciary inheritances.

Origo fidei-commissorum.

§ I. Sciemund itaque est, omnia fidei-commissa primis temporibus infirma fuiffe; quia nemo invitus cogebatur praetare id, de quo rogatus erat. Quibus enim non poterant hæreditatem vel legata relinquere, si relinquebant, fidei commitembant eorum, qui capere ex testamento poterant. Et ideo fidei-commissa appellata sunt, quia nullo vinculo juris, sed tantum pudore eorum, qui rogabantur, continebantur. Postea Divus Augustus primus, semel iterumque gratia personarum motus, vel quia per iusius salutem rogatus quis diceretur, aut ob insignem quorundam per-tdiam, justit consulibus auoritatem suam interponere: quod, quia juftum videbatur et populare erat, paulatim conversum est in assistam jurisdic- tionem; tantulque eorum favor factus est, ut paulatim etiam pretor proprius crearetur, qui de fidei-commissis jus diceret, quem fidei-commissa-raym appellabant.

§ 1. It must be observed, that in the first times all trusts were weak and precarious; for no man could be compelled to the performance of what he was only required to perform. And yet, when testators were disirous of giving an inheritance or legacy to persons, to whom they could direcly bequeath neither, they then committed the inheritance or legacy in trust to those, who were capable of taking; and such commitments were called fiduciary, because the performance of the trust could not be enforced by the law, but depended solely upon the honor of the trustee. But the emperor Augustus, having been frequently moved with compassion on account of particular persons, and detesting the perjury and perfidiousness of trustees in general, commanded the consuls to interpose their authority; and this, being a just and popular command, gave them by degrees a continued jurisdiction; and in process of time trusts became so common, and were so highly favored, that a pretor was purposely appointed to give judgment in these cases, and was therefore called the commissary of trusts.
De fidei-commisso hæredis scripti.

§ II. In primis igitur scendum est, opus esse, ut aliquis recto jure testamento hæres insituatur, ejusque fidei committatur, ut eam hæreditatem alii restituat: aliqui inutilis esse testamentum, in quo nemo hæres insituitur. Cum igitur aliquis scripserit, Lucius Titius hæres est, potest adjicere, rogo te, Luci Titi, ut, cum primum poteris hæreditatem meam adire, eam Caio Seio reddas, restitutas. Potest autem quisque et de parte restituen-nda hæredem rogare; et liberum est vel pure, vel sub conditione, relinquere fidei-commisium, vel ex certo die.

§ 2. We must here observe, that there is an absolute necessity of appointing an heir in direct terms to every testament; but he then may be requested to restore the inheritance to any other person; yet without an heir a testament is ineffectual. And therefore, when a testator says — let Lucius Titius be my heir — he may add — and I request you, Lucius Titius, that, as soon as you enter upon my inheritance, you will restore it to Caio Seius. But a testator is at liberty to request his heir to restore a part of the inheritance only, and may make him a trustee upon condition, or from a certain certain.

Hæres insituat.*) The substantial and essential part of every testament is the appointment of an executor; for in England, if a man bequeathes ever so many legacies and appoints no executor, such a disposition may be called a codicil or a will, but not a testament; and therefore he, who made such a disposition, shall be deemed to have died without a testament, and the administration of his goods, with the will annexed, shall be committed to his widow or next of kin, as in the case of an intestate. Swart. part 4. sect. 2.

Effectus restitutionis hæreditatis.

§ III. Restituta autem hæreditate, is quidem, qui restituit, nihilominus hæres permanet; is vero, qui recipit hæreditatem, aliquando hæredis, aliquando legatarii, loco habetur.

§ 3. After an heir hath restored an inheritance in obedience to the trust reposed in him, he nevertheless continues heir. But he, who hath received the inheritance from such fiduciary heir, is sometimes reputed to be in the place of the heir, and sometimes in the place of a legatory.

De senatus-consulto Trebelliano.

§ IV. Et Neronis quidem temporibus, Trebellio Maximo et Annaeus Seneca coff. senatus-consultum factum est, quo cautum est, ut, si hæreditas ex fidei-commisso causâ restituta sit, omnes actiones, quæ jure civili hæredi et in hæredem competent, ei et in eum darentur, cui ex fidei-commisso restituta esset hæreditas. Post quod senatus-consultum, prætor utiles actiones ei et in eum, qui recepti hæreditatem, quasi hæredi et in hæredem, dare copit.

§ 4. In the reign of Nero the emperor, when Trebélius Maximus and Annaeus Seneca were consuls, it was provided by a decree of the senate, that, if an inheritance was restored by reason of a trust, all actions, which by the civil law might be brought by or against the heir, should be given to and against him, to whom
the inheritance was restored.—And, after this decree, the praetor began to give equitable and beneficial actions so and against the receiver of an inheritance, as if he was the heir.

Utilis actiones.] See the 4th book of the institutions, title 6, law 16.

De senatus-consulto Pegasianno.

§ V. Sed, quia heredes scripti, cum aut totam hereditatem, aut pene totam, plerumque restituere rogabantur, adire hereditatem ob nulsum vel minimum lucrum recusabant, atque ob id extinguebantur fidei-commissi, postea Vespasiani Augusti temporibus, Pegaso et Pugionis consulibus, senatus cenfuit, ut e, qui rogatus esset hereditatem restituere, perinde liceret quartam partem retinere, atque ex lege Falcidiae ex legatis retinere conceditur. Ex singulis quoque rebus, quae per fidei-commissium reliquuntur, eadem retentio permissa est. Post quod senatus-consultum, ipse hæres onera hereditaria suturebat: ille autem, qui ex fidei-commissivo recipiebat partem hereditatis, legatarii partiarii loco erat; id eft, ejus legatarii, cui pars bonorum legabatur: quæ species legati partitio vocabatur, quia cum hærede legatarius partiebatur hereditatem. Unde, quæ solent fipulationes inter hæredem et partiarium legatarium interponi, eadem interponebantur inter eum, qui ex fidei-commissivo recepit hereditatem et hæredem; id eft, ut lucrum et damnun hereditarium pro rata parte inter eos commune effet.

§ 5. But, when written heirs were requested to restore the whole, or almost the whole, of an inheritance, they often refused to accept it, since they could receive but little or no emolument; and thus it happened, that trusts were frequently extinguished. But afterwards in the consulate of Pegasi and Pugio, in the reign of the emperor Vespasiun, the senate ordained by that decree, that an heir, who was requested to restore an inheritance, might retain a fourth, as in the case of legacy by the Faldician law. And an heir is also allowed to make the same deduction from particular things, which are left to him in trust for the benefit of another. For, some time after this decree, the heir alone bore the burden of the inheritance, [i.e. all the charges and demands incident to it;] but afterwards, whoever had received a share or part of an inheritance, by being benefited under a trust, was regarded as having a partial legacy, and this species of legacy was called partition, because the legatory took a part of the inheritance together with the heir, and thence it arose, that the same stipulations, which were formerly used between the heir and legatory in part, were also interposed between the person benefited under the trust and the heir or trustee, to the intent, that the profit and loss might be in common between them in due proportion.

Post quod senatus-consultum ipse hæres [The best way to explain this section will be to transcribe a passage from the paraphrase of Theophrastus, as it is translated by Gul. Otto Reisse; to whom the literary work is much obliged, for his late most complete edition of Theophrastus in Greek and Latin, to which is added a great variety of notes by the editor and others. This edition conflits of two volumes in 4to, and was published at the Hoges in the year 1751. “Post hoc autem hæres solus subjacebat one-ribus hereditatis, non vero fidei-commissariis: fed denique placuit, fidei-commissarium vici-cem obtiner legatarii partiarii, id eft, partem dimidiam accipientia. Quoniam enim quintum genus legati erat, dicebaturque partitio, et relinquatur hoc modo: Titus modo hæres hīo, et cum Seo hereditatem devidit in dimidia partim. Porro igitur hujusmodi inter eos stipulationes sexebant. Hæres legaturium fecur.
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§ VI. Ergo, si quidem non plus quam adiunctum hæreditatis scriptus
haeres rogatus sit restituere, tum ex Trebelliano senatus-consulto restitu-ebatur hæreditas; et in utrumque actiones hæreditariae pro parte rata dabantur: in hæredem quidem jure civili; in eum vero, qui recipiebat hæreditatem ex senatus-consulto Trebelliano, tanquam in hæredem. At, si plus quam adiunctum, vel etiam totam hæreditatem, restituere rogatus esset, locus erat Pegasiano senatus-consulto: et hæres, qui femel adierat hæreditatem, (si modo sua voluntate adierat,) sive retnuerat partem, sive retinere noluerat, ipse universa onera sustinebat. Sed, quarta quidem retenta, quasi partis et pro parte stipulationes interpon-ebantur, tanquam inter partium legatarum et hæredem: si vero totam hæreditatem restituueret, empta et vendita hæreditatis stipulationes inter-ponebantur. Sed, si recusabat scriptus hæres adire hæreditatem, ob id, quod dicet, eam sibi sustinam esse, quasi damnores, cavebatur Pegasiano senatus-consulto, ut, defiderante eo, cui restituere rogatus esset, jussu praetoris adiere, et restitueret hæreditatem; perindeque ei et in eum, qui recipieret hæreditatem, actiones darentur, ac juris est ex Trebelliano senatus-consulto; quo casu nullis stipulationibus est opus: quia simul et huic, qui restituit, securitas datur, et actiones hæreditariae ei et in eum transferuntur, qui recipit hæreditatem; utroque senatus-consullo in hac specie concurrente.

§ 6. And therefore, if a written heir, or heir in trust, had not been requested to surrender more than three fourths of the inheritance, be was obliged to restore so much of it, by virtue of the Trebellian senatus-consultum; and all actions, whether in favor of, or against, the inheritance, were brought, or sustained, by the heir and fidei-commiari, according to their respective hæres, and this obtains, in regard to the heir, by virtue of the civil law: and, in regard to the fidei-commiari, by virtue of the Trebellian decree. But, if the written heir was requested by the testator to restore the whole inheritance, or more than three fourths, then the Pegasian senatus-consultum took place; for, if he had once taken upon himself the heirship voluntarily, he was obliged to sustain all charges, and this, whether he did, or did not, retain the fourth, to which he was entitled. But, when an heir retained a fourth part, the stipulations, called partis et pro parte, were entered into, as between a legatary in part and an heir; and, when the heir did not retain a fourth, then the stipulations,

Quibus causibus locus est senatus-consulto Trebelliano vel Pegasiano.

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called emptæ et venditæ hæreditatis, were interposed. But, if the written heir, or heir in truth, refused to accept the inheritance on suspicion, that there would not be offsets, and that the acceptance would be detrimental to him, it was provided by the Pegasian decree, that the praetor, at the instance of the fidei-committarii, might compel such heir to take upon himself the inheritance, and then restore it; and that afterwards all actions should be brought by or against the fidei-committarii only; as it is ordained by the Trebellian decree. And in this case stipulations are not necessary; for the heir, who restores the inheritance, is made effectually secure, and all hereditary actions are transferred to and against him, by whom the inheritance is received; there being, in this instance, a concurrence of both decrees, the Pegasian and the Trebellian.

Pegasiani in Trebellianum transfusio.

§ VII. Sed, quia stipulationes ex senatus-consulto Pegasiano descendentes et ipfi antiquitati displicuerunt, et quibusdam casibus captoæas eas homo excellit ingenii Papianus appellat, et nobis in legibus magis simplicitas, quam difficulatas, placet, ideo omnibus nobis suggéstis tam familiaribus, quam differentiis utriusque senatus-consulti, placuit, explefo senatus-consulto Pegasiano, quod potest superservit, omnem auctoritatem Trebelliano senatus-consullo praeparet, ut ex eo fidei-committaria hæreditates, restituantur, five habeat hæres ex voluntate testatoris quartam, five plus, five minus, five nihil penitus: ut tunc, quando vel nihil, vel minus quarta, apud eum remanet, liceat ci vel quartam, vel quod ci deest, ex nostra auctoritate retinere, vel repetere solum, quafi ex Trebelliano senatus-consullo pro rata portione actionibus tam in hæredem, quam in fidei-committarium, competentibus. Si vero totam hæreditatem sponte restituerit, omnes hæreditariae actiones fidei-committarii, et adversus eum, competant. Sed etiam id, quod praecipuum Pegasiani senatus-consulti fuerat, ut, quando recusaret hæres scriptus fibi datum hæreditatem adire, necessitas ei imponeretur totam hæreditatem volenti fidei-committarii restituere, et omnes ad eum, et contra eum, transferre actiones; et hoc transposimus ad senatus-consulturn Trebellianum, ut ex hoc solo necessitas hæredi imponatur, fi, ipso nolente adire, fidei-committarii desideret restituui fibi hæreditatem, nullo nec damno nec commodo apud hæredem remanente.

§ 7. But, as the stipulations, which took their rise from the Pegasian decree, were displeasing even to the antients themselves, insomuch that Papinian, a man of a true sublime genius, does not scruple to call them captious in some cases, and, as simplicity is far more agreeable to us in all matters of law, than unnecessary difficulties, it hath therefore pleased us, upon comparing the agreement and disagreement of each decree, to abrogate the Pegasian, which was subsequent to the Trebellian, and to transfer a greater authority to the Trebellian decree, by which all fidei-committarii inheritances shall be restored for the future, whether the testator hath given by his will a fourth part of his estate to his written heir, or more or less than a fourth, or even nothing; so that, when either nothing is given to the heir, or less than a fourth part, he may be permitted to retain a fourth, or as much as will complete the deficiency, by
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Virtue of our authority, or even to demand a repayment of what he hath paid in his own wrong, all actions being divided between the heir and the fidei-commisarius in a just proportion according to the Trebellian decree. But, if the heir spontaneously restores the whole inheritance, all actions must be brought either by or against the fidei-commisarius. And, whereas it was the principal effect of the power of the Augustan decree, that, when a written heir had refused to accept an inheritance, he might be constrained to take it, and restore it, at the instance of the fidei-commisarius, to whom, and against whom, all actions passed, we have transferred that power to the Trebellian decree; so that this is now the only law, by which a fiduciary heir can be compelled to enter upon the inheritance, when the fidei-commisarius is desirous, that it should be restored; and the heir, in this case, can neither receive profit, nor suffer loss.

Quam in fidei-commisariis.] The term cestui que trust, used at present in our own law, seems in general to convey the meaning of the word fidei-commisarius; but yet not precisely: it was therefore thought most proper to anglicise it in the translation, as we have no single English word, adequate to the sense of it: for a fidei-commisarius, in the Roman law, denotes a person, who has a beneficial interest in an estate, which for a time is committed to the faith or trust of another.

De quibus hæredibus, et in quibus fidei-commissariis, supra dicta locum habeant.

§ VIII. Nihil autem intereft, utrum aliquis, ex alici hæres institutus, aut totam hæreditatem pro parte restituisca rogatur; an, ex parte hæres institutus, aut totam eam partem, aut partem partis, restituiue rogatur. Nam et hoc casu eadem obserueri praecipimus, quam in totius hæreditatis restitutione diximus.

§ 8. But it makes no difference, whether an heir, who is instituted to the whole of an inheritance, is requested by the testator to restore the whole or a part of it only—or whether an heir, who is nominated but to a part of an inheritance, is requested to restore that entire part, or only a portion of it; for we have ordained, that the same rule of law shall be observed, whether an heir is requested to restore the whole or a part only of an inheritance.

De eo, quod hæres voluntate testatoris deducit, praecipue.

§ IX. Si quis, una aliqua re dedeucta sive praecerta, qua quartacontinet, (veluti fundo vel alia re,) rogatus sit restituere hæreditatem, simillimo modo ex Trebelliano senatus-confulto restitutio sit, perinde ac si, quarta parte retenta, rogatus esset reliquam hæreditatem restituere. Sed illud intereat, quod altero causâ, id est, cum dedeucta sive praecerta aliqua re restitutur hæreditas, in solidum ex eo senatus-confulto actiones transferuntur, et res, quæ remanet apud hæredem, fine ullo onere hæreditario apud eum remanet, quasi ex legato ei acquisita; altero vero causâ, cum qua parte retenta rogatus est hæres restituere hæreditatem, et restituit, scinduntur actiones; et pro dodrant quidem transferuntur ad fidei-commissarium, pro quadrante remanent apud hæredem. Quinetiam, licet una aliqua re dedeucta aut praecerta restituere aliquis hæreditatem rogatus

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rogatus sit, in qua maxima pars hereditatis continentur, æque in solidum transferuntur actiones: et secum deliberare debet is, cui restituitur hereditas, an expediat sibi restituui. Eadem scilicet interveniunt, et si, duabus pluribusque rebus deductis praecipitave, restituere hereditatem rogatus sit. Sed et, si certa summa deducta praecipitave, quæ quartum vel etiam maximum partem hereditatis continet, rogatus sit aliquid hereditatem restituere, idem juris est. Quæ autem diximus de eo, qui ex asse institutus est, eadem transferimur et ad eum, qui ex parte hæres scriptus est.

§ 9. If an heir is requested by a testator to give up an inheritance, after deducting some specific thing, amounting to a fourth, as a piece of ground, &c. he may be compelled to give it up by the Trebellian decree, in the same manner, as if he had been requested to restore the remainder of an inheritance, after referring to himself a fourth. There is however this difference, that, in the one case, when an heir is requested to give up an inheritance, after deducting a particular thing, iben all actions, passive as well as active, are transferred by virtue of the decree to the fidei-commiitary, and what remains with the heir is free of all incumbrance, as if acquired by legacy; and, in the other case, when an heir is requested in general terms to give up an inheritance, after retaining a fourth to himself, all actions are proportionably divided; those, which regard the three fourths of the estate, being transferred to the fidei-commiitary; and those, which regard the single fourth, remaining for the benefit of the heir. And, even if an heir is requested to give up an inheritance, after making a deduction of some particular thing, which amounts to the value of the greatest part of it, all actions, both active and passive, are nevertheless transferred to the fidei-commiitary, who ought therefore always well to consider, whether it will be expedient or not, that the inheritance should be given up to him. And the law is the same, whether an heir is requested to give up an inheritance after a deduction of two, or more, specific things—or of a certain sum of money, which exceeds in value the greatest part of the inheritance. Thus what we have said of an heir, who is instituted to the whole of an inheritance, is equally true of him, who is instituted only to a part.

De fidei-commissis ab intestato relictis.

§ X. Praeterea intestatus quoque moriturus potest rogare eum, ad quem bona sua vel legitimo jure vel honorario pertinere intelligit, ut hereditatem suam totam, partemve ejus, aut rem aliquam, veluti fundum, hominem, pecuniam, aliiquis relictuat; cum alioqui legata nisi ex testamento non valeant.

§ 10. And farther, even a man, who is willing to die intestate, may request the person, who thinks will succeed him, either by the civil or praetorian law, to give up the whole inheritance, or a part of it, or any particular thing, as a piece of ground, a slave, a sum of money, &c. But this liberty is granted to intestates in regard to trusts only; for legacies are not valid, unless they are bequeathed by testament.

Cum alioqui legata.] It is strictly true, that legacies, as such, are not valid, unless bequeathed by testament; but by virtue of Justinian's ordinance, [Cod. 6. t. 43.] which puts legacies and gifts in trust upon an equality, whatever is bequeathed in a codicil, will be good, as a gift in trust, tho' not as a legacy.
De fidei-commissio relicto a fidei-commissario.

§ XI. Eum quoque, cui aliquid restituitur, potest rogare, ut id rursus aliu, aut totum, aut partem, vel etiam aliquid aliud, restituat.

§ XII. A fidei-commissary may also himself be requested to pay over, or give up, to another, either the whole, or a part, of what he receives; or even to give some other thing in lieu of it.

De probatione fidei-commissi.

§ XII. Et, quia prima fidei-commissorum cunabula a fide hæredum pendent, et tam nomen, quam substantiam, acceperunt, ideo D. Augustus ad necessitatem juris ea retrait. Nuper et nos, eundem principem superare contendentes, ex facto, quod Tribonianus, vir excellentissimus, questor facri palatii, suggeritus, constitutionem fecimus, per quam dispositions, si testator fidei hæresis sibi commissit, ut vel hæreditatem vel specialis fidei-commissum restituant; et neque ex scriptura, neque ex quinque testium numero, qui in fidei-commissis legitimus esse noscitur, posset res manifesteri, sed vel pauciores, vel nemo penitus testis interventerit; tunc, sive pater hæresis, sive alius quicunque sit, qui fide hæresis elegerit, et ab eo restitui aliquid voluerit, si hæres per fidia tentus adimplere fidem recusat, negando rem ita esse subsecutam, si fidei-commissarius ei jusjurandum detulerit, cum prius ipse de calumnia juraverit, necessè eum habere, vel jusjurandum subire, quod nihil tale a testatore audiverit, vel recusantem ad fidei-commissio vel universalis vel specialis solutionem coarctari; ne deperaret ultima voluntas testatoris fidei hæresis commissia. Eadem observari censuimus, et si legataro vel fidei-commissario aliquid simili relictum sit. Quod si est, a quo relicitum dicitur, [postquam negaverit,] conficentur quidem, aliquid a fe relicitum esse, sed ad legis subtilitatem recurrat, omnino solvere cogendus est.

§ XII. All fiduciary gifts or bequests depended formerly in a precarious manner upon the sole faith of the heir; from which they took as well their name as their essence; and the emperor Augustus was the first, who thought it proper to reduce them under a judicial cognizance. But we have since endeavoured to exceed that prince, and, at the instance of that most excellent man Tribonian, the questor of our palace, we have enabled by our constitution, that, if a testator hath trusted to the faith of his heir for the surrender of an inheritance, or any particular thing, and this trust can not be made manifest by the depositions of five witnesses, (which is known to be the legal number in such cases,) where having been not so many, or perhaps no witnesses present, the heir at the same time perfidiously refusing to make any payment, and denying the whole transaction, then in this case the fidei-commisary, having previously taken the oath of calumni, may put the heir, altho' he is even the son of the testator, to his oath, and thus force him either to deny the trust upon oath, or comply with it, whether the trust is universal or particular; and this is allowed.
Titulus Vigesimus-quartus.

De singulis rebus per fidei-commissium reliquit.

Summa.

Potest tamen quis etiam singulas res per fidei-commissium relinquere; veluti fundum, argentum, hominem, vestem, et pecuniam numeratam; et vel ipsum hæredem rogare, ut alii cui restituet vel legatarium, quamvis a legatario legari non poffit.

A man may also leave particular things in trust; as a field, silver, cloaths, or a certain sum of money; — and may request either his heir to restore them, or even a legatary; albo a legatary can not be made chargeable with a legacy.

Quamvis a legatario.] This was the ancient law; but by Justinian's constitution [Cod. 6. t. 43.] legacies, and gifts in trust, are allowed to come in aid of each other reciprocally; so that, to use the words of the ordinance, omnia, quam naturaliter insunt legatis, et fidei-commisius in hæresi intelligitur; et contra quicquid fide com-mittitur, hoc intelligatur esse legatum — from which it follows, that a legatary may now be charged with the payment of a legacy.

Quae relinquui possunt.

§ 1. Potest autem non solum proprias res testator per fidei-commissium relinquere, sed et hæreditis, aut legatarii, aut fidei-commissarii, aut cujuslibet alterius. Itaque et legatarius et fidei-commissarius non solum de eae rogari potest, ut cam alii cui restituat, quae ei relinquat sit; sed etiam de alia, sive ipsius, sive aliena sit. Hoc solum observandum est, ne plus quiaquam rogetur alii cui restituere, quam ipse ex testamento copert; nam, quod amplius est, inutiliter relinquitur. Cum autem aliena res per fidei- commissium relinquuitur, necesse est ei, qui rogatus est, aut ipsam rem redimere et praestare, aut æstimationem ejus solvere.

§ 1. A testator may leave not only his own property in trust, but also the property of his heir, of a legatary, of a fidei-commissary, or of any other: so that a legatary or fidei-commissary may not only be requested to give what hath been left to him, but what is his own, or even what is the property of another. And the only caution necessary to be observed by the testator is, that no man be requested to give more,
De libertate.

§ II. Libertas quoque servio per fidei-commissum dari potest, ut hæres eum rogetur manumittere, vel legatus, vel fidei-commissarius; nec interesse, utrum de suo proprio servo testator roget, an de eo, qui ipsius hæredis, aut legatus, vel etiam extranei fit: itaque et alienus servus redimi et manumittit debit. Quod si dominus eum non vendat, (si modo nihil ex judicio ejus, qui reliquit libertatem, perceperit,) non statim extinguitur fidei-commissaria libertas, sed differtur, quoad potit tempore procedente, ubicunque occasio servi redimendi fuerit, præstari libertas. Quia autem ex fidei-commissi causa manumittitur, non testatoris fit libertas, etiam si testatoris servus fit, sed ejus, qui manumittit. At is, qui directo ex testamento liber esse jubeat, ipsius testatoris libertas fit; qui etiam Orcinus appellatur: nec alius ullus directo ex testamento libertatem habere potest, quam qui utroque tempore testatoris fuerit, et quo faceret testamentum, et quæ moreretur. Directo autem libertas tunc dari videtur, cum non ab alio servum manumittit rogat, sed velut ex suo testamento libertatem ei competere vult.

§ 2. Liberty may also be conferred upon a slave by virtue of a trust; for an heir, a legatory, or a fidei-commissary, may be requested to manumit: nor does it make any difference, whether the testator requests the manumission of his own slave, of the slave of his heir, of the slave of a legatory, or of the slave of a stranger: and therefore, when a slave is not the testator's own property, he must be bought, if possible, and manumitted. But, if the proprietor of the slave refuses to sell him, (whereby refusal the proprietor may justify, if he be taken nothing under the will of the testator,) yet the fiduciary bequest is not extinguished, but deferred only, till it can be conveniently performed. It is here to be observed, that he, who is manumitted in consequence of a trust, does not become the freedman of the testator, altho' he was the testator's own slave, but he becomes the freedman of the manumittor: but a slave, to whom liberty is directly given by testament, becomes the freedman of the testator, and is called Orcinus; and no one can obtain liberty directly by testament, unless he was the slave of the testator, not only at the time of the testator's death, but also at the time of the making of his testament. And liberty is understood to be directly given, not when a testator requests, that his slave shall be made free by another, but when he commands, that the freedom of his slave shall commence instantly by virtue of his testament.

De verbis fidei-commissorum.

§ III. Verba autem fidei-commissorum haec maxime in usu habentur: peto, rogo, volo, mando, fidei tuœ commito: quæ perinde singula firmam fiant, atque si omnia in unum congrega essent.
§ 3. The terms generally used in the commitment of trusts are the following:—peto, rogo, volo, mando, fidei tuæ committo:—any of which words, simply taken, is as firm and binding, as if all were joined together.

Titulus Vigesimus-Quintus.

De codicillis.


Codicillorum origo.

Ante Augusti tempora constat, codicillorum ius in usu non fuisse: sed primus Lucius Lentulus, ex cuius persona etiam fidei-commisâ esse ceperunt, codicillos introductit. Nam, cum decederet in Africa, scripit codicillos testamento confirmatos, quibus ab Augusto petit per fidei-commissum, ut faceret aliquid: et, cum D. Augustus voluntatem ejus implevit, deinceps reliqui, ejus auctoritatem secuti, fidei-commissa praetabant: et filia Lentuli legitæ, quæ jure, non debebat, solvit. Dicitur autem Augustus convocasse sapientes viros, interque eos Trebatium quoque, cujus tunc auctóritas maxima erat, et quæsitis, an posset recipi hoc, nec absonans a juris ratione codicillorum usus esset: et Trebatium suassit Augustus, quod diceret, utilissimum et necessarium hoc civibus esse, propter magnas et longas peregrinationes, quæ apud veteres suissent: ubi, si quis testamentum facere non posset, tamen codicillos posset. Post quæ tempora, cum et Labo codicillos fecisset, jam nemini dubium erat, quin codicilli jure optimo admitterentur.

It is certain, that codicils were not in frequent use before the reign of Augustus: for Lucius Lentulus, by whose means trusts became efficacious, was the first, who caused authority to be given to codicils. When he was dying in Africa, he wrote several codicils, which were confirmed by his testament; and in these he requested Augustus to perform some particular act in consequence of a trust: the emperor complied with the request; and many other persons afterwards, being influenced by the authority of the emperor's example, punctually performed trusts, which had been committed to their charge: and the daughter of Lentulus paid debts, which in strictness of law were not due. But it is reported, that Augustus, having convened upon this occasion the sages of the law, and also Trebatius, whose opinion was of the greatest authority, demanded, whether codicils could be admitted to be of force, and whether they were not repugnant to the very reason of the law?
to which Trebatius answered, that codicils were not only most convenient, but most necessary on account of the great and long voyages, which the Romans were frequently obliged to take, to the intent, that, where a man could not make a testament, he might bequeath his effects by codicil. And afterwards, when Laboe, a lawyer of great eminence, disposed of his own property by codicil, it was no longer a doubt, but that codicils might be legally allowed.

Codicillorum jus.] The word codicilli, or codicil, is a diminutive from codex, a book; and denotes any solemn last will, in which no heir or executor is named. "Codicilli, et aliquando numero unitatis codicilli, proprietas quod scribi solita erat in codicillis, id est, tabulis brevioribus et tenuioribus, item factis, ut facile, quo cuique commodum effet, circumferi possit. Heineccio autem judice, codicilli apud veteres sunt epistolae, vel scriptura ad alios mittit; quia ergo codicilli plurumque percriseparentur in forma epistolae, hic et nomen retinuit, erunt." Finn.

Codicilli fieri possunt vel ante, vel post, testamentum, imo etiam ab intestate.

§ I. Non tantum autem testamento facto potest quis codicillos facere, sed et intestato quis decedens fidei-committere codicillis potest. Sed, cum ante testamentum factum codicilli facti erant, Papinianus ait, non aliter vires habere, quam si speciali voluntate posse confirmaretur. Sed Divi Severus et Antoninus rescripterunt, ex iis codicillis, qui testamentum praecedunt, posse fidei-commismum peti, si appareat eum, qui testamentum fecit, a voluntate, quam in codicillis expresserat, non recessisse.

§ I. Not only, but who hath already made his testament, is permitted to make a codicil, but even an intestate may commit a trust to others by codicil: yet, when a codicil is antecedent to a testament, the codicil, according to Papinian, cannot otherwise take effect, than by being confirmed by the subsequent testament. But the emperors Severus and Antoninus have by rescript declared, that a thing, left in trust in a codicil preceding a testament, may be demanded by the fidei-commisary, if it appears, that the testator hath not receded from the intention, which be at first expressed in his codicil.

Non tantum testamentum.] "It is granted of all, [says Suid.] that a codicil may be made either by him, who died intestate, or by him, who died with a testament. If the codicil is made by a person, who dies intestate, the legacy therein must be paid by him, who shall have the administration of the goods of the deceased, with the codicil, or testamentary schedule annexed. And, if a codicil is made by him, who hath also made a regular testament, then, whether it was made before or after the testament, it is to be reputed as part and parcel of the testa-

ment, and it is to be performed as well as the testament; unless, being made before the testament, it appears to be revoked by the testament, or to be contrary to that, which is contained in the testament." Suid. part 1. sec. 5.

"Codicilli et ab intestato confici possunt, et facto testamento. Ab intestato factiuis ipsi viribus nituntur et vicem testamenti exhibent; proinde quicunque intestati succedent erit, five legitimus, five honorarius, etiam poetæ natus, codicillis reliqua praefilabit. "Testamento autem condito, codicilli quo-B b "cunque
Codicillis hereditas directo dari non potest.

§ II. Codicillis autem hereditas neque dari, neque adimi, potest; ne confundatur jus testamentorum et codicillorum; et ideo nec exhaeridatus scribi. Directo autem hereditas codicillis neque dari neque adimi potest: nam per fidei-commiissum hereditas codicillis jure relinquitur. Nec conditionem heredi instituto codicillis adjicere, neque substituere directo, quis potest.

§ 2. But an inheritance can neither be given nor taken away by codicil, left be different operations of testaments and codicils should be confounded: and of course an heir can not be disinherited by codicil. — But also an inheritance can neither be given nor taken away by codicil, in direct terms, yet it may be legally left from the heir in a codicil, by means of a trust or fidei-commiissum. But no man is allowed to impose a condition upon his heir by codicil, nor to substitute directly.

Codicillis autem hereditas.] Groenewegen, in his book of abrogated laws, says, that the distinctions between testaments and codicils have now ceased to be observed almost everywhere. Eadem enim ordinatis solemnitate re quirunt, atque ita suprema Hollandiarum curia confis; et confusi eorum nominibus hereditis institutis, ad substantiam testamenti necessariam esse negant praeconatus: bene quique codicillis hereditatem directo dari et adimi, idque et exbeatuam scribi, ne vivus nofritis mil vestis. Groenew. de ll. abr. in Inf. 2. t. 21.

In England the appointment of an executor makes the only difference between a testament and a codicil: and this difference is little more than nominal; for whatever may be done by the one, may be also done by the other; so that a condition may be imposed, an estate may be given, or an heir disinherited, as well by a codicil as by a testament; and even lands may be disposed of by a codicil, if it is signed by the deceased, and attested by three witnesses in his presence, tho' the deceased left no testament; (for a codicil, in its true sense, denotes any testamentary schedule, and may stand singly, without relation to any other paper;) and, even where there is a testament, disposing of real estate, that testament may be altered or revoked by a codicil properly executed. And, where personal estate only is bequeathed, the same degree of proof, (and it has already been said what degree of proof is sufficient,) will establish either a testament or a codicil; and the one may revoke or confirm the other, either wholly or in part, according to its respective contents.

De numero et solemnitate.

§ III. Codicillos autem etiam plures quis facere potest: et nullam solemnitatem ordinationis desiderant.

§ 3. A man may make many codicils, and they require no solemnity.

Nullam solemnitatem.] When it is said, that no solemnity is required in making a codicil, the compilers of the institutions must be understood to mean no extraordinary solemnity, as that of bringing seven witnesses to subscribe it, as in case of a testament: for it is necessary by the civil law, that a codicil should be supported by five witnesses; [Cod. 6. t. 36. l. 8.] which is the
the ordinary number required to attest several other transactions. [Cod. 4. 12. 1. 18.] But, in England, there is in this respect no distinction between a testament and a codicil; for either may be supported by an equal number of witnesses: two are regularly required to a testament, and the same number is also required to a codicil; but, if either a testament or a codicil, contains a devise of a real estate, three witnesses are indispensably necessary by act of parliament. vid. 29 Car. 2. cap. 3.

FINIS LIBRI SECUNDI.
DIVI JUSTINIANI INSTITUTIONUM LIBER TERTIUS.

TITULUS PRIMUS.

De hæreditatibus, quæ ab intestato deferuntur.


Definitio intestati.

Intestatus decedit, qui aut omnino testamentum non fecit, aut non jure fecit; aut id, quod fecerat, ruptum irritumve factum est; aut si ex eo nemo hæres extiterit.

Every person is said to die intestate, who hath either not made a testament; or, if he has made one, hath neglected to use the solemnities prescribed by law. A man is also said to die intestate, if his testament, alibi rightly made, is either cancelled or rendered void; or if no one will take upon himself the heirship by virtue of the testament.

Primus ordo sucedentium ab intestato.

§ I. Intestatorum autem hæreditates ex lege duodecim tabularum primum ad suos hæreses pertinent.

§ I. The inheritances of intestates, according to the law of the twelve tables, belong primarily to the sui hæreses, i.e. to the proper or domestic heirs of such intestates.

Ex lege duodecim tabularum.] This law of the 12 tables is not extant.

Qui sunt sui hæreses.

§ II. Sui autem hæreses existimantur, (ut supra diximus,) qui in postestate morientis fuerint; veluti filius filiave, nepos neptive ex filio, pronepos proneptive ex nepote, ex filio nato prognatus prognatae: nec interept
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tertio, utrum naturales sint liberi, an adoptivi. Quibus connumerari necesse est etiam eos, qui ex legitimis quidem nuptiis vel matrimonii non sunt progeniti, curis tamen civitatum dati, secundum Divallium constitutionum, quæ super his positæ sunt, tenorem, hæredum suorum jura nanciscuntur: nec non eos, quos nostræ amplexæ sunt constitutiones, per quas jussimus, si quis mulierem in suo contubernio copulaverit, non ab initio affectione maritali, eam tamen, cum qua poterat habere conjugium, et ex ea liberos sutfulerit, postea vero, affectione procedente etiam nuptialia instrumenta cum ea fecerit, et filios vel filias habuerit, non solam eos liberos, qui post dotem editi sunt, justos et in potestate patris esse; sed etiam antiores, qui et iis, qui postea nati sunt, occasionem legitimi nominis praeficerunt: quod obtinere censuimus, et si non progeniti fuerint poft dotale instrumentum confecit liberi, vel etiam nati ab hac luce fuerint sub fracti. Ita demum tamen nepos nepti, prones prones et præcedens persona deficerit in potestate parentis esse, eum morte id acciderit, eum alia ratione, veluti emancipatione. Nam, si per id tempus, quo nos moritur, filius in potestate ejus sit, nepos ex eo suis hæres esse non potest: idque et in ceteris hæredum personis dictum intelligimus. Posthumis quoque, qui, si vivo patre nati essent, in potestate ejus futuri forent, sui hæredes sunt.

§ 2. And, as we have observed before, these are esteemed sui hæredes or proper heirs, who, at the time of the death of the deceased, were under his power; as a son or a daughter, a grandson or a grand-daughter by a son, a great-grandson or great-grand-daughter by a grandson of a son, &c.—neither is it material, whether these children are natural or adopted. But, in the number of natural children, we must reckon these, who, altbo' they were not born in lawful wedlock, are nevertheless, according to the tenor of the imperial constitutions, intitled to the rights of proper heirs, by being admitted into the order of Decurions. We must also add these persons, who are comprised within our own constitutions, by which it is ordained, that, if any person, without intending matrimony, shall keep a woman, with whom he is not prohibited to marry, and have children by her, and shall afterwards, thro' the dictates of affection, marry that woman, and have other children by her, sons or daughters, then not only these latter children, born after the celebration of marriage, shall be legitimate and in the power of their father, but also the former, who gave occasion to the legitimacy of these, who were born afterwards. And we have thought it expedient, that this law shall also obtain in regard to the children born before marriage, altbo' the children, born subsequent to it, are dead; or even altbo' there never were any children subsequent to the marriage. But a grandson or grand-daughter, a great-grandson or great-grand-daughter, is not reckoned in the number of proper heirs, unless the person preceding them in degree hath ceased to be under paternal power, either by death or some other means, as by emancipation: for, if a son, when his father died, was under the power of his father, the grandson can by no means be the proper or domestic heir of his grand-father; and, by a parity of reasoning, this rule is understood to take place in relation to all descendents in the right line. But all posthumous children, who would have been under the power of their father, if they had been born in his life-time, are esteemed sui hæredes, or proper heirs.
Quomodo sui hæredes sunt.

§ III. Sui autem hæredes sunt etiam ignantes, et, licet furiosis sint, hæredes possunt existere: quia, quibus ex caulis ignorantibus nobis acquisitur, ex his caulis et furiosis acquiri potest. Et statim a morte parentis quasi continuatur dominium; et ideo nec tutoris auctoritate opus est pupillis, cum etiam ignorantibus acquiratur suis hæredibus hæreditas: nec curatoris asserent acquiritur furioso, sed ipso jure.

§ 3. Persons may become sui hæredes, or proper heirs, without their knowledge, and even alio they are disordered in their senses: for, as inheritances may be acquired without our knowledge, it is a consequence, that they may also be acquired by persons deprived of their understanding. And here observe, that the dominion of an inheritance is continued in the heir from the very instant of the death of his ancestor, and that the authority of a tutor is not necessary to enable a pupil to inherit, because inheritances may be acquired by proper heirs, without their knowledge: neither does a disordered person inherit by the assent of his curator, but by operation of law.

De filio, post mortem patris, ab hostibus reverso.

§ IV. Interdum autem, licet in potestate parentis mortis tempore suus hæres non fuerit, tamen suus hæres parenti efficitur; veluti si ab hostibus quis reversus fuerit post mortem patris sui: jus enim postlimini facit.

§ 4. But sometimes a child becomes a proper heir, alio he was not under power, at the time of the death of his parent; as when a person returns from captivity after the death of his father: and this is effected by the jus postlimini, or right of return.

De memoria patris damnata ob crimen perduellionis.

§ V. Per contrarium autem hoc evenit, ut, licet quis in familia defuncti sit mortis tempore, tamen suus hæres non fiat; veluti si post mortem suam pater judicatus fuerit perduellionis reus, ac per hoc memoria ejus damnata fuerit; suum enim hæredem habere non potest, cum sicus ei succedat: sed potest dici, ipso quidem jure suum hæredem esse, sed definere.

§ 5. On the contrary, it may happen, that a child, who, at the time of the death of his parent, was under his power, shall not be his proper heir: as when a parent,
after his decease, is adjudged to have been guilty of lese-majesty, by which crime his memory is rendered infamous; for a criminal of this sort can have no proper heir, inasmuch as all his possessions are forfeited to the treasury. But a son, in this case, may strictly be said to have been the proper heir of his father, and afterwards to have ceased to be so.

De divisione hereditatis inter suos heredes.

§ VI. Cum filius siliave et ex altero filio nepos neptive exinitum, pariter ad hereditatem avi vocantur, nec, qui gradu proximior effet, uterum excludit: aequum enim esse videtur, nepotes neptive in patris sui locus succedere. Pari ratione et si nepos neptive fit ex filio, et ex nepote pronepos proneptive, simul vocantur. Et, quia placuit, nepotes neptive, item pronepotes proneptive, in parentis sui locum succedere, conveniens esse visum effet, non in capita, sed in stirpes, hereditatem dividit; ut filius partem dimidiam hereditatis habeat, et ex altero filio duo pluribus nepotes alteram dimidia. Item, si ex duobus filiis nepotes neptive exant, ex altero unus aut duo forte, ex altero tres aut quatuor, ad unum aut duos dimidia pars pertineat, ad tres vel quatuor altera dimidia.

§ 6. When there is a son or a daughter, and a grandson or grand-daughter by another son, they are called equally to the inheritance of their parents; nor do they nearly exclude the more remote: for it appears just, that grandsons and grand-daughters should succeed in the place of their father. And, by the same reasoning, if there is a grandson or grand-daughter by a son, and a great-grandson or great-grand-daughter by a grandson, they ought all to be called to the inheritance. And, inasmuch as it hath been esteemed right, that grandsons and grand-daughters, great-grandsons and great-grand-daughters, should succeed in the place of their parent, it seemed convenient, that inheritances should not be divided into capita, but into stirpes: so that, where there is a son and grand-children by another son, the son possesses half the inheritance, and the grand-children, however numerous, are intituled only to the other half, as the representatives of their father. And in like manner, where there are grand-children by two sons, the one son leaving one or two children, and the other three or four, the inheritance must be equally divided, half belonging to the single grand-child, or the two grand-children by the one son, and half to the three or four grand-children by the other son.

Item ex duobus filiis.] By the civil law, representation takes place in infinitum in the right line descending; and therefore it follows, according to that law, that, when any person dies, leaving grand-children by sons or daughters, who died in his life-time, such grand-children, tho equal in degree and unequal in their number, in regard to their respective stocks, will divide the estate of their grand-father per stirpes, i.e. according to their stocks: for example, if A dies worth nine hundred aurei, and intestate, leaving only grand-children by three sons, already dead, to wit, three grand-children by one son, five by another, and six by another, then each of these classes of grand-children would be intituled to a third; that is, to three hundred aurei, no regard being paid to that class, in which there were most persons. In hoc callo (fays Viniius,) maxime conficius est nec representationis; licet enim omnes hic pari gradu sunt, ut proprio singuli jure succedere possit; sed in hereditate, quicquam simile placuit, nepotes in locum patrii sui describuntur, alioque ratione exint jure sui hereditatem; nec quidem, non debet hoc satis ex accidenti aliqua causi, puta ut soli nepotes ex diversi filii et unius inquinantes, cum pauciores cum pluribus ex hoc vel illius stirpe concurrentes, in capita hereditatis dividantur.
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... in airpes, non in capite, succedere. But, in England, alother representation may also be laid to extend in infinitum in the right line descending; yet this I apprehend must be understand to be in those cases only, where representation is absolutely necessary to prevent the exclusion of grand-children, great-grand-children, &c. For example, therefore, if Titius dies leaving a son, and D, E, F, his grand-children by another son, who died before Titius, then the surviving son would take one moiety, and the grand-children D, E, F, would take the other, as the representatives of their deceased father: for in this case representation would be necessary; because, if representation was not allowed, the grand-children of Titius, being in a more remote degree, than his son, would be totally excluded; which would be highly unjust. But, if Titius dies, and leaves only grand-children by two sons, already dead; e.g. three grand-children by one son, and six by the other, then representation would not only not be necessary, (as all the persons are in the same degree, so that none of them can be excluded;) but it would occasion a very unequal distribution of the effects; namely, of only half the estate to six of the grand-children, and of half to the other three, which does not seem agreeable either to the sense, or even the words of the statute. See 22, 23 Car. 2, cap. 10.

Quo tempore suitas spectatur.

§ VII. Cum autem quaeritur, an quis suus haeres existerit postit, eo tempore quærendum est, quo certum est, aliquem fine testamento decessisse; quod accidit et defuncto testamento. Haec ratione, si filius exhæredatus fuerit et extraneus haeres institutus, et filio mortuo, postea certum fuerit, haerædem institutum ex testamento non fieri haerædem, aut quia noluit eie haeres, aut quia non potuit, nepos avo suus haeres exstitit: quia, quo tempore certum est, intestatum decessisse patrem-familias, solus inventur nepos: et hoc certum est.

§ 7. Whenever it is demanded, whether any person is a proper heir, we must inquire at what time it was certain, that the deceased died without a testament; and a man is said to die without a testament, if his testament is relinquished. 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 was not in fact the heir, either because he was unwilling, or unable, to accept the inheritance, in this case, the grandson of the deceased becomes the proper heir of his grandfather: for at the time, when it was certain, that the deceased died intestate, there was no other heir, but the grandchild; and this is evident.

De nato post mortem avi, vel adoptato a filio emancipato.

§ VIII. Et, licet post mortem avi natus sit, tamen avo vivo conceptus, mortuo patre ejus, potestate deserto avi testamento, suus haeres efficitur. Plane, si et conceptus et natus fuerit post mortem avi, mortuo patre suo; defuncto poetae avi testamento, suus haeres avo non exstitit; quia nullo jure cognationis patrem sui patris attigit: sed nec illè est inter liberos avi, quem filius emancipatus adoptavit. Hi autem, cum non sint suì, (quantum ad haereditatem,) liberi, neque bonus possessionem petere possunt, quasi proximi cognati. Haec de suis haereditibus.

§ 8. And also a child is born after the death of his grandfather, yet, if he was conceived in the life-time of his grandfather, he will, at the death of his father and after his grandfather's testament is decreed by the instituted heir, become the proper heir of his grandfather. But, if a child is both conceived and born after the death of his grandfather, such child, also his father should die and the testament of his grandfather,
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father be deserted, could not become the proper heir of his grandfather; because he was never allied to his grandfather by any tie of cognation: neither is be, whom an emancipated son hath adopted, to be reckoned in any respect among the children of bis adoptive father's father. So that the adopted children of an emancipated son can neither become the proper heirs of their father's father in regard to the inheritance, nor demand the possession of goods, as next of kin. This is what we have thought it expedient to observe concerning proper heirs.

Plane si et conceptus et natus.] "Sunt, qui velint hunc nepotem, eti ad hereditatem avi jure suo non veniant, posse nihilominus jure paterno eam adipisci: et enim certum est, liberos parentum hereditatem, quantumvis non acquisitam, ad liberos suos transmittere." Cod. 6. t. 51. l. 1. fed. 5. Cod. 6. t. 52. l. 1. "Filius porro in propria facta specie, si adhuc vivere, posset patris hereditatem acquirere; sic igitur ad filium suum posthumum, eti post avi mortem conceptum, hereditatem ejus transmittere posset; sed non habeat jure suum hoc quidem. Per Novellam 118, suuccursum esse dent, ut suo jure avo sucessione possit; et hoc quidem suadet sequitas; sed non faveat fatis perpsectoe verba legem." Donatus.

De liberis emancipatis.

§ IX. Emancipati autem liberi jure civili nihil juris habent: neque enim sui haereses sunt, qui in potestate morientis esse degerunt, neque ullo jure per legem duodecim tabularum vocantur. Sed praetor, naturali sequitate motus, dat eis bonorum possessionem unde liberi, perinde ac si in potestate parentis tempore mortis fuissent; sive foli sint, sive cum suis hereditibus concurrant. Itaque, duobus liberis existentibus, emancipato uno, et eo, qui tempore mortis in potestate fuerit, sanc quidem is, qui in potestate fuit, solus jure civili haeres est, et solus suis haeres; sed, cum emancipatus, beneficio praetoris, in partem admittitur, evenit, ut suis haeres pro parte haeres fiat.

§ 9. Emancipated children by the civil law have no right to the inheritance of their parents: for those are not proper heirs, who have ceased to be under the power of their parent deceased, before his death, neither are they called to inherit by any other right according to the law of the twelve tables. But the praetor, induced by natural equity, grants them the possession of goods, by the said beginning, unde liberi, as fully, as if they had been under power at the time of the death of their parent; and the praetor grants this, whether they are sole, or mixed with others, who are proper heirs: therefore, when there are two sons, the one emancipated, and the other under power at the time of his father's death, the latter, by the civil law, is alone the heir, and alone the proper heir: but, when the emancipated son, by the indulgence of the praetor, is admitted to his share, then the proper heir becomes the heir only of his own moiety.

Si emancipatus su dederit in adoptionem:

§ X. At hi, qui emancipati a parente in adoptionem su dederunt, non admonuntur ad bona naturalis patris quasi liberis, nisi modo, cum moraretur, in adoptiva familia fuerint: nam vivo eo emancipati ab adoptivo patre perinde admonuntur ad bona naturalis patris, ac si emancipati a ipso effenter, nec unquam in adoptiva familia suffissent: et conveniunt, quod ad adoptivum patrem pertinet, extraneorum loco esse incipient. Post mortem vero
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Vero naturalis patris emancipati ab adoptivo patre, et, quantum ad hunc adoptivum patrem pertinent, æque extraneorum loco fiunt, et, quantum ad naturalis patris bona pertinent, nihil magis liberorum gradum nanciscuntur. Quod ideo sic placuit, quia iniquum erat, esse in potestate patris adoptivi, ad quos bona naturalis patris pertineant, utrum ad liberos ejus, an ad agnatos.

§ 10. But those, who after emancipation have given themselves in adoption, are not admitted, as children, to the possession of the effects of their natural father, if, at the time of his death, they were in the adoptive family. But, if in the life-time of their natural father they were emancipated by their adoptive father, they are then admitted by the prætor to take the goods of their natural father, as if they had been emancipated by him, and had never entered into the family of the adoptor; and consequently, in regard to their adoptive father, they are looked upon as mere strangers. But those, whoo are emancipated by their adoptive father, after the death of their natural father, are nevertheless reputed strangers to their adoptive father; and, in regard to the inheritance of their natural father, they are not at all the more intituled to re-assume the rank of children. These rules of law have been established, inasmuch as it was unjust, that it should be in the power of an adoptor to determine at his pleasure, to whom the inheritance of a natural father should appertain, whether to his children, or to his agnates.

Ad liberos, an ad agnatos.) For the arro-gator, by retaining under his power the emancipated son of the deceased, might make room for the agnati of the deceased; or, by emancipating his emancipated son, who was the natural son of the deceased, the arrogator might exclude the agnati; so that thus the right of inheritance would depend upon the will and pleasure of a stranger, which the law would not permit.

Collatio filiorum naturalium et adoptivorum.

§ XI. Minus ergo juris habent adoptivi filii, quam naturales: namque naturales emancipati, beneficio prætoris gradum liberorum retinent, Icet jure civili perdant. Adoptivi vero emancipati et jure civili perdunt gradum liberorum, et a prætor non admissuntur; et recte. Naturalia enim jura civilis ratio permere non potest; nec, quia desinunt sui heredes esse, possunt desinere filii filiæve, nepotes neptaeve esse. Adoptivi vero emancipati extraneorum loco incipient esse; quia jus nomenque filii filiæve, quod per adptionem consecuti sunt, alia civili ratione, id est, emancipatione, perdunt.

§ XI. Adopted children have therefore fewer rights and privileges, than natural children; for natural children, even after emancipation, retain the rank of children by the indulgence of the prætor, altho' they lose it by the civil law: but adopted children, when emancipated, lose the rank of children by the civil law, and are denied admittance into the rank of children by the prætor; and not without reason: for civil policy can by no means destroy natural rights; nor can natural children ever cease to be sons and daughters, grandsons and grand-daughters, altho' they may cease to be proper heirs: but adopted children, when emancipated, commence instantly strangers; for the right and name of son or daughter, which were obtained by the civil right of adoption, may be destroyed by another civil right; namely, by emancipation.

Cc 2
De bonorum possessione contra tabulas.

§ XII. Eadem haec observantur et in ea bonorum possessione, quam contra tabulas testamenti parentis liberis praeteritis, id est, neque hereditibus institutis, neque, ut oportet, exhereditatis, praetor policetur. Nam eos quidem, qui in poteestate mortis tempore fuerint, et emancipatos, vocat praetor ad eandem bonorum possessionem; eos vero, qui in adoptiva familia fuerint per hoc tempus, quo naturalis pears moreretur, repellit. Item adoptivos liberos, emancipatos ab adoptivo patre, sicut nec ab intestato, ita longe minus contra tabulas testamenti, ad bona ejus admittit; quia definunt in numero liberorum ejus esse.

§ 12. The same rules are observed in regard to that possession of goods, which the praetor, contrary to the testament of the parent, grants to the children, who are not mentioned in the testament, that is, to such, who are neither instituted heirs, nor properly disinherited. For the praetor calls those, who were under power at the time of the death of their parents, and those also, who are emancipated, to the same possession of goods, but he repels those, who were in an adoptive family at the time of the decease of their natural parents. And, as the praetor admits not those adopted children, who have been emancipated by their adoptive father, to succeed him ab intestato, much less therefore does the praetor admit such children to possess the goods of their adoptive father contrary to his testament; for, by virtue of the emancipation, they cease to be in the number of his children.

Unde cognati.

§ XIII. Admonendi tamen fumus, eos, qui in aliena familia sunt, quive post mortem naturalis parentis ab adoptivo patre emancipati fuerint, intestato parente naturali mortuo, licet ea parte edicti, qua liberi ad bonorum possessionem vocantur, non admittantur, alia tamen parte vocari, scilicet, qua cognati defuncti vocantur. Ex qua ita admittuntur, si neque fui heredes liberi, neque emancipati obstant, neque agnatus quidem ullus interveniat. Ante enim praetor liberos vocat, tam suos heredes quam emancipatos, deinde legitimos heredes, tertio proximos cognatos.

§ 13. We must nevertheless observe, that, although those, who were in an adoptive family, but have been emancipated by their adoptive father, after the decease of their natural father, dying intestate, are not admitted by that part of the edict, by which children are called to the possession of goods, yet they are admitted by another part, by which the cognates of the deceased are called to the possession of his effects. But, by this last-named part of the edict, the cognates are only called, when there is no opposition from proper heirs, emancipated children, or agnates: for the praetor only calls the proper heirs with the emancipated children, then the agnates, and lastly the nearest cognates.

Emendatio juris antiqui. De adoptivis.

§ XIV. Sed ea omnia antiquitati placuerunt: aliquam autem emendationem a nostra constitutio acceperunt, quam super iis personis expouimus,


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mus, quæ a patribus suis naturalibus in adoptionem aliis dantur: inveni-mus etenim nonnulllos caus, in quibus filii et naturalium sucessionem propter adoptionem amittebant, et, adoptione facile per emancipationem soluta, ad neutrius patris successionem vocabantur. Hoc, solito more, corrigentes, constitutionem scripsimus, per quam definimus, quando pares naturalis filium suum adoptandum alii dederit, integra omnia jura ita servari, atque si in patris naturalis potestate permanisset, nec penitus adoptio fuisset subsecuta; nisi in hoc tantummodo casu, ut posset ab intestato ad patris adoptivi venire successionem. Testamento autem ab eo facto, neque jure civili, neque prætorio, ex hæreditate ejus aliquid persequi potept, neque contra tabulas bonorum possessoriae agitata, neque inofficiosi querela instituta; cum nec necessitas patri adoptivo imponatur, vel hæredem eum inquitia, vel exhaerendum facere, utpote nullo vinculo naturali copulatum; neque si ex Sabiniano senatus-confulto ex tribus maribus fuerit adoptatus: nam, et in ejusmodi casu, neque quarta ei servatur, neque uilla actio ad ejus persequionem ei competit. Nostrae autem constitutione exceptus est is, quem pares naturalis adoptandum suceperit. Utroque enim jure, tam naturali quam legitimo, in hunc personam concurrente, prætina jura tali adoptioni servamur; quemadmodum si pater-familias se deuerit arrogandum: quæ specialiter et fingulatim ex præfatis constitutionis tenore posseunt colligi.

§ 14. These were the rules of law, which formerly obtained; but they have received some emendation from the constitution, which we promulged, relating to those persons, who are given in adoption by their natural parents: for we have found frequent instances of sons, who by adoption have lost their succession to their natural parents, and who, by the same with which adoption is dissolved by emancipation, have also lost the right of succeeding to their adoptive parents. We therefore, correcting as usual whatever is amis, have enabled a constitution, by which it is decreed, that, when a natural father hath given his son in adoption, all the rights of such son shall nevertheless be preserved entire, in the same manner, as if he had still remained under the power of his natural father, and there had been no adoption; except only, that the person adopted may succeed to his adoptor, if he dies intestate. And it is also enacted, that, if the adoptor makes a testament and omits the name of his adopted son, such son can neither by the civil nor the praetorian law obtain any part of the inheritance, whether he demands the possession of the effects contra tabulas testamenti, (contrary to the letter of the testament,) or prefers a complaint, alleging, that the testament is inofficious: for an adoptor is under no obligation either to institute, or disinherit, his adopted son, inasmuch as these subsist not between them any natural eye or relation. And we have further decreed, that no adopted person shall receive any benefit from the Sabinian senatus-confultum, by being one of three sons: for in this case he shall neither obtain the fourth part of his adoptive father's effects, nor be intitled to any action upon that account. But all these, who are adopted by their natural parents, i. e. by a grand-father or great-grand-father, &c. are excepted in our constitution: for, inasmuch as such persons are united together by the concurrence both of natural and civil rights, we have thought proper to retain the old law in relation to those adoptions; in the same man-
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ner, as when the father of a family hath given himself in arrogation. But all, which we have here observed, may be collected from the tenor of the above-mentioned constitution.

1. 10. De adoptionibus.
Ex Sabiniano senatus-consulta. "Quo sena-
"tus-confulto, quantum ex hoc loco conjiciere
"est, cautum sunt, ut, qui unum e tribus alte-

De descendenteribus ex feminis.

§ XV. Item vetustas, ex masculis progenitos plus diligens, solos nepo-
tes vel nepotes, qui quaeve ex virili sexu descendunt, ad suorum vocabat
succefsionem, et jure agnatorum eos anteponebat; nepotes autem, qui ex
filiabus nati sunt, et pronepotes, qui ex nepibus, cognatorum loco con-
umerans, potf agnatorum lineam eos vocabat, tam in avi vel proavi ma-
terni, quam in aviae vel proavie, sive paternae sive maternae, successionem.

Divi autem principes non passi sunt talem contra naturam injuriam sine
competenti emendatione relinquere: sed, cum nepotis et pronepotis no-
men commune sit utrisque, tam qui ex masculis, quam qui ex feminis
descendunt, ideo eundem gradum et ordinem succesionis essent donaverunt.
Sed, ut amplius aliquid sit eis, qui non solum naturae, sed etiam veteris juris,
suffragis muniantur, portionem nepotum vel nepum, vel deinceps;
(de quibus supra diximus) paulo minuendum esse evisimaverunt; ut mili
minus tertia parte acciperent, quam mater eorum, vel avia, fuerat accepta,
vel pater eorum vel avus, paternus sive maternus, quando femina mor-
tua sit, cujus de hæreditate agitur; iisque, licet soli sint, adeuntibus, agna-
tos minimæ vocant. Et, quemadmodum lex duodecim tabularum, filio
mortuo, nepotes vel nepotes, pronepotes vel pronepotes, in locum patris sii
ad succesionem avi sui vocat; ita et principalis dispositio in locum ma-
tris sui vel aviae, cum jam designata partis tertiae diminuitione, vocat.
Sed nos, cum adhuc dubitatio maneret inter agnatos et memoratos ne-
tes, quartam partem substantiae defuncti agnatis fibi vindicantis ex cu-
judam constitutionis auteritate, memoratam quidem constitutionem a
nostrò codice segregavimus, neque inferi eam ex Theodosiano codice in cò
conceffimus. Nostra autem constitutione promulgata, toti juri ejus der-
gatum est: et sanximus, talibus nepotibus ex filia, vel pronepotes ex
nepe, vel deinceps superfinitibus, agnatos nullam partem mortui succe-
sionis fibi vindicare; ne hi, qui ex transversa linea veniant, potiores his
habeantur, qui recto jure descendunt. Quam constitutionem nostram
obtinerere secundum sui vigorem et temporae et nunc sanctius, ita tamen
ut, quemadmodum inter filios et nepotes ex filio antiquitas statuit, non in
capita, sed in stirpes, dividi hæreditatem, similiiter nos, inter filios et nepo-
tes ex filia, distributionem fieri jubeamus, vel inter omnes nepotes et nep-
tes, et inter pronepotes vel pronepotes, et alias deinceps personas; ut utra-
que progenies matris vel patris, aviae vel avi, portionem fine ulla dimi-


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§ 15. The ancient law, showing most favor to descendents from males, called those grand-children only, who were so descended, to the succession as proper heirs, and preferred them by the right of agnation: for the old law, reposing the grand-children born of daughters, and the great-grand-children born of grand-daughters, to be cognates, prohibited such children from succeeding to their grand-father and great-grand-father, maternal or paternal, until after the line of agnati was exhausted. But the emperors Valentine, Theodosius, and Arcadius, would not suffer such a violence against nature to continue in practice, and, inasmuch as the name of grand-child and great-grand-child is undoubtedly common, as well to descendents by females, as to descendents by males, they therefore granted an equal right of succession to descendents from males and descendents from females. But, so the end, that those persons, who have been favored by nature, as well as by the suffrage of antiquity, might enjoy some peculiar privileges, the same emperors have thought it right, that the portions of grand-children, great-grand-children, and other lineal descendents of a female, should be somewhat diminished, and therefore they have not permitted such persons to receive so much by a third part, as their mother or grand-mother would have received, or their father or grand-father, paternal or maternal, at the decease of a female; for we now treat concerning inheritances, derived from a female: and, also, there were only grand-children by a female to take an inheritance, yet the emperors did not call the agnates to the succession. And as, upon the decease of a son, the law of the twelve tables calls the grand-children, and great-grand-children, male and female, to represent their father in respect to the succession of their grand-father, so the imperial ordinance calls them to succession in the place of their mother or grand-mother, with the before-regulated diminution of a third part of their share. But, as there still remained matter of dispute between the agnati and the above-named grand-children, the agnati claiming the fourth part of the estate of the deceased by virtue of a certain constitution, we have therefore not permitted it to be inserted into our Code from that of Theodosius. And we have farther taken care to alter the old law by our ordinance, having enacted, that agnates shall not be intitled to any part of the goods of the deceased, whilst grand-children born of a daughter, or great-grand-children born of a grand-daughter, or any other descendents from a female in the right line, are living; lest those, who proceed from the transferre line, should be preferred to lineal descendents. And we now decree, that this our ordinance shall obtain according to it's full tenor. But as the old law ordered, that every inheritance should be divided in stirpes, and not in capita; between the son of the deceased and his grandsons by a son, so we also ordain, that distribution shall be made in the same manner between sons and grandsons by a daughter, and between all grandsons and grand-daughters, great-grandsons and great-grand-daughters, and all other descendents in a right line; so that the issue either of a mother or a father, or of a grand-mother or a grand-father, may obtain their portions without any diminution; and, if on the one part there should be only one or two claimants, and on the other part three or four, that the greater number shall be intitled only to one half, and the left number to the other half of the inheritances.

Sed ut amplius aliquid. Nam, si quis decessit relietio filio, et ex filia nepote nepteve, vel pronepote pronepisteve, filius quidem odo uencias habebit, nepos vero neptive, aut pronepos pro-

neptive, ex filia premortuo, quatuor; hoc est, tertia parte minus quam mater eorum, vel avia, si superesse, haberet. Quod si mortua sit femina relietio filio, filiave, relietio item nepote.
aut pronepotes ex filio filiave, jam ante defunctis, filius illi, aut filia, olim uncius habebit; nepos vero aut pronepos, five ex filio, five ex filis, jam ante defunctis, quatuor: hoc est, tertia parte minus quam pater eorum, aut mater, vel avus aviae, five paterni, five materni, accepturi effent. Thaophilus.

Portionem nepotum vel neptum.] Defendents by a female were afterwards exempted by Novell 18, from suffering any defalcation, when they concurred with descendents from a male.

Uniform in omnibus pontibus nepotibus et pronepotibus, non serentes, feminam a masculo in talibus minis: neque enim masculum isse in se, neque feminam solem, ad nativitatem propagationem sufficient eis: sed facit utrumque eorum cooptavint Deus ad genetvironim opus, ina etiam non tandem utrique ssecuri est.

NOFRA autem constitutione.] See Cod. 6. de suis et legimis libris, t. 55, l. 12. by which the agnati are prohibited for the future to claim the fourth, which was before due to them, in consequence of a law made by Theod. Jud. vid. Cod. Theod. de leg. hered. l. 4.

Sine ulla diminutio.] "Quarta sit: eat et legimis, naticorun; tertiem enim deductionem tribuat ipsis, qui etiam juris veteris suffragatione inanissentur, intaciam reliquit: sed juris nostri potestas est omnium liberorum, in successione ab inanis, teifiato, conditionem." Vinn. Nov. 118, c. 1.

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**TITULUS SECUNDUS.**

**De legitima agnatorum successione.**


Secundus ordo heredum legitimorum.

SI nemo suis haeres, vel eorum, quos inter suis haeares prator vel constitutiones vocant, exitat, quia successionem quoquo modo amplectatur, tunc ex lege duodecim tabularum ad agnatum proximum pertinent hereditas.

When it happens, that there are no proper heirs to succeed the deceased, nor any of those persons, whom the prator or the constitutions would call to inherit with proper heirs, then the inheritance, by a law of the twelve tables, appertains to the nearest agnate.

Ad agnatum proximum.] "Quamquam in rebus lineis gradus non curetur, in his tamen, qui e transverso conjuunguntur, gradus praestatur, rogativa omnino attenditur; sic ut proximi remotoribus anteponantur; quare ULPIA-

"NUS, Hereditias (inquit) proxima agnata, i.e. "ei, quem nemo antecedit, defertur." Myrs-
gerus.

**De agnatis naturalibus.**

§ I. Sunt autem agnati (ut primo quoque libro tradidimus) cognati per virilis sexus perfonas cognatione conjuncti, quasi a patre connati. Itaque ex eodem patre nati fratres, agnati sibi sunt; qui et consanguinei vocantur: nec requiritur, an etiam eandem matrem habuerint. Item patruus fratris filio, et invicem est illi, agnatus est. Eodem numero sunt fratres patruales, id est, qui ex duobus fratribus procreati sunt, qui etiam confobrini vocantur. Qua ratione etiam ad plures gradus agnationis pervenire poterimus. Etiam, qui post mortem patris nascentur, jura con-
sagui-
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Fanguinitatis nanciscuntur. Non tamen omnibus simul agnatis dat lex hæreditatem; fed iis, qui tunc proximiore gradu sunt, cum certum esse coeperit, aliquem intestatum decessisse.

§ I. Agnates, as we have observed in the first book, are those, who are related or cognatae by males, (quasi a patre cognati:) and therefore brothers, who are the sons of the same father, are agnates in regard to each other; they are also called consanguinei, being of the same blood; but it is not required, that they should have the same mother. An uncle is also agnato to his brother’s son, and vice versa the brother’s son to the paternal uncle: and brothers patruel, that is, the children of brothers, who are also called confobrini, are likewise reckoned agnates. In this manner we may enumerate many degrees of agnation; and even those who are born, after the decease of their parents, obtain the rights of consanguinity: the law nevertheless does not grant the right of inheritance to all the agnati, but to those only, who are in the nearest degree, when it becomes certain, that the deceased balius died intestate.

A patre connati.] "Cognatio est nomen general; fed non tantum general, plerumque autem speciale est, et proprium eorum, qui vel per feminei fexus perfonas conjunguntur, vel capitis dimensione jura agnationis ami.

"Serunt. Vin. b. t.

Confobrini.] "Per absonem sic dixi; con-

fobrini enim proprie sunt, qui ex duas so-

roribus nati sunt; ita dixi, quasi conforo-

rini." Theoph.

De adoptivis.

§ II. Per adoptionem quoque agnationis jus consitit; veluti inter filios naturales et eos, quos pater eorum adoptavit; nec dubium est, quin ii improprie consanguinei appellentur. Item, si quis ex cæteris agnatis tuis, veluti frater aut patruel, aut denique is, qui longiore gradu est, adoptaverit aliquem, agnatus inter tuos esse non dubitatur.

§ 2. The right of agnation arises also by bro’ adoption; thus the natural and adopted sons of the same father are agnates; but such persons are without doubt improperly called consanguinei. Also if a brother, a paternal uncle, or any other, who is agnato to you in a more remote degree, should adopt any person into his family, then such adopted person is undoubtedly to be reckoned in the number of your agnati.

De masculis et feminis.

§ III. Cæterum inter masculos quidem agnationis jure hæreditas, etiam longissimo gradu sint, ultro citroque capitur. Quod ad Æminas vero attinet, ita placebat, ut ipsæ consanguinitatis jure tantum capiant hæreditatem, si forores sint; ulterius non capiant. Masculi autem ad earum hæreditates, (etiam longissimo gradu sint,) admittantur. Quæ de cauæ fratris tui, aut patrui tui filiae, vel amitæ tææ, hæreditas ad te pertinebat: tua vero ad illas non pertinebat. Quod ideo ita constitutum erat, quia commodius videbatur, ita jura constitui, ut plerumque hæreditates ad masculos confluenter. Sed, quia sane inequum erat, in universum eas quasi extraneas repelli, pretor eam ad honorem possessionem admittit ea parte, qua proximitatis nomine bonorum possessionem pollicetur: ex qua parte igitur admittuntur, sic neque agnatus ullam, neque proximi cognai-

d tus,
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tus, interveniat. Et haec quidem lex duodecim tabularum nullo modo introductit; sed, simplicitatem legibus amicam amplexa, simili modo omnes agnatos, five masculos five feminas, cujusque gradus, ad similitudinem suorum, invicem ad successionem vocabat. Media autem jurisprudentia, quae erat quidem lege duodecim tabularum junior, imperialis autem dispositione anterior, subtilitate quadam excogitata, praeferat differentiam inducebat, et penitus eas a successione agnorum repellebat; omni alia successione incognita, donec praetores, paulatim asperitatem juris civilis corrigentes, five, quod deearat, implentes, humano proposito alium ordinem suis editis addiderunt; et cognationis linea, proximitatis nomine introducita, per bonorum possessionem eas adjuvabant, et pollicebantur his bonorum possessionem, quae unde cognati appellatur. Nos vero, legem duodecim tabularum sequentes, et ejus vestigia hac in parte conservantes, laudamus quidem praetores suae humanitatis, non tamen eos in plenum huic causae mediari invenimus. Quare etenim, uno eodemque gradu naturali concurrente, et agnationis titulis tam in masculis quam in feminis aqua lance constitutis, masculis quidem dabant ad successionem venire omnium agnorum, ex agnatis autem mulieribus nulli penitus, nisi soli fori, ad agnatorum succesionem patebat aditus? Ideo nos, in plenum omnia reducentes, et ad jus duodecim tabularum eandem dispositiorem exequantes, nostra constitutione fancimus, omnes legitimas personas, id est, per virilem sexum descendentes (five masculini generis five feminini sint) similis modo ad jura successionis legitimae ab inteftato vocari, secundum sui gradus prerogativam; nec ideo exclusendas, quia consanguinitatis jura, fitus germanae, non habent.

§ 3. Succesison among males proceeds according to the right of agnation, albeit they are in the most distant degree. But it hath pleased the antient lawyers, that females should only inherit by consanguinity, if they are sisters; and not in a more remote degree; theo' males might be admitted in the most distant degree to inherit females: thus, in case of death, the inheritance of your brother's daughter, or of the daughter of your paternal uncle or aunt, would appertain to you; but your inheritance would not appertain to them. And this was so constituted, because it seemed expedient for the benefit of society, that inheritances should for the most part fall into the possession of males. But, inasmuch as it was extremely unjust, that females should be thus almost wholly excluded as strangers, the prae tor admitted them to the possession of goods in that part of his edict, in which he gives the possession of goods on account of proximity: yet they are only admitted upon condition, that there is no agnate, or nearer cognate. But the law of the twelve tables did not introduce these dispositions; for that law, according to the plainness and simplicity, which are agreeable to all laws, called the agnates of either sex, or any degree, to succession, in the same manner as it admitted proper heirs. But the middle law, which was posterior to the law of the twelve tables, and prior to the imperial constitutions, subtly introduced the before-mentioned distinction, and initially repelled females from the succession of agnates, no other method of succession being known, till the praetors, correcting by degrees the aspersion of the civil law, or supplying what was deficient, added in their edicts a new order of succession, being induced to it by a motive of humanity; and, by introducing the line of cognation on account
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account of proximity, they thus assisted the females, and gave them the possession of goods, which is called unde cognati. But we, albo we have adhered to the law of the twelve tables, and strictly maintained it in regard to females, must yet commend the humanity of the prae tors, for they have not afforded a full remedy in the present case. But, since the same natural degree of relation, and the same title of agnation appertains as well to females as to males, what reason can be assigned, that males should be permitted to succeed all their agnati, and that no means of succession should be open to any female agnate, except a sister? We therefore, reducing all things to an equality, and making our disposition conformable to the laws of the twelve tables, have by our constitution ordained, that all legitimate persons, that is, descendants from males, whether male or female, shall be equally called to the rights of succession ab intestato according to the prerogative of their degree, and be by no means excluded, albo they possess not the rights of consanguinity in so near a degree as sisters.

Nostra constitutione fancimus.] Vid. Cod. 6. t. 58. l. finis. de legis. hæreditibus.

De filiis fororum.

§ IV. Hoc etiam addendum nostræ constitutioni existimavimus, ut transferatur unus tantummodo gradus a jure cognationis in legitimam successionem; ut non solum frater filius et filia (secundum quod jam definitius) ad successionem patrui sui vocentur, sed etiam germanae consanguineae vel fororis uterinæ filius et filia sibi, et non deinceps persona, una cum his ad jura avunculi sui perveniant : et, mortuo eo, qui patruus quidem est sui fratris filius, avunculus autem fororis siboboli, simili modo ab utroque latere succedant, tanquam si omnes ex masculis descendentes legitimo jure veniant; scilicet ubi frater et foror superstites non sunt ; (his etenim potissimus præcedentibus et successionem admittentibus, aesteri gradus remanent penitus fæoti;) videlicet hæreditate non in stripse, sed in capita, dividenda.

§ 4. We have farther thought it necessary to add a clause to our constitution, by which one degree is transferred from the line of cognation to the line of legitimate succession, i.e. of agnation: so that not only the son and daughter of a brother (according to our former definition of agnates) shall be called to the succession of their paternal uncle, but the son or daughter of a sister, who is either by the same father or by the same mother, may also be admitted with agnates to the succession of their maternal uncle; but no one of the descendents of the son or daughter of a sister is by any means to be admitted. And, when a person dies, who at his decease was both a paternal and maternal uncle, that is, who had nephews or nieces living both by a brother and by a sister, then such children succeed in the same manner, as if they were all descendents from males, when the deceased leaves no brother or sister, and they take the inheritance not per stripes, or according to their respective flocks, but per capita, i.e. by poll: but, if there are brothers or sisters, and they accept the succession, all others of a more remote degree are excluded.

Non in stripse sed in capita.] It appears from this section, that as yet brothers children were not allowed to represent their parents: for instance; if Sempronius had died intestate, leaving a brother, and children by two other brothers deceased; then, if the surviving brother

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had accepted the succession, the children of the deceased brothers, (i.e. the nephews of Sempronius) would have been entirely ousted; but, if the surviving brother of Sempronius had declined the inheritance, the children of the two deceased brothers would have been intitled to a distributive share of their uncle's estate per capita, that is, by poll; because they would then take suo quaque jure each in his own right and not by representation. But by Nov. 118. cap. 3. and Nov. 127. cap. 1. brothers and sisters children are allowed to represent their parents; and yet this representation is only permitted by the civil law to prevent exclusion, when the party deceased leaves a brother, and nephews by another brother; and then the uncle and nephews take per stirpes; for, when there are only nephews, there is no representation; and the distribution of the estate is consequently made per capita, each person taking in his own right. This is also the certain rule of distribution in England in the case of collaterals. vide. 22. Car. 2. Bacon's Abr. verb. executors and administrators. Abridgment of cas. in 29. pug. 149. Wakb. v. Wakb.

De proximis vel remotis.

§ V. Si plures sint gradus agnorum, aperte lex duodecim tabularum proximum vocat: itaque, si (verbi gratia) sint defuncti frater, et alterius fratris filius, aut patruus, frater potior habetur. Et, quamvis singulari numero usus, lex duodecim tabularum proximum vocet, tamen dubium non est, quin, si plures sint ejusdem gradus, omnes admittantur. Nam et proprie proximus ex pluribus gradibus intelligitur; et tamen non dubium est, quin, licet unus sit gradus agnorum, pertineat ad eos hereditatis.

§ 5. When there are many degrees of agnates, the law of the twelve tables calls stole, who are in the nearest degree: if therefore, for example, there is a brother of the deceased, and a son of another brother, or a paternal uncle, the brother is preferred. But, aliter the law of the twelve tables calls the nearest agnate in the singular number, yet it is not to be doubted, but that, if there are many, in the same degree, they ought all to be admitted. And, aliter properly the nearest degree must be understood to denote the nearest degree of many, yet, if there is but one degree of agnates, the inheritance must undoubtedly appertain to stole, who are in that degree.

Quo tempore proximitas spectatur.

§ VI. Proximus autem, si quidem nullo testamento facto quiscum deceferit, per hoc tempus requiritur, quo mortuus est is, cujus de hereditate quæritur; quod si facto testamento quiscum deceferit, per hoc tempus requiritur, quo certum esse cœperit, nullum ex testamento hereditem extirurum; tunc enim proprie quique intestatus duodecim aliquando longo tempore declaratur; in quo spatio temporis sœpe accidit, ut, proximiore mortuo, proximus esse incipiat, qui moriente testatore non erat proximus.

§ 6. When a man dies and leaves no testament, then that person is esteemed his proximate kinsman, who was the nearest of kin at the decease of the intestate. But, when the deceased hath actually made a testament, then that person is esteemed his nearest of kin, who was so at the time, when it became certain, that the testamentary heir had declined the inheritance; for, till then, a man, who hath made a testament, can not be said to have died intestate: and thus an intestacy does not sometimes become evident, till after a long time; in which space, the proximate kinsman being dead,
dead, it often happens, that he becomes the nearest of kin, who was not so at the death of the testator.

De successorio edito.

§ VII. Placebat autem, in eo genere percipiendarum hæreditatum successionem non esse; id est, ut quamvis proximus, quæ secundum ea, quæ diximus, vocatur ad hæreditatem, aut superest hæreditatem, aut antequam adeat, decesserit, nihil magis legitimo jure sequentes admittantur. Quod iterum preiores, imperfecto jure corrigentes, non in toto fine adminículo relinquebant, sed ex cognitorum ordine eos vocabant, utpote agnatonis jure eis recludio. Sed nos, nihil perfectiffimo juri deesse cupientes, nostra constitutio, quam de jure patronatus humanitate suggerente protulimus, fancimus, successionem in agnatorum hæreditatibus non esse eis denegandum; cum fatis absurdum erat, quod cognatis a pretero apertura eft, hoc agnatis esse recluffum; maxime cum in onere quidem tutelarum et primo gradu deficientes sequens succedtit; et, quod in onere obtinebat, non erat in lucro permittum.

§ 7. But it hath obtained as law, that there should be no succession among cognates; so that, if the nearest agnate is called to an inheritance, and hath either refused the bequest, or been prevented by death from entering upon it, his own legitime heir would not be admitted to succeed him. But this the preiores have in some measure corrected, and have not left the agnates of a deceased person wholly without assistance, but have ordered, that they should be called to the inheritance as cognates, because they were deprived from the rights of agnation. But we, being earnestly desirous to render our law as perfect and complete as possible, have ordained by our constitution, which, induced by humanity, we published concerning the right of patronage, “that legitimate succession should not be denied to agnates in the inheritances of agnates:” for it was sufficiently absurd, that a right, which by means of the praetor was open to cognates, should be shut up and denied to agnates: but it was more abundantly absurd, that, in tutelages, the second degree of agnates should succeed upon failure of the first; and that the same law, which obtained in that, which was onerous, should not also obtain in that, which was lucrative.

Successionem non esse.] Veluti; deessit aliquis intestatius, extante fratre, extante et patruo; frater vocabatur, nimium ut proximus; siigitur contin- gat, ut frater, aut, antequam adeat, decedat, aut hæreditatem repugnet, patruus aut agnatus venire non poterit, proprietas quod lex duodecim tabularum successionem nefitat; hæreditas igitur ad filiam deferte-
batur. Theop. b. 1.

Nostra constitutione.] This constitution is not to be found; nor would it be of use, if it was still extant, since the 118th Novel hath destroyed all distinction between agnates and cognates, and put them upon an equality.

De legitima parentum successione.

§ VIII. Ad legitimam successionem nihilominus vocatur etiam pares, qui contracta fiducia filium vel filiam, nepotem vel neptem, ac deinceps, emancipat. Quod ex nostra constitutione omnino inducitur, ut emancipationes liberorum semper videantur, quasi contracta fiducia, fieri; cum apud veteres non aliter hoc obtinebat, nisi specialiter contracta fiducia parentis manumississet.

§ 8.
§ 8. A parent, who hath emancipated a son or a daughter, a grandson or a grand-daughter, or any other of his lineal descendants under a fiduciary contract, is admitted to their legitimate succession. But it is now effected by our constitution, that every emancipation shall for the future be always regarded, as if it had been made under such a contract; alioquin among the antients the parent was never called to the legitimate succession of his children, unless he be actually emancipated them under a fiduciary contract.

Ex nostra constitutione. Cod. 8 t. 49. 1. 6. de emancipationibus liberorum. See also Book the 1st. t. 12. 1. 6. But Heiniccius is of opinion, that the compilers of the institutions refer in this place to some other constitution, which is not now extant. Videunt compositores hoc loco ad aliam reflexisse constitutionem, quam cum codice Justiniano interdicti, qua imperator Saxonius, ut postum fiduciem semper interpositum esse fingereetur, etiamque expresso interpositum non esset. Sed hoc constitutionem post legem ultimam Cod. de emanc. lib. non amplius quae fuerit; unde et omissa fuerit in codice repetita praecellentior. Ceterum omnino catenas exorsari nequeant compositores, quod, immemores novae sitius constitutionis, quos fecerint ab aliis jussis accommodati, scholaris et ab assensus et discriminibus memorati. Hein. b. 1.

TITULUS TERTIUS.

De senatus-consulto Tertylliano.


De lege duodecim tabularum et jure Praetorio.

Ex duodecim tabularum ita stricto jure utetatur, et præpondebat masculorum progeniem; et eos, qui per feminini sexus necessitudinem sibi junguntur, adeo expellebat, ut ne quidem inter matrem et filium filiamve ultimo citroque hæreditatis capienda juris daret; nisi quod praetores ex proximitate cognatorum eas personas ad successionem bonorum, possefionem unde cognati accommodata, vocabant.

Such was the rigor of the law of the twelve tables, that it preferred the issue by males, and excluded ibi, who were related by the female line, so that the right of succession was not permitted to take place reciprocally between a mother and her son, or a mother and her daughter. But the prætors, on account of the proximity of cognation, admitted ibi, who were related by the female line, to the succession, giving them the possession of goods, called unde cognati.

De constitutione Divi Claudii.

§ 1. Sed hæ juris angustiae posse emendata sunt; et primus quidem Divus Claudius matri, ad solutum liberorum amissorum, legitimam eorum detulit hæreditatem.

§ 1. But these narrow limits of the law were afterwards enlarged by the emperors Claudius, who first gave the legitimate inheritance of deceased children to their mothers, in affusion of their grief for so great a loss.

Liberorum amissorum.] It is probable, that this indulgence extended only to those mothers, whose children died in battle, or fell by the hand of the enemy. " Procul (emphatic) autem, (says " Heiniccius) hoc privilegium a Claudio non tam " omnibus feminis, quam quibusdam speciali beneficio, " esse, concussum est.}
Lib. III.  Tit. III.

Ad Senatus-consultum Tertullianum. De jure liberorum.

§ 2. Postea autem senatus-consulto Tertulliano, quod Divi Adriani temporibus factum est, pleniffime de tri'di successione matri, non etiam avae, referenda cautam est; ut mater ingenua trium liberorum jus habens, libertina quatuor, ad bona filiorum filiarumque admittatur intestato mortuorum, licet in potestate parentis sit; ut scilicet, cum alieno juri subjecta est, jus ejus adeo hæreditatem, cujus juri subjecta est.

§ 2. But afterwards by the Tertullian senatus-consultum, made in the reign of Adrian, the emperor, the fullest care was taken, that the succession of children should pass to their mother, though not to their grand-mother: so that a mother, who is born of free parents, and has the right of three children, and also a libertine or freed-woman, who has the right of four children, may be admitted, alioquin they are under the power of a parent, to the goods of their sons or daughters, dying intestate. But, when a mother is under power, it is required, that she should not enter upon the inheritance of her children, but at the command of him, to whom she is subject.

Divi Adriani temporibus. i. e. about an hundred years after the constitution of Claudius: for Tiberius Claudius Cæsar began to reign in the year of Christ 16, and Adrian did not begin his reign till the year of Christ 120. Mynfinger.

Non etiam avae. The Tertullian decree probably flapped here out of reverence to the old law; but Justinian proceeded farther, by admitting the grandmother and other ascendants to the succession. vid. Nov. 118. cap. 2.

Qui præferuntur matri, vel cum ea admittuntur.

§ III. Praefrentur autem matri liberi defuncti, qui suæ sunt, quive suorem loco sunt, sine primi gradus, sine ulterioris. Sed et filiæ suæ mortuae filius vel filia preponitur ex constitutionibus matri defunctae, id est, avae suæ. Pater vero utriusque, non etiam avus et proavus, matri antepositur; scilicet cum inter eos solos de hæreditate agitur. Frater autem confanguineus tam filii, quam filiae, excludebat matrem; foror autem confanguineae pariter cum matri admittebatur. Sed, si fuerant frater et foror confanguinei, et mater liberis onerata, frater quidem matrem excludebat; communis autem erat hæreditas ex æqualibus partibus fratibus et fororibus.

§ 3. But, when a deceased son leaves children, who are proper heirs, or in the place of proper heirs, either in the first or an inferior degree, they are preferred to the mother of such deceased son. And the son, or daughter, of a deceased daughter is also preferred by the constitution to the mother of the deceased daughter; i. e. to their grand-mother. Alsó the father of a son, or daughter, is preferred to the mother; but a grand-father or great-grand-father is not preferred to the mother, when the inheritance is contested for by these only without the father. Alsó the confanguineus brother either of a son or a daughter excluded the mother; but a confanguineus sister was admitted equally with her mother. But, if there had been both a brother and a sister of the same blood with the deceased, the brother of the deceased excluded his mother, alioquin she was honored with the privilege of those, who have children: But the inheritance, in this case, was always divided in equal parts between brothers and sisters.

Sorum.
Lib. III. Tit. III.

Suorum loco sunt.] Emancipated children by the praetorian law, and by the constitutions grand-children and great-grand-children by a daughter, are numbered in loco suorum, i.e. in the place of proper heirs. Vide t. 1. sect. 15. of this book.

Ex constitutibus.] Si, matre superbi, filius vel filia, qui quasse moritur, filias deleriquit, omnimoda patri suo, matrissae sua, ipso jure sucedcant; quod sine dubio et de prœnuptibus observandum esse confenus. Cod. 6. t. 54. l. 11. Cod. 6. t. 57. l. 4. ad senatus-consultum Orficanum.


Jus novum de jure liberorum subjacet.

§ IV. Sed nos constitutio, quam in codice, nofro nomine decora to, possumus, matri subveniendiu esse existimavimus, replicientes ad naturam, et puerperium, et periculum, et fæpe mortem ex hoc causam matribus illatam. Ideoque impium esse credidimus, casum fortuitum in ejus admittere detrimentum. Si enim ingenua ter, vel libertina quater, non pepererit, immemio de fraudabatur succussionem suorum liberorum. Quid enim peccavit, si non plures, sed paucos, peperit? Et dedimus jus legitimum plenum matribus, five ingenuis five libertinis, eti non ter enixæ fuerint vel quater, sed eum tantum vel eam, qui quæve morte intercepti sunt, ut sic vocentur in liberorum suorum legitimam succussionem.

§ 4. But by a constitution, which we have inserted in the code, and honored with our name, we have thought proper, that mothers should be favored in regard to the law of nature, on account of their pains in child-bearing, their great danger, and death itself, which they often suffer; we therefore have esteemed it to be highly unjust, that the law should make that detrimental, which is in its nature merely fortuitous; for, if a married woman, who is free-born, does not bring forth three children, or if a freed-woman does not become the mother of four children, can such persons, for that reason only, be with justice deprived of the succession of their children? for how can a failure of this nature be imputed to them, as a crime? We therefore, not regarding any fixed number of children, have given a full right to every mother, whether ingenuus or a freed-woman, of being called to the legitimate succession of her child or children deceased, whether male or female.

Sed nos constitutio.] Cod. 8. de jure liberorum. t. 59. l. 2.

Quibus mater praebitur, et quibuscum admittitur.

§ V. Sed, cum antea constitutiones, jura legitimæ successionis percru tantes, partim matrem adjuvabant, partim eam praegravabant, nec in solidum eam vocabant, sed, in quibusdam caibus tertiam ei partem abfrerantes, certis legitimis dabant perfonis, in aliis autem contrarium faciebant, nobis visum est, recta et simplici via matrem omnibus perfonis legitimis anteponi, et fineulla diminutione filiorum suorum successionem accipere; excepta fratris et fororis persona, (five confanguieni sint, five sula cognitionis jura habentes) ut quemadmodum eam toti aliis ordini legitimo præposuimus, ita omnes fratres et forores, (five legitimi sint, five non,) ad
ad capiendas hæreditates simul vocemus: ita tamen ut, si quidem sœlo forores, agnate vel cognate, et mater defuncti vel defunctæ superint, dimidiam quidem mater, alteram vero dimidiam partem omnes forores habent. Si vero, matre superfite, et fratre vel fratrisus sœlis, vel etiam cum fororibus, sive legítima sive cognationis jura habentibus, inteñatus quis vel inteñata moriatur, in capita ejus distribuatur hæreditas.

§ 5. But, in examining the constitutions of former emperors, relating to the right of succession, we observed, that these constitutions were partly favorable to mothers and partly grievous; not always calling them to the entire inheritance of their children, but in some cases depriving them of a third, which was given to certain legitimate persons; and in other cases, doing the contrary; i.e. allowing the mother a third only. It hath therefore seemd right to us, that mothers should receive the succession of their children without any diminution, and that they should be exclusively preferred before all legitimate persons, except the brothers and sisters of the deceased, whether they be consanguine, or only cognate: But, as we have preferred the mother to all other legitimate persons, we are willing to call all brothers and sisters, legitimate or otherwise, to the inheritance together with the mother: yet in such manner, that, if only the sisters, agnate or cognate, and the mother of the deceased survive, the mother shall have one half of the effects, and the sisters the other. But, if a mother survives, and also a brother or brothers, or brothers and sisters, whether legitimate or cognate, then the inheritance of the intestate son or daughter must be distributed in capite; i.e. must be divided into equal shares.

Cum antea constitutiones.] vid. l. 1, 2, et postul. Cod. Theod. de legit. hæred. Partim matrem.] Exempli gratia; "si consignisset, ut quis dedeceret relinquens matrem, "juris liberorum cohonestatam, superest autem et patruus, qui est legitimus, aut patruus "filius, mater sibi capiebat uncias, quod beiem hæreditatis; patruus autem ejus eius trium "centem; hoc est, quatuor uncias. Quod si ex contrario jus liberorum mater non habuisset, "tunc patruus aut filius ejus beiem hæreditatis "capiebat, at mater trium centum." Theob. b. 1.

Ita tamen, &c.] "Quo sequitur pertinent ad "modum sucedendi, sive rationem distribuen- "dæ hæreditatis inter materem defuncti, ejusque "fratres et forores. Conslituit autem impera- "tor, ut, si cum mater concurrens forores fo- "læ, sive consanguineae ueterinae, duo semifës sint, quorum unum mater, alterum "forores capiant; sin fratres, fœli, fœle, fœle, "etiam cum fororibus, in capita hæreditas di- "vidatur, toque partes sint, quot sunt perfo- "ræ succedentium. Cod. 6. t. 56. t. 7. Hæc "itterum mutata sunt Novell. 118. qua fratres et "forores omnes, ex uno tantum latere defunctor "conjunctori, tam a mater, quam a fratibus "utrique conjuncti, excluuntur; mater cum "his ex æquis partibus sucedidit. Vim. b. 1.

But in England, the civil law takes place almost in the same manner, as it prevailed before the novel constitution: for brothers and sisters by the half blood take equally with brothers and sisters by the whole blood; so that, if a man, whose father is dead, dies intestate, and is survived by a mother and by brothers and sisters, or by brothers only, or sisters only, then the mother, and the brothers and sisters, will all be intitled to take an equal share per capita, whether such brothers and sisters were related to the deceased by the whole blood, or by the half blood only. 1 Mod. 209. 1 Jac. 2. cap. 17.

De tutore liberis petendo.

§ 6. Sed, quemadmodum nos matribus prospeemosus, ita eas oportet sue soboli consilere; scituris eis, quod, si tutores liberis non petierint, vel in locum remoti vel excusati intra annum petere neglexerint, ab eorum impuberum morientium succellione merito repellentur.
§ 6. As we have taken a particular care of the interest of mothers, it behoves them in return to consult the welfare of their children. Be it known therefore, that, if a mother shall neglect, during the space of a whole year, to demand a tutor for her children, or shall neglect to require a new tutor in the place of a former, who hath either been removed or excused, she will be deservedly repelled from the succession of such children, if they die within puberty.

De vulgo quæstis.

§ VII. Licet autem vulgo quæstus sit filius filiave, potest tamen ad bona ejus mater ex Tertulliano senatus-consulto admitti.

§ 7. Altera a fove or a daughter is of spurious birth, yet the mother, by the Ter-
tyllian senatus-consultum, may be admitted to succeed to the goods of either.

TITULUS QUARTUS.

De senatus-consulti Orficiano.


Origo et summa senatus-consulti.

Per contrarium autem liberi ad bona matrum inteftatarum ad-
mittuntur ex senatus-consulo Orficiano, quod, Orficio et Rufo con-
fulibus, effectum est Divi Marci temporibus; et data est tam filio, quam
filiae, legitima hereditas, etiam si alieni juri subjici sint; et preferuntur
confangueinis et agnatis defunctæ matris.

On the contrary children are reciprocally admitted to the goods of their infeitate
mothers, by the Orfician senatus-consultum, which was enacted in the consulate of
Orfucius and Rufus, in the reign of the emperor Marcus Antoninus; and, by this decree,
the legitimate inheritance is given both to sons and daughters, altbo' they are under pow-
er; and they are also preferred to the consanguine brothers, and to the agnates, of their
decayed mother.

Per contrarium.] "Lege duodecim tabula-
rum, nec mater libris nec liberi matris ab in-
tefato sucedeant; nam duo duxaurat gene-
da lex agnoscatur, suos hæredes et agnatos;
cujusmodi nec mater libris, nec illi libri
funt. Caesarum, cum placitum est hoc dare
naturali conjunctioni, ut mater vocaretur ad le-
gitimam successionem filii et filiae, aequum
erat, ut retro tantundem etiam concederetur
liberia, ut fìciliéct et hì vicifìmmus legítima;
successionis confèquentur in bonis matris:
cum adeo liberorum conditio in caufa succe-
fìonis etiam potior esse debeat, propter na-
ræ fìmul et parentem commune votum. Id
vero effectum est senatus-consulo Orficiano
vìginti ferme annis postea, quam matris legi-
tima hereditas delata fuerat senatus-consulfo
Tertulliano, ut ex Fastis colligitur. Cur ma-
tri tanto tempore ante consulturn fuerit, quam
liberis, caufam ignorare me fateor. \Vine.
Maxime autem probabilis est ratio, quam
reedit Schultingius, quod mater, sì vellet, pie-
tatis officio per tefamentum poftef satisfac-
tere id, quod per aetatem libris fepe haud
licuerit."

Orficio et Rufo Cos.] Anno ab urbe con-
dita 930, qui vigesimae annis est a consulatu
Flavii Terthii, a quo senatus-consulum Teryyllia-
num.

Preferuntur consangueinis.] Pleniore jure voc-
cantur filius et filia ad hereditatem matris ex
Orficiano, quam mater ad illorum hereditatem
ex Tertulliano. \vide f. 30. supra tit. praen. De
De nepote et nepte.

§ 1. Sed, cum ex hoc senatus-consulto nepotes et nepotes ad aviae successionem legitimo jure non vocarentur, postea hoc constitutionibus principalibus emendatum est, ut, ad similitudinem filiorum filiarumque, et nepotes et nepotes vocentur.

§ 1. But, since grandsons and grand-daughters were not called by the senatus-consultum to the legitimate succession of their grand-mother, the omission was afterwards supplied, by the imperial constitutions; so that grandsons and grand-daughters were called to inherit, as well as sons and daughters.

Constitutionibus principalibus.] The Tertiary decree conferred upon mothers the right of legitimate succession to their children; and the Orfician decree gave children the same right in regard to their mothers: but neither of these decrees went farther out of reverence to the old law; so that hitherto grand-mothers were called to the succession of their grand-children; and grand-children to the succession of their grand-mothers, by the indulgence of the prator only; i.e. per honorum possessionem unde cognati, and in default of cognates. ff. 38. t. 8. But the emperors, Valentinian, Theodosius, and Arcadius, called grandsons and grand-daughters to the succession of their grand-mothers; prohibiting them nevertheless to take more than two thirds of that sum, to which their father or mother would have been intitled. l. 4. Cod. Theod. de leg. hered. But the emperor Justinian, by his 118th Novel, cap. 1, makes the condition of all children equal, when they succeed their parents upon an intestacy. And, by the 2d chapter of the same Novel, the emperor calls also the grand-mother to the succession of her grand-children.

De capitis diminutione.

§ 2. But it must be observed, that those successions, which proceed from the Tertiary and Orfician senatus-consulto, are not extinguished by diminution. For it is an established rule, that new legitimate inheritances are not destroyed by diminution; but that it affects only those inheritances, which proceed from the law of the twelve tables.

De vulgo quæstitis.

§ 3. It is lastly to be noted, that even illegitimate children are admitted by the Orfician senatus-consultum to the inheritance of their mother.

Qui vulgo quæstiti sunt.] The vulgo quæstiti are those, whom the law emphatically calls spurious, their father being uncertain and not known; but the mother, who is always certain, is allowed to succeed even her spurious issue; which is not permitted in England, where a bastard is reckoned as a terminus a quo, and the first of his family; he can therefore have no heir but of his body, and is deemed in law to have no consanguine relations, except his children; yet this must be understood, as to civil purposes; for, as to moral purposes, his natural relation to ascendants and collaterals is regarded by the law, which will not suffer such a person to marry his mother, or his base father. 3 Salk. 66, 67.

Ad matris hereditatem.] The vulgo quæstiti, or spurious children, are allowed to succeed their mother, unless she is a person of illustrious birth, having lawful children; for, if she has no lawful children, her illegitimate issue will succeed
De jure accrescendi inter legitimos hæredes.

§ IV. Si ex pluribus legitimis hæredibus quidam omiserint hæreditatem, vel morte, vel alia causa, impediti fuerint, quominus adeant, reliquis, qui adierint, accrescit illorum portio; et, licet ante deceperint, ad hæredes tamen eorum pertinent.

§ 4. When there are many legitimate heirs, and some renounce the inheritance, or are hindered from entering upon it by death, or any other cause, then the shares or portions of such persons fall by the right of accretion to those who have accepted the inheritance; and, also, the acceptors happen to die even before the refusal or the failure of their coheirs, yet the portions of such coheirs will appertain to the heirs of the acceptors of the inheritance.
LIB. III. · TIT. V.

TITULUS QUINTUS.

De successione cognatorum.

Tertius ordo succedentium ab intestato.

POST suos hæredes, eosque, quos inter suos hæredes prætor et constitutiones vocant, et post legitimos, (quorum numero sunt agnati, et hi, quos in locum agnatorum tam supradicta senatus-consulta, quam nostra erexit constitution, proximos cognatos prætor vocat.

After the proper heirs and those, whom the prætor and the constitutions call to inherit with the proper heirs, and after the legitimate heirs (among whom are the agnati, and those, whom the above mentioned senatus-consulta and our constitution have numbered with the agnati) the prætor calls the nearest cognates, observing the proximity of relation.

Post suos hæredes.] "Lex antiqua duodecin tabularum duos tantum hæredem ab intestato ordines fecit, suorum et agnatorum. Nove leges et senatus-consulta non addiderunt qui dem ordinem novum, sed personas quasdam, quæ nec hæredes, nec agnati, revera sunt, suorum hæredem et agnatorum numero eſſe voluerunt, atque in ordine suorum vel agnatorum, una cum vere suis hæredibus aut agnatis, ad hæreditatem intestatae admitteri. In ter suos hæredes novæ leges numerant, fuiſque per omnia exaudiunt, liberos legitimatos; inter eodem quoque, et simul cum iis, vocant nepotes et prænepotes ex sexu feminino; in agnatorum ordinem senatus-consultum transulerunt matrem et liberos: Juſtinius frates et forores uteros, eorumque et fororum consanguinarum filios et filias: Anathæsius fratres et forores emancipatos. Prætor vero tres succedentium ab intestato ordines fecit; primum liberorum; (non dixit suorum, quæ ex liberis vocat etiam non suos; alterum legitimorum, in quo vocantur agnati et jura agnationis habentes, ex posteriormibus legibus aut ex senatus-consultis; tertium cognatos, in quo admissit omnes, quos sola familia gainis ratio vocat ad hæreditatem, licet iure civili deficient; item eos, qui, quod prioribus ordinibus exclusi essent, ex nullo ab eo capite venire poterant. Tandem Justinianus cognatos omnes etiam hæredes legitimos fecit, ad empta agnatis omni praerogativa. Nov. 118. Vinn.

Qui vocantur in hoc ordine. De agnatis capite minutis.

§ 1. Qua parte naturalis cognatio spectatur. Nam agnati capite diminuunt, quæque ex his progeniti sunt, ex lege duodecin tabularum inter legitimos non habentur, sed a prætore tertio ordine vocantur; exceptis solis tantummodo fratre et forore emancipatis, non etiam liberes eorum, quos lex Anathæsiana cum fratibus integri juris constitutis vocat quidem ad legitimam fratris hæreditatem, five fororis, non æquos tamen partibus sed cum aliqua diminutione, quam facile est ex iphis constitutionis verbis intelligere. Aliis vero agnatis inferioris gradus, licet capitis diminutionem passi non sunt, tamen anteponit eos, et procul dubio cognatis.

§ 1. By the law of the twelve tables, neither the agnates, who have suffered diminution, nor their issue, are esteemed legitimate heirs; but they are called by the prætor in the third order of succession: we must nevertheless except a brother and sister, alike they are emancipated, but not their children; for the constitution of Anathæsius calls an emancipated brother or sister to the succession of a brother or sister.
LIB. III.  TIT. V.

§ II. Eos etiam, qui per feminini sexus personas ex transferro cognitione junguntur, tertio gradu proximitatis nomine praetor ad successionem vocat.

§ 2. Theses also, who are collaterally related by the female line, are called by the praetor in the third order of succession, according to their proximity.

Eos etiam.] The 118th Novel of Justinian contains the ancient law between agnatis and cognation.

De liberis datis in adoptionem.

§ III. Liberi quoque, 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.

De vulgo quæstis.

§ IV. Vulgo quæsitos nullos habere agnatos, manifestum est; cum agnatio a patre sit, cognatio a matre; hi autem nullum patrem habere intelligentur. Eadem ratione ne inter se quidem possum videri consanguinei effe; quia consanguinitatis jus species est agnationis. Tantum ergo cognati sunt sibi, scilicet et matri cognati sunt. Itaque omnibus illis ex ea parte competit bonorum possessorio, qua proximitatis nomine cognati vocantur.

§ 4. It is manifest, that base born children have no agnates; in so much as agnation proceeds from the father, cognation 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 the bastard children of the same woman; because consanguinity is a species of agnation. They can therefore only be allied to each other as they are related to their mother, that is, by cognation; and it is for this reason, that all such children are called to the possession of goods by that part of the prætorian clã, by which cognates are called by the right of their proximity.
Ex quo gradu vel agnati vel cognati succedunt.

§ V. Hoc loco et illud necessario admonendi sumus agnationis quidem jure admiti aliquem ad hereditatem, et si decimo gradu sit; fivé de lege duodecim tabularum quaeramus, fivé de edicto, quo prætor legitimis hereditibus daturum se bonorum possessorum populos sit. Proximitatis vero nomine ipsis prætor promittit bonorum possessorum, qui usque ad sextum gradum cognationis sunt, et ex septimo a fœrino fœrino natâ et natâ.

§ 5. In this place it will be necessary to observe, that any person may, by the right of agnation be admitted to inherit, alioquin he is in the tenth degree; and this is allowed both by the law of the twelve tables, and the edict, by which the prætor promises, that he will give the possession of goods to the legitimate heirs. But the prætor promises the possession of goods to cognates, only as far as the sixth degree of cognation, according to their right of proximity; and in the seventh degree, to ibi cognates only, who are the descendents of a cousin german.

Utile ad sextum gradum cognationis.] It is not easy to determine what should induce the prætor to fix upon the sixth rather than the fifth or any other degree; and, concerning this, the writers have differed much in their opinions. But all, except Hoffman, agree, that the difference in the limits of succession between agnates and cognates hath ceased, since the distinction between agnation and cognation was abolished by Novell 118. Taking it then for granted, that cognates can be called in as distant a degree as agnates, the next question will be, whether agnates can succeed in a more distant degree, than the tenth; which some deny; and urge, that Justinian would not have named the tenth degree, if agnates could have been admitted in a degree beyond it; and that, unless some period had been put to the succession of agnates, the third and the fourth degree of succession, in which are husband and wife, could never or very rarely be admitted; and from hence they conclude, that, tho' in consequence of the 118th Novell, both agnates and cognates must now be admitted without distinction, according to their proximity, yet this must be in the tenth degree, and not beyond it; and of this opinion are Mansfînger, Föhrer, Weschenbra, and others. But the words of Justinian, in the 3d sect. of the 2d title of this book, very strongly evince the contrary. v. g. Inter mosculus quidem agnationis jure hereditatis, etiam longissimo gradu sunt, ultra citroque captiur, &c. And again, in paragraph the 1st, tit. 7. of this book, the emperor writes thus — Amatis suis hereditibus, agnati, etiam longissimo gradu, plerumque potior habuerunt. Quam proximitatem cognatis, tit. 7. de fœlis et cognationes. This is also the doctrine of the law of the twelve tables, which declares generally, without specifying any limits, that upon a failure of proper heirs, the nearest agnate shall succeed. And, as to the before-mentioned arguments, they may be answered without much difficulty; for we may safely pronounce, that the words decimo gradu are not here used determinately, but merely for the sake of giving an example. Non enim (says Vinny) cœdum modo de agnatis et cognatis imperator loquitur; de agnatis non loquitur determinatim; sed ait, eos succedere, eis decimo gradu sunt, uti res datum et certo numero pro incerto. De cognatis contra loquitur determinativè; ait enim, eos succedere usque ad sextum gradum. And, to the second argument, it may be answered, that a deceased person may leave no agnates by means of emancipation, or that his agnates, as such, may be ouled of their succession, by the death or refusal of the nearest agnate. See sect. 7. t. 7. lib. 3. So that there is no great reason to fear, that the third and fourth order of succession would have been always excluded by allowing agnates to succeed in the most distant degree. It therefore follows upon the whole, that cognates and agnates are now called to succeed equally, according to their proximity, and without any limitation.
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De gradibus cognitionum.

Continuatio, et cognitionis divisiō.

Hoc loco necessarium est exponere, quemadmodum gradus cognitionis numerentur. Quare in primis admonendi sumus, cognitionem aliam supra numerari, aliam infra, aliam ex transverso, que etiam a latere dicitur. Superior cognitionis est parentum: inferior liberorum: ex transverso fratrum sororumve, et eorum, qui quæve ex his generantur; et conveniencer patru, amite, avunculi, matertera. Et superior quidem et inferior cognitionis a primo gradu incipit; at ea, quæ ex transverso numeratur, a secundo.

It is necessary in this place to show how the degrees of cognition are to be computed: and first we must observe, that there is one species of cognition, which relates to ascendants, another to descendents, and a third to collateral. The first and superior cognition is that relation, which a man bears to his parents— the second, or inferior, is that, which he bears to his children— and the third is that relation, which he bears to his brothers and sisters, and their issue; and also to his uncles and aunts, whether paternal or maternal. The superior and inferior cognition commences at the first degree; but the transverso or collateral cognition commences at the second.

De primo, secundo, et terto gradu.


§ 1. A father, or a mother, is in the first degree in the right line ascending: and a son, or a daughter, is also in the first degree in the right line descending. A grand-father, or a grand-mother, is in the second degree in the right line ascending: and a grandson, or grand-daughter, is in the second degree in the right line descending: and a brother, or a sister, is also in the second degree in the collateral line. A great-grandfather, or a great-grandmother, is in the third degree in the right line ascending: and a great-grandson, or great-grand-daughter, is in the third degree in the right line descending: and the son or daughter of a brother or sister is also in the third degree in the collateral line, and by a parity of reasoning an uncle, or an aunt, whether paternal or maternal, is also in the third degree. A paternal
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...uncle, called paterus, is a father's brother; a maternal uncle, called avunculus, is a mother's brother; a paternal aunt, called amita, is a father's sister; and a maternal aunt, called matertera, is a mother's sister. And each of these persons is called in Greek ἃτεος or ἄτεξ promiscuously.

Primo gradu eff supra pater.] In England all relationship, as far as personal estate only is concerned, is measured according to the computation of degrees by the civil law.

Quartus gradus.

§ II. Quarto gradu supra abavus, abavia: infra abnepos, abneptis: ex transferio fratis sororifique nepos neptive: et convenienter patruus magnus, amita magna, id est, avi frater et foror: item avunculus magnus et matertera magna, id est, aviae frater et foror: confobrinus, confobrina, id est, qui quaeve ex fororibus aut fratribus procreantur. Sed qui dam recte confobrinos eos proprii dicio putant, qui ex duabus fororibus prognerantur, quasi confororinos: eos vero, qui ex duobus fratribus prognerantur, propri frateres patruoe vocati: si autem ex duobus fratribus filiae nascuntur, forores patruoe appellari. At eos, qui ex fratre et forore prognerantur, amitinos proprii dicio putant. Amitae tuae filii confobrinum te appellant, tu illos amitinos.

§ 2. A great-great-grand-father, or a great-great-grand-mother, is in the fourth degree in the right line ascending; and a great-great-grandson, or a great-great-grand-daughter, is in the fourth degree in the right line descending. Also, in the transverse or collateral line, the grandson, or the grand-daughter, of a brother or a sister, is in the fourth degree; and consequently a great uncle, or great aunt, paternal or maternal, is in the fourth degree: and also cousins german, who are called confobrinus. But some have been rightly of opinion, that the children of sisters are only properly called confobrinus, quasi confororini; that the children of brothers are properly called frateres patruoe, or brothers patruel, if males, and forores patruoe, or sisters patruel, if females; and that, when there are children of a brother, and children of a sister, they are properly called amitini, but the sons of your aunt by the father's side call you confobrinus, and you call them amitini.

Confobrinus confobrina.] It will be necessary to explain the following terms of relation before we proceed. — Confobrini and Confobrina denote cousins german in general; i.e. brother's and sister's children. — Frateres patruoe and forores patruoe signify cousins german, when they are the sons or daughters of brothers. — Confobrini and Confobrina in a limited and strict sense denote cousins german, who are the children of two sisters, quasi confororini. — Amitini and amitine are cousins german, who are the children of a brother on the one side and a sister on the other. — Sobrini and sobrina note the children of cousins german in general. — Proprie sobrino and propri sobrina denote the son or daughter of a great-uncle or great-aunt, paternal or maternal.

Quintus gradus.

§ III. Quinto gradu supra atavus, atavia: infra atnepos, atneptis: ex transferio fratis sororifique pronepos, proneptis: et convenienter propatruus, proamita, id est, proavi frater et foror: et proavunculus et pro-matertera, id est, proaviae frater et foror: item fratis patruelis, vel foror.
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ris patruelis, confobrini et confobrineae, amitini et amitinae filius, filia: proprior frbrino, proprior sobrina; hi sunt patrui magni, amitae magnae, avunculi magni, materterae magnae filius, filia.

§ 3. A great-grand-father's grand-father, or a great-grand-father's grand-mother, is in the fifth degree in the line ascending, and a great-grandson, or a great-granddaughter, of a grand-son or a grand-daughter is in the fifth degree in the line descending. And, in the transverse or collateral line, a great-grandson, or a great-grand-daughter, of a brother or sister, is also in the fifth degree: and consequently a great-grand-father's brother or sister, or a great-grand-mother's brother or sister, is in the fifth degree. The son or daughter also of a cousin german is in the fifth degree; and so is the son or daughter of a great uncle or great aunt, paternal or maternal; and such son, or daughter, is called proper fbrino and proper sobrina.

Sextus gradus.

§ IV. Sexto gradu supra tritavus, tritavia: infra trinepos, trineptis: ex transverso fratris sororisque abneos, abneptis: et convenienter abpatruus abamita, id eft, abavi frater et soror: abavunculus, abmatertara, id eft, abavi frater et soror: item propatriui, proamitae, proavunculi, promaterterae filius, filia: item propius frbrino sobrinate filius, filia: item confobrini confobrineae nepos, neptis: item sobrini, sobrine; id eft, qui quaeve ex fratibus vel sororibus patruelibus, vel confobrinis, vel amitiniis, prognerantur.

§ XV. A great-grand-father’s great-grand-father, or a great-grand-father’s great-grand-mother, is in the sixth degree in the line ascending; and the great-grandson, or great-grand-daughter of a great-grandson, or a great-grand-daughter, is likewise in the sixth degree in the line descending. And, in the transverse or collateral line, a great-great-grandson, or a great-great-grand-daughter, of a brother or sister, is also in the sixth degree: and consequently a great-great-grand-father’s brother or sister, and a great-great-grand-mother’s brother or sister, is in the sixth degree. And the son or daughter of a great-great-uncle, or great-great-aunt, paternal or maternal, is also in the sixth degree; and so also is the son or daughter of the son or daughter of a great-uncle or great-aunt, paternal or maternal. The grandson also, or the grand-daughter, of a cousin german is in the sixth degree; and in the same degrees between themselves, we reckon the sobrini and the sobrine; that is, the sons and daughters of cousins german in general, whether such cousins german are born of two brothers, or of two sisters, or by a brother and a sister.

De reliquis gradibus.

§ V. Haecenius ostendit sufficit quemadmodum gradus cognationis numerentur: namque ex his palam eft intelligere, quemadmodum ulteriores quoque gradus numerare debemus: quippe semper genera persona gradum adicit; ut longe facilius fit respondere, quo quoque gradu sit, quam propria cognationis appellatione quemquam denotare.

§ 5. It is sufficient to have shewed thus far, how the degrees of cognition are enumerated: and, from the examples given, it is evident in what manner we ought to compute the more remote degrees; for every person generated always adds one degree; so that it is much easier to determine, in what degree any person is related to another, than to denote such person by a proper term of cognition.

§ VI.
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De gradibus agnationis

§ VI. Agnationis quoque gradus eorum modo numerantur.

§ 6. The degrees of agnation are enumerated in the same manner, as the degrees of cognition.

De graduum descriptione.

§ VII. Sed, cum magis veritas oculata vide, quam per aures animis hominum, insigatur, ideo necessarium duximus, post narrationem graduum, eos etiam praebent libro inscribi, quatenus possint et auribus et oculorum inspectione adolescentes perfectissimam graduum doctrinam adi- pisci.

§ 7. But as truth is fixed in the mind much better by the eye, than by the ear, we have therefore thought it necessary to subjoin, to the account already given, a table with the degrees of cognition inscribed upon it; that the student, both by bearing and seeing, may attain a most perfect knowledge of them.

TITULUS SEPTIMUS.

De servili cognitione.


ILLUD certum est, ad serviles cognitiones illum partem edicti, qua proximitatis nomine bonorum possession promittitur, non pertinere: nam nec ullam antiquam lege talis cognition computabatur. Sed nostra constitutione, quam pro jure patronatus fecimus, (quod jus usque ad nostra tempora statis obsercunt atque nube plenam, et undique confusum fuerat,) et hoc humanitate suggeree concefimus, ut, si quis, in servili constitutione confortio, liberum vel liberos habuerit, sive ex libera sive ex servili conditionis muliere, vel contra serva mulier ex libero vel servo habuerit liberos cujuscumque sexus, et, ad libertatem his pervenientibus, ii, qui ex servili ventre nati sunt, libertatem meruerint, vel, dum mulieres liberæ erant, ipse in servitute eos habuerint, et postea ad libertatem pervenerint, ut hi omnes ad succeffionem patris vel matris veniant, patronatus jure in hae parte sopito. Hos etenim liberos non solum in suorum parentum successionem, sed etiam alterum in alterius successionem mutuam, vocavimus; ex illa lege specialiter eos vocantes, sive soli inveniantur, qui in servitute nati et postea manumissi sunt; sive una cum aliis, qui post libertatem parentum concepti sunt; sive ex eodem patre, sive ex eadem matre, sive ex aliis nuptiis; ad similitudinem eorum, qui ex justis nuptiis procreati sunt.
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It is certain, that the part of the edict, in which the possession of goods is promised, according to the right of proximity, does not relate to servile cognition; neither hath such cognition been regarded by any ancient law. But, by our own constitution, concerning the right of patronage, which right was heretofore obscure, and every way confused, we have ordained (humanity so suggesting) that, if a slave shall have a child, or children, either by a free-woman, or by a bond-woman, with whom he lives in contubernio, and, on the contrary, that, if a bond-woman shall have a child, or children, of either sex by a freeman, or by a slave, with whom he lives in contubernio, and such father and mother are afterwards manumitted, the children shall succeed to their father or mother, no regard being paid to the right of patronage. And we have not only called these children to the succession of their parents, but also to succeed each other mutually, whether they are sole in succession; having all been born in servitude and afterwards manumitted, or whether they succeed with others, who were conceived after the manumission of their parents, and whether they are all by the same father and mother, or by a different father, or a different mother. And, in brief, we have been willing, that children born in slavery, and afterwards manumitted, should succeed in the same manner, as those, who are the issue of parents legally married.

Sed nostra constitutio.] This constitution is not extant.

Collatio ordinum et graduum.

§ I. Repetitis itaque omnibus, quae jam tradidimus, appareat non semper eos, qui parem gradum cognationis obtinent, pariter vocari: eoque amplius, ne eum quidem, qui proximior sit cognatus, semper potiorem esse. Cum enim prima causa sit suorum hæredum, et eorum, quos inter suos hæreses enumeravimus, appareat, pronepotem vel abnepotem defuncti potiorem esse, quam fratrem, aut patrem, aut matrem defuncti: cum alioqui pater quidem et mater (ut supra quoque tradidimus) primum gradum cognationis obtineat, frater vero secundum, pronepos autem tertio gradu sit cognationis, et abnepos quarto: nec interea, in poteftato morientis fuerit, an non, quod vel emancipatus, vel ex emancipato, aut femineo sexu, propagatus est. Amoris quoque sui hæredibus, et quos inter suos hæreses vocari diximus, agnatus, qui integrum jus habet agnationis, etiam si longissimo gradu sit, plerumque potior habetur, quam proximior cognatus: nam patrui nepos vel pronepos avunculo vel mateternæ praefertur. Toties igitur dicimus, aut potiori haberi eum, qui proximiores gradum cognationis obtinet, aut patrici vocari eos, qui cognati sunt; quoties neque suorum hæredum, quique inter suos hæreses sunt, neque agnationis jure aliquis praeferrit debeat, secundum ea, quæ tradidimus: exceptis fratre et forore emancipatis, qui ad successionem fratrum vel sororum vocantur; qui, et si capite diminuti sunt, tamen praeferruntur cæteris ulterioris gradus agnatis.

§ II. By what we have already said, it appears, that those, who are in an equal degree of cognation, are not always called equally to the succession; and farther, that even he, who is the nearest of kin, is not constantly to be preferred. For, inasmuch as the first place is given to proper heirs, and to those, who are numbered with proper heirs,
heirs, it is apparent, that the great-grandson, or great-great-grandson, is preferred to the brother or even the father or mother of the deceased: albo' a father and mother, (as we have before observed,) obtain the first degree of relation, a brother the second, a great-grandson the third, and a great-great-grandson the fourth: neither does it make any difference, whether such grand-children were under the power of the deceased, at the time of his death; or out of his power; either by being emancipated, or by being the children of those, who were emancipated: neither can it be objected, that they are descended by the female line. But, when there are no proper heirs, nor any of those, who are permitted to rank with them, then an agnate, who hath the full right of agnation in him, albo' he is in the most distant degree, is generally preferred to a cognate, who is in the nearest degree; thus the grand-son or great-grand-son of a paternal uncle is preferred to an uncle or aunt, who is maternal. We therefore observe, that, when there are no proper heirs, nor any, who are numbered with them, nor any, who ought to be preferred by the right of agnation, (as we have before noted,) then he, who is in the nearest degree of cognation, is called to the succession; and that, if there are many in the same degree, they are all called equally. But a brother and sister, albo' emancipated, are yet called to the succession of brothers and sisters; for, albo' they have suffered diminution, they are nevertheless preferred to all agnates of a more remote degree.

TITULUS OCTAVUS.

De successione libertorum.

D. xxxviii. T. 2.

Qui succedunt. De lege duodecim tabularum:

NUNC de libertorum bonis videamus. Olim itaque licebat liberto patronum suum impune teftamento præterire: nam ita demum lex duodecim tabularum ad hæreditatem liberti vocabat patronum, si intestatus mortuus esset libertus, hærede tuo nullo relicto. Itaque, intestato mortuo liberto, si est suum hæredem reliquisset, patrono nihil in bonis ejus juris erat. Et, quidem ex naturalibus liberis aliquem suum hæredem reliquisset, nulla videbatur querela; si vero adoptivus filius fuisse, aperte iniquum erat, nihil juris paterno superesse.

Let us now treat of the succession of freed-men. A freed-man bad it formerly in his power, without being subject to any penalty, wholly to 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 freed-man died intestate and without proper heirs; and therefore, tho' a freed-man bad died intestate, yet, if he bad left a proper heir, the patron would have received no benefit: and indeed, when the natural and legitimate children of the deceased became his heirs, there seemed no cause of complaint; but, when the freed-man left only an adopted son, it was manifestly injurious, that the patron should have no claim.
De jure praetorio.

§ I. Qua de causa postea praetoris edicto haec juris iniquitas emendata est. Sive enim faciebat testamentum libertus, jubebat ut patrone partem dimidiam bonorum suorum relinquere; et, si aut nihil aut minus parte dimidia reliquerat, dabatur patrono, contra tabulas testamenti, partis dimidii bonorum posseficio: sine intestatu moriebatur, sua hærede relictor filio adoptivo, dabatur aequo patrono contra hunc suum hæredem partis dimidii bonorum posseficio. Procede autem libero solebant, ad excludendum patronum, naturales liberi, non solum quos in potestate mortis tempore habebat, sed etiam emancipati, et in adoptionem dati, si modo ex aliqua parte scripti hæredes erant, aut praeteriti contra tabulas bonorum posseficionem ex edicto praetorio petieran. Nam ex hæredati nullo modo repellebant patronum.

§ 1. The law was therefore afterwards amended by the edict of the praetor: for every freed-man, who made his testament, was commanded so to dispose of his effects, as to leave a moiety to his patron: and, if the testator left nothing, or left less than a moiety, then the possession of half was given to the patron contra tabulas, i.e. contrary to the disposition of the testament. And, if a freed-man died intestate, leaving an adopted son bis heir, the possession of a moiety of the effects was in this case also given to the patron notwithstanding such heir: yet not only the natural and lawful children of a freed-man, whom he bad under his power at the time of his death, excluded the patron, but those children also, who were emancipated, and given in adoption, if they were heirs for any part, or even, although they were omitted, if they had requested the possession contra tabulas, by virtue of the praetorian edict. But disinherited children by no means repelled the patron.

De lege Papia.

§ II. Postea vero lege Papia adauota sunt jura patronorum, qui locupletiores libertos habeabant. Cautum enim est, ut ex bonis ejus, qui testamentum centum millium patrimonium reliquerat, et pauciores quam tres liberos habebat, five is testamento facto, five intestatus mortuus erat, virilitis pars patrono debeeretur. Itaque, cum unum quidem filium filiave hæretem reliquerat libertus, perinde pars dimidia deebatur patrono, ac si is fine ullo filio filiave intestatus decepsisset: cum vero duos duavere hæredes reliquerat, tertia pars deebatur patrono: si tres reliquerat, repellebatur patronus.

§ 2. But afterwards the rights of those patrons, who had wealthy freed-men, were enlarged by the Papian law: by which it is provided, that an equal share shall be due to the patron out of the effects of his freed-man, whether dying testator or intestate, who hath left a patrimony of an hundred thousand solidi and fewer than three children: so that, when a freed-man hath left only one son or daughter, then a moiety of the effects is due to the patron, as if the deceased had died intestate without either son or daughter. But, when there are two heirs, male or female, a third part only is due to the patron; and, when there are three, the patron is wholly excluded.

Legs
De constitutione Justiniani.

§ III. Sed nostra constitutione, (quam pro omni natione graeca lingua compendiofo tractata habito composuimus,) ita hujusmodi caufam definivit; ut, siquidem libertus vel liberta minores centenarius sint, id est, minus centum aureis habeant substantiam, (lic enim legis Papiae summam interpretati sumus, ut pro mille septemtiis unus aureus computetur,) nullum locum habeat patronus in eorum sucessione, si tamen testamentum fecerint: sin autem intestati deceferint, nullo liberorum relicto, tunc patronatus jus, quod erat ex lege duodecim tabularum, integrum reservavit. Cum vero maiores centenariis sint, si haeredes vel bonorum possessoris liberos habeant, five unum, five plures, cujuscunque fexus vel gradus, ad eos successiones parentum deduximus, patronis omnibus modis cum sua pro genius fomentis. Sin autem sine liberis deceferint, siquidem intestati, ad omnem haereditatem patronos patronisque vocavimus. Si vero testamentum quidem fecerint, patronos autem aut patronas praeterierint, cum nullos liberos haberent, vel habentes eos exhaerederint, vel mater five avus maternus eos praeterierint, ita quod non possint argui inofficiis eorum testamenta, tunc ex nostra constitutione per bonorum successionem contra tabulas, non dimidiam, ut antea, sed tertiam partem bonorum liberti consequantur; vel quod deceat eis, ex constitutione nostra repleatur, si quando minus tertia parte bonorum suorum libertus vel liberta eis reliquerit: ita fine onere, ut nec liberis libertaeque ex ea parte legata vel fideicommissa praestentur, sed ad cohaerentes eorum hoc onus redundet: multis aliis caibus a nobis in praestata constitutione congregatis, quos necessarios esse ad hujusmodi dispositionem juris perfeximus: ut tam patroni patronaque quam liberi eorum, nec non qui ex usufero latere veniant usque ad quinimum gradum, ad successionem libertorum libertarumque vocentur, ficut ex ea constitutione intellectuendum est. Et, si ejusdem patroni vel patronae vel duorum duorumque pluriumque liberis sint, qui proximior est, ad liberti vel libertae vocetur successionem; et in capita, non in stirpes, dividatur sucession; eodem modo et in iis, qui ex usufero latere veniant, servando. Pene enim confonantia iura ingenuitatis et libertinitatis in successionibus fecimus.

§ 3. But by our imperial constitution, (which we have caused to be promulgated in the Greek language, for the benefit of all nations,) we have ordained, that, if a freed-man, or freed-woman, dies possessed of less than an hundred aurei, (for thus have we interpreted the sum mentioned in the Papian law, counting one aureus for a thousand Septemni,) the patron shall not be intitled to any share in the succession, where there is a will. But, if either a freed-man, or freed-woman, dies intestate, and without children, we have in this case reserved the right of patronage intire, as it formerly was, according to the law of the twelve tables. But, if a freed person dies worth more than an hundred aurei, and leaves one child, or many, of
either sex or any degree, as the heirs and possessors of his goods, we have permitted, that such child or children shall succeed their parent to the entire exclusion of the patron and his heirs: and, if any freed-persons die without children and illegitimate, we have called their patrons or patronesses to their whole inheritance. And if any freed-person, worth more than an hundred aurei, hath made a testament, omitted his patron, and left no children, or both disinherited them; or if a mother, or maternal grand-father, being freed-persons, have omitted to mention their children in their wills, so that such wills can not be proved to be insufficient, then, by virtue of our constitution, the patron shall succeed, not to a moiety as formerly, but to the third part of the estate of the deceased, by the possession of the goods, called contra tabulas: and, when freed-persons, men or women, have less than the third part of their effects to their patrons, our constitution ordains, that the deficiency shall be supplied; and that the third part, due to patrons, shall not be subject to the burden of trusts, or legacies, even for the benefit of the children of the deceased; for the co-heirs only of the patron shall be loaded with this burden. In the before-mentioned constitution, we have collected many more cases, which we have thought necessary in relation to the right of patronage, that patrons and patronesses, their children and collateral relations, as far as the fifth degree, might be called to the succession of their freed-men and freed-women: as will appear more fully from our ordinance itself. And, if there are many children of one patron or patroness, or of two or more patrons or patronesses, he, who is nearest in degree, is called to the succession of his freed-man or freed-woman; and, when there are many in equal degree, the estate must be divided in capita and not in titipes; and the same order is decreed to be observed among the collaterals of patrons and patronesses: for we have rendered the laws of succession almost the same in regard to the ingenui and libertini.

Sed nostra constitutio.] This constitution is " haud dubie constitutionem, l. omnimo. Col. not extant. " Ex constitutione nostra pleatur.] "Intelligit Quibus libertinis succeditur."

§ IV. Sed hæc de iis libertinis hodie dicenda sunt, qui in civitatem Romanam pervenerunt, cum nec sint ali liberti, simul et Deditiis et Latiniis sublatis, cum Latinorum successione nulla penitus erant; qui, licet ut liberi vitam suam peragebant, attamen ipsò ultimo spiritu simul animam atque libertatem amittebant; et, quasi servorum, ita bona eorum jure quod-modo peculii ex lege Junia Norbana manumissores detinebant. Postea vero senatus-consulto Largiano cautum fuerat, ut liberi immanumissorii, non nominantis exhaereditati facti, extraneis haeredibus eorum in bonis Latinorum praeponerentur. Quibus etiam supervenit Divi Traiani  editum, quod eundem hominem, si, invito vel ignorante patrone, ad civitatem Romanam venire ex beneficio principis felinarat, faciebat quidem vivum civem, Latinum vero morientem. Sed nostra constitutione, propter hujusmodi conditionem vices et alias difficultates, cum ipsis Latinis etiam legem Juniam, et senatus-consultum Largianum, et editum Divi Traiani, in perpetuum deleri cessuimus, ut omnes liberi civitate Romana fruantur; et mirabili modo quibusdam adjuctionibus ipsas vias, quæ
Lib. III. Tit. IX.

in Latinitatem ducebant, ad civitatem Romanam capiendam transposui-
mus.

§ 4. But what we have said relates to the libertini of the present time, who are all citizens of Rome; for there is now no other species of freed-men; that of the Dediritii and Latini being abolished: the latter of whom never enjoyed any right of succession; for although they led the lives of freed-men, yet, with their last breath, they left both their lives and liberties: for their possessions, like the goods of slaves, were detained by their manumitter, who possessed them, as a peculium, by virtue of the law Junia Norbana. It was afterwards provided by the senatus-consultum Largianum, that the children of a manumitter, who were not nominally disinherited, should be preferred to any strangers, whom a manumitter might constitute his heirs: then followed the edict of Trajan, which ordained, that, if a slave either against the will or without the knowledge of his patron should obtain the freedom of Rome by the favor of the emperor, such slave should continue free, whether living, but, at his death, should be regarded only as a Latin. But we, being averse to these changes of condition and dissatisfied with the difficulties attending them, have thought proper, by virtue of our constitution, for ever to abolish, together with the Latins, the law Junia, the senatus-consultum Largianum, and the edict of Trajan; to the intent, that all freed-men may become freed-men of Rome. And we have happily contrived, by some additions, that the manner of confering the freedom of Latins should now become the manner of confering the freedom of Rome.

Nostra constitutione.] vid. Cod. 7. 1.6. De latina libertate tollenda.

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Titulus Nonus.

De assignatione libertorum.


An assignari possit, et quis assignationis effectus.

In summa, (quod ad bona libertorum attinet,) admonendi sumus, cen-
suiffe senatum, ut quamvis ad omnes patroni liberos, qui ejusdem
gradus sunt, equaliter bona libertorum pertineant; tamen licere parenti,
uni ex liberis assignare libertum, ut post mortem ejus solebat es patronus
habeatur, qui assignatus est; et cæteri liberi, qui ipsi quoque ad eadem
bona, nulla assignatione interveniente, pariter admitterentur, nihil juris
in his bonis habeant; sed in demum pristinum jus recipiant, si is, cui
assignatus est, decesserit, nullis liberis relietis.

In regard to the possessions of freed-men it must be remembered, that the senate
had decreed, that, although the goods of freed-men belong equally to all the children
of the patron, who are in the same degree, yet it is lawful for a parent to as-
sign a freed-man to any one of his children, so that, after the death of the pa-
rent, the child, to whom the freed-man was assigned, is solely to be esteemed his
patron: and the other children, who would have been equally admitted to a di-
vidend
LIB. III.  TIT. IX.

vidend of the goods of the freed-man, had he not been assigned, are wholly excluded; but, if the assignee happens to die without issue, the excluded children regain their former right.

[Senatus consulto.] This decree was in the reign of Claudian, anno urb. cond. 798.

De sexu assignati, et de sexu graduque ejus, cui assignatur.

§ I. Nec tantum libertum, sed etiam libertam, et non tantum filio nepotivio, sed etiam filiæ neptive, assignare permititur.

§ 1. Every freed-person is assignable, whether man or woman: and an assignment may be made not only to a son or grandson, but to a daughter or grand-daughter.

De liberis in poteestate vel emancipatis.

§ II. Datur autem hac assignandi facultas ei, qui duos plurimæ liberes in poteestate habebit, ut eis, quos in poteestate habet, assignare libertum libertamve liceat. Unde quaeratur, si eum, cui assignavit, postea emancipaverit, num evanescat assignatio? Sed placuit evanescere: quod et Juliano et aliis plerisque viisum est.

§ 2. The power of assigning freed-persons is given to him, who hath two or more children emancipated, so that a father may assign a freed-man or freed-woman to those children, whom he retains under his power: and hence it becomes a question, if a father should assign a freed-man to his son and afterwards emancipate that son, whether the assignment would, or would not be null? and the decision hath been in the affirmative; which hath been approved of by Julian and many others.

Quibus modis aut verbis assignatio fit: et de senatus-consulto.

§ III. Nec intereat, an testamento quis assignet, an fine testamenti; sed etiam quibusunque verbis patronis hoc permittitur facere, ex ipso SC. quod Claudianis temporibus factum est, Sabellio Rufo et Aterio Scapula Consulibus.

§ 3. But it makes no difference, whether the assignment of a freed-man is made by testament, or not by testament; for patrons may assign even by word of mouth; which was permitted by the senatus-consultum, made in the reign of Claudian in the consulate of Sabellius Rufus and Aterius Scapula.
Titulus Decimus.
De bonorum possessionibus.

D.xxxvii. T. r.

Cur introductae bonorum possessiones; et quis sit earum effectus.

Jus bonorum possessionis introductum est a praetore, emendandi veteris juris gratia: nec solum in intestatorum hereditatibus vetus jus eo modo praetor emendavit, sicut supra dictum est; sed in eorum quoque, qui testamento facto deceperint. Nam, si alienus posthumus heres fuerit institutus, quamvis hereditatem jure civili adire non poterat, cum instituto non valebat, honorario tamen jure bonorum possessor efficiebatur; videlicet cum a praetore adjuvabatur. Sed et is a nostra constitutione hodie recte heres instituitur, quasi et jure civili non incognitus. Aliquam tamen neque emendandi neque impugnandi veteris juris, sed magis con firmandi gratia, praetor pollicetur bonorum possessionem: nam illis quoque, qui, recte testamento facto, heredes instituti sunt, dat secundum tabulas bonorum possessionem. Item ab intestato suos heredes, et agnos tos, ad bonorum possessionem vocat: sed et remota quoque bonorum possessione ad eos pertinet hereditas jure civili. Quos autem solus praetor vocat ad hereditatem, heredes quidem ipsi jure non sunt: nam praetor heredem facere non potest: per legem enim tantum, vel similem juris constitutionem, heredes sunt, vel per senatus-consulta et constitutiones principales: sed, cum eis praetor dat bonorum possessionem, loco heredum constituuntur, et vocantur bonorum possessores. Adhuc autem et alios complures gradus praetor fecit in bonorum possessionibus dandis, dum id agebat, ne quis sine succedere moreretur. Nam, angustissimis finibus constitutum per legem duodecim tabularum, jussi perci piendarum hereditaturn praetor ex bono et æquo dilatavit.

The right of succeeding by the possession of goods was introduced by the praetor, in amendment of the antient law; which be corrected, not only in regard to the inheritances of intestates, (as we have before observed;) but in regard also to the inheritances of those, who die testate: for, if a posthumous stranger was instituted an heir, alboz he could not enter upon the inheritance by the civil law, inasmuch as his institution as heir would not be valid, yet by the praetorian or honorary law he might be made the possessor of the goods, when he had received the assentence of the praetor. But such stranger may at this time, by virtue of our constitution, be legally instituted an heir, being no longer regarded as a person unknown to the civil law. But the praetor sometimes bestows the possession of goods,
intending neither to amend nor impugn the old law, but only to confirm it: for be gives the possession of goods secundum tabulas to those, who are appointed the heirs of the deceased by a regular testament. He also calls proper heirs and agnates to the possession of the goods of intestates; and yet the inheritance would be their own by the civil law, altho' the pretor did not interpose his authority. But tho'he, whom the pretor calls to an inheritance merely by virtue of his office, do not become legal heirs; inasmuch as the pretor cannot make an heir; for heirs are made only by law, or by what has the effect of a law, as a decree of the senate, or an imperial constitution. But, when the pretor gives any persons the possession of goods, they stand in the place of heirs, and are called the possessors of the goods. But the pretor hath also devised many other orders of persons, to whom the possession of goods can be granted, to the intent, that no man may die without a successor: and, by the rules of justice and equity, be hath greatly enlarged the right of taking inheritances, which was bounded within the most narrow limits by the laws of the twelve tables.

Jus bonorum possessionis.] The bonorum possessionis is not now in use even in those countries, where the civil law prevails: for succession by testament, or by law, comprehends every case. "Jus civile et prae torum hodie in unam confo- nantiam redactum est; idque hujus tituli "nullus amplius est usus: etenim, qui aliis ex "teftamento et ab intestato successunt, in uni- "verum heredes appellari solent." Grenruegen, de legisbus abrogatis, b. 14. In England, estates in general may be divided into two sorts, real and personal; and successions to these two different kinds of estates are governed by different rules of law. But it is necessary to premise, that by real estate is most commonly meant an estate in land in fee, i.e. descendible from a man to his heirs for ever: and that by personal estate are meant estates in land, determinable upon years, money in the funds or upon mortgages, plate, jewels, &c. and that such personal estate is generally comprehended, in technical and artificial language, under the terms goods and chattels. Now in real estates there is no room for the bonorum possessionis of the Roman law to take place in England; for all such estates vest in and descend intestantly to the heir, at the death of his ancestor; but in regard to goods and chattels the office of the ordinary or ecclesiastical judge seems to be similar to that of the Roman pretor in granting the possession of goods. For, when a man dies, who has disposed of his personal estate by testament, the heirs or executors, appointed by that testament, must prove it before an ecclesiastical judge, who by granting probate gives the possession of goods to the executors secundum tabulas, according to the will, or at least confirms them in the possession already taken. Counsel, b. 1. And, when any person dies intestate, the ordinary (by virtue of 31 Edu. 3. chap. 11, and 21 Henry 8. chap. 5.) grants the possession and administration of the intestate’s goods to the widow or next of kin to such intestate, or to both, at his discretion. And by the 22d and 23d of Charles the second, cap. 10. it is enacted, "that all ordinances and ecclesiastical judges may call administra tors to an account and order distribution, after debts and funeral expenses are paid; to wit, one third to the widow of the intestate, and the residue among his children and those who legally represent them, if any of them are dead: that, if there are no children, or legal representatives of them, one half of the intestate’s estate shall be allotted to the widow, and the residue to the next of kin to the intestate in equal degree, and thence, who re present them: that no reprentation shall be admitted among collaterals after brothers and sisters children; and that, if there is no wife, all shall be distributed among the children; and, if no child, to the next of kin to the intestate in equal degree and their representatives." And by 1 Jac. 2. cap. 17. it is enacted, "that, if a brother or sister dies, each brother and sister, and their representatives, shall have an equal share with the mother." From all which the analogy, between the civil law and the law of England, is very observable.

A nostris constitutione.] This constitution is not extant.

Confirmando gratia.] Ob id certe, ut iustus "possidere viderentur, qui auctore praetro ad "succeffionem pervenissent; iustius enim habe tur possidet, quam quis praetore nuncius. "Pratera non pot fi non effe commodus plu res habere vias consecquare unde hereditatis quo nim, una repudiata, suaperte tamen altera; "ex quo facile colligitur, hanc praeorium con firmationem, et ilia necessaria non fit, sua tamen "utilitatem non carere." Mynthinger, b. 1. "Et alios complures gradus.] "Complures "gradus fecit pretor in bonorum possessionibus; "non eos solum, qui supera memoriae sunt, unde "liber.
LIB. III. TIT. X.

De speciebus ordinariis. Jus vetus.

§ I. Sunt autem bonorum possedentes ex testamento quidem haec; prima, quae preteritis liberis datur, vocaturque contra tabulas: secunda, quam omnibus jure scriptis hereditibus praetor pollicitur; ideoque vocatur secundum tabulas. Et, cum de testatis prius locutus est, ad intestatos transitum fecit: et primo loco suis hereditibus, et iis, qui ex edicto praetoris inter suis heredes connumerantur, dat bonorum possessionem, quae vocatur unde liberi. Secundo, legitimis hereditibus. Tertio, decem personis, quas extraneo manumissori praeferbat. Sunt autem decem personae; pater, mater, avus, avia, tam paterni quam materni; item filius, filia; nepos, neptis, tam ex filio, quam ex filia; frater forove, consanguinei vel uterini. Quarto, cognatis proximis. Quinto, tanquam ex familia. Sexto, patrono patronaeque, liberisque eorum et parentibus. Septimo, viro et uxori. Octavo, cognatis manumissoriis.

§ I. The kinds or species of the possession of goods or praetorian successions, when there is a testament, are the following. The first is that possession, which is given to children, of whom no mention is made in the testament; and this is called possession contrary to the testament. The second is that, which the praetor promises to all written heirs, and it is therefore called secundum tabulas; i.e. a possession according to the testament. These being fixed, the praetor proceeded to the possession of goods in regard to intestates; — and first be gives the possession of goods, called unde liberi, to the proper heirs, or to those, who by the praetorian edict are numbered among the proper heirs: — secondly, to the legitimate heirs: — thirdly, to ten persons, in preference to a stranger, who was the manumittor, viz. to a father, a mother, or a grandfather or grand-mother, paternal or maternal; to a son, a daughter, or to a grandson or grand-daughter, as well by a daughter as by a son; to a brother or sister, either consanguine or uterine: — fourthly, to the nearest cognates: — fifthly, to those, who are, as it were, of the family, tanquam ex familia: — fixtly, to the patron or patroness, and to their children, and their parents: — seventhly, to an husband and wife: — eighthly, to the cognates of a manumittor or patron.

Extraneo manumissori.] "Extraneus manumissor erat, qui non contrafacta fiducia emanavit; cipasset." Mnfin. b. l.

Tanquam ex familia.] "Puto familiae figulis, nifi cari patre, i.e. hac bonorum possessione vocari patre, agnati." Vinn.

Jus novum.

§ II. Sed eas quidem praetoria introduxit jurisdictio: a nobis tamen nihil incursofum praeecessitum est; sed, nostra constitutionibus omnia corrigentes, contra tabulas quidem et secundum tabulas bonorum possessiones admissimus, utpote necessarie constitutae: nec non ab intestato, unde liberi, et unde legiti, bonorum possessiones. Quae autem in praetoris edicto quint lo proposita fuerat, id est, unde decem personae, eam pio pro-
postito et compendiose dementia supervacuam ostendimus. Cum enim praefata bonorum possesio decem personas praeponerat extraneo manusmissori, nostra constitutio, quam de emancipatione liberorum fecimus, omnis parentibus eisdemque manusmissoribus, contracta fidicia, manusmissionem facere dedit; ut ipsa manusmissio eorum hoc in se habeat privilegium, et supervacua fiat supradicta bonorum possesio. Sublata igitur praedicta quinta bonorum possessione in gradum ejus sextam antea bonorum possessionem inducimus, et quintam fecimus, quam praetor proxima cognatis pollicetur. Cumque ante fuerat septimo loco bonorum possesio, tanquam ex familia, et octavo, unde patroni patronaeque, liberi et parentes eorum, utramque per constitutionem nostram, quam de jure patronatus fecimus, penitus evacuavimus. Cum enim, ad familiae in usque successionis ingenuorum, libertinorum successiones posuerimus, quas usque ad quintum gradum tantummodo coarctavimus, ut sit aliqua inter iungua et libertinos differentia, sufficit eas tam contra tabulas bonorum possesio, quam unde legittimi, et unde cognati, ex quibus posseunt sua iura vindicare, omni scrupulositate et inextricabili errore iurare duarum bonorum posses- sionum revoluto. Alliam vero bonorum possesionem, qua unde vir et uxor appellatur, et nono loco inter veteres bonorum possessiones posita fuerat, et in suo vigore servavimus, et aliore loco, id est, sexto, eam posuimus: decima quoque veteri bonorum possessione, qua erat unde cognati manusmissoribus, propter causas enumeratas merito sublata, ut sex tantummodo bonorum possessiones ordinariae permaneant, suo vigore pollentes.

§ 2. The prator's authority hath introduced these successions; but we, not suffering any useless institution to continue in the law, have nevertheless admitted by our constitutions the possession of goods contra tabulas and secundum tabulas, as necessary; and also the possessions of goods ab inteftato, called unde liberi and unde legittimi: but we have briefly forewove, that the possession, called unde decem peronia, which was ranked by the prator's edict in the fifth order, was unnecessary: for, whereas that possession preferred ten kinds of persons to a stranger, who was the manusmissor at emancipation, our constitution, which regards emancipation, hath permitted all parents to manumit their children, a fiduciary contract being presumed; so that the possession unde decem peronia is now useless. The afore-mentioned fifth possession being thus abrogated, we have now made that the fifth, which was formerly the sixth, by which the prator gives the succession to the nearest cognates. And, whereas formerly the possession of goods, called tanquam ex familia, was in the seventh place, and the possession of goods called unde patroii patroaeque, liberi et parentes eorum, was in the eighth, we have now annulled them both by our ordinance concerning the right of patronage. And having brought the successions of the libertini to a hamility with those of the 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 legittimi — and unde cognati may suffice, by which all persons may vindicate their rights, the niceties and inextricable errors of those two kinds of possessions, tanquam ex familia and unde patroni, being removed. The other possession of goods, called vir et uxor, which held the ninth place among the arient possessions, we have preserved in full force and have placed in an
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Specie extraordinaria.

§ III. Septima eas secuta, quam optima ratione praetores introducunt: novissime enim promittitur edicto iis etiam bonorum possessor, quibus, ut detur, lege vel senatus-consulto vel constitutione comprehensum est: quam neque bonorum possessionibus, quae ab intestato veniunt, neque iis, quae ex testamento sunt, praetor stabilire jure connumeraverit: sed quasi ultimum et extraordinaeum auxilium (prout res exigat) accommodavit, scilicet iis, qui ex legibus, senatus-consultis, constitutionibusque principum, ex novo jure, vel ex testamento, vel ab intestato veniunt.

§ 3. But to these a seventh possession hath been added, which the praetors have introduced with the greatest reason: for, by edict, this possession of goods is promised to all those, to whom it is appointed to be given by any law, senatus-consultum, or constitution: and the praetor hath not positively numbered this possession of goods either with the possessions of the goods of intestate or testate persons, but hath given it, according to the exigence of the case, as the last and extraordinary resource of these, who are called to the successions of testates or intestates, by any particular law, any decree of the senate, or any new constitution.

De successorio edicto.

§ IV. Cum igitur plures species sucessionum praetor introduxisset, eaque per ordinem dispositisset, et in unaquaeque species sucessionis facie plures extent dispari gradu perfunxerat, ne actiones creditorum differentur, sed haberent, quos convenienter, et ne facile in possessionem bonorum defuncti mittentur, et eo modo sibi confecerent, ideo petendae bonorum possessioni certam tempus praefini-it. Liberas itaque et parentibus, tam naturalibus quam adoptivis, in petenda bonorum possessione anni spatio, ceteris autem (agnatis vel cognatis) centum dierum, dedit.

§ 4. The praetor, having introduced many kinds of successions and ranked them in order, hath thought proper, inasmuch as many persons of different degrees are often found in one species of sucession, to limit a certain time for demanding the possession of goods, to the intent, that the actions of creditors may not be delayed for want of a proper person, against whom to bring them, and that the creditors themselves may not obtain the possession of the effects of the deceased too easily, and so confult solely their own advantage: therefore to parents and children, whether natural or adopted, the praetor hath given the space of one year, in which they may either accept or refuse
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the possession of goods. But to all other persons, agnates or cognates, be allowed only an hundred days.

Certum tempus.] See Digest. 38. tide 9. De successorio edito. ULPIAN.

De iure accrescendi et iterum de successorio edito.

§ V. Et, si intra hoc tempus aliquis bonorum possessionem non petiret, ejusdem gradus personis accrescit; vel, si nullus sit, deinceps caeteris bonorum possessionem perinde ex successorio edito pollicetur, ac si quis, qui precedebat, ex eo numero non effet. Si quis itaque delatam sibi bonorum possessionem repudiaverit, non, quousque tempus bonorum possessionis praefinitum exceperit, expectatur; sed statim caeteri ex eodem edito admissuntur.

§ 5. And, if any person intitled does not claim the possession of goods within the time limited, his right of possession accrues first to those in the same degree with himself; and, in default of persons in the same degree, then the praeceptor by the successory edito confers the possession of goods upon those in the next degree, as if, who preceded, bad no right. And, if any man refuses the possession of goods, when it is open to him, there is no necessity to wait, till the time limited is expired, but those, who are the next in succession, may be instantly admitted by virtue of the before-mentioned edit. Ex successorio edito.] vid. fl. 38. t. 9.

Explicatio dicti temporis.

§ VI. In petenda autem bonorum possessione dies utiles singuli considerantur.

§ 6. It is here to be observed, that, in regard to the time prescribed for demanding the possession of goods, we count all the days, which are utiles; i.e. those days, on which the party, having knowledge that the inheritance is open to him, might apply to the judge.

Dies utiles.] "Dies in jure nostro alii sunt continui, alii utiles. Continui, quae in terputatione, nullique exceptis, current: utiles sunt illi duxines, quibus experienda sui juris potestas est; et, si necesse erit, aliquis, si fertur, et non se agere non valenti, currunt. § 44. "§ 1. Vin. Theopb. § 1.

Quomodo peti debeat.

§ VII. Sed bene anteiiores principes et huic causa providerunt, ne quis pro petenda bonorum possessione curaret; sed, quocumque modo admitteret eam indicium offenderit, intra statuta tamen tempora, plenum habeat earum beneficium.

§ 7. The emperors, our predecessors, have wisely provided in this case, that no person need be solicitous to demand the possession of goods in solemn form; for, if by any act it manifestly appears, that a man has in any manner consented to accept the prætorian succession within the prescribed time, he shall enjoy the full benefit of it.
LIB. III. TIT. XI.

TITULUS UNDECIMUS.

De acquisitione per arrogationem.

Continuatio.

Est et alterius generis per universitatem succeffio; quae neque lege duodecim tabularum, neque praetoris edicto, sed eo jure, quod consentiendum reperit, introducta est.

There is also an universal succession of another kind, which was introduced neither by the laws of the twelve tables, nor by the editio of the praetor, but by that law, which takes its rise from general consent and usage.

Qua boc modo acquiruntur. Jus vetus.

§ 1. Ecce enim, cum pater-familias sese in arrogationem dat, omnes res ejus corporales et incorpores, quaeque ei debita sunt, arrogatori antea quidem pleno jure acquirabantur, exceptis iis, quae per capitis diminutionem perent; quales sunt operarum obligationes et jus agnationis: usus etenim et usufructus licet his antea connumerabantur; attamen capitis diminutione minima eos tolle prohibuit nostra constitutio.

§ 2. For example, if the father of a family gave himself in arrogation, all things, which appertained to him, whether corporeal or incorporeal, and whatever was due to him, became antiently the property of the arrogator; those things only excepted, which perished by diminution or change of state, as the duties of freed-men to their patrons and the rights of agnation. But, also, use and usufruct were heretofore numbered among those rights, which perished by diminution, yet our constitution hath prohibited, that the use and usufruct of things should be taken away by the least diminution or change of state.

Prohibuit nostra constitutio.] vid. Cod. 3. t. 33. l. 16. de usufructu.

Jus novum.

§ II. Nunc autem nos eandem acquisitionem, quae per arrogationem fiebat, coarctavimus ad similitudinem naturalium parentum. Nihil enim aliud, nisi tantummodo usufructus, tam naturalibus parentibus quam adoptivis, per filios-familias acquiritur in iis rebus, quae extrinsecus filiis obveniunt, dominio eis integro servato. Mortuo autem filio arrogato in adoptiva familia, etiam dominium rerum ejus ad arrogatorem pertranset; nisi supersint aliae perfore, quae ex constitutione nostra patrem in iis, quae acquiri non possint, antecedant.

§ 2. But we have now limited the acquisitions obtained by arrogation, in similitude of what is gained by natural parents: for nothing is now acquired either by natural or adoptive parents, but the bare usufruct of those things, which their children possess adventitiously and extrinsically in their own right, the property still re-
maining insire in the adopted or natural child. But, if an arrogated son dies under
the power of his arrogator, then even the property of the effects of such son will pass
to the arrogator in default of those persons, whom we have by our constitution pre-
ferred to the father in the succession of those things, which could not be acquired
for him.

Quæ ex constitutione nostra.] vid. Cod. 6. t. 59. l. ult. Communionis de successionibus.

Effectus hujus acquisitionis.

§ III. Sed ex diversis pro eo, quod is debut, qui se in adoptionem
dedit, ipso quidem jure arrogator non tenetur, sed nomine filii conven-
titur; et, si noluerit eum defendere, permittitur creditoribus, per com-
petentes nostros magistratus, bona, quæ ejus cum usufructu futura suf-
fent, si se alieno juri non subjiciisset, possidere, et legitimo modo ea di-
ponere.

§ 3. On the contrary an arrogator is not bound at law to satisfy the debts of his
adopted son in consequence of a direct action; but yet he may be con"ved in his son's
name; and, if he refuses to defend his son, then the creditors, by order of the proper
magistrates, may seize upon and legally sell all those goods, of which the usufruct, as
well as the property, would both have been in the debtor, if he had not made himself
subject to the power of another.

-TITULUS DUODECIMUS.

De eo, cui libertatis causa bona addi-
cuntur.

Continuatio.

A Ccessit novus causas successionis ex constitutione Divi Marci.
Nam, si ii, qui libertatem acceperunt a domino in testamento, ex
quo non aditur haereditas, velint bona sibi addici libertatum conservan-
darum causa, audiantur.

A new species of succession hath taken it's rise from the constitution of Marcus Au-
relius. For, if those slaves, to whom freedom hath been bequeathed, are destitute,
for the sake of obtaining it, that the inheritance, which hath not been accepted by the
written heir, should be adjudged for their benefit, they shall obtain their request.

Rescriptum D. Marci.

§ I. Et ita Divi Marci rescripto ad Pompeium. Rufum contineat:
verba rescripti ita se habent. Si Virginio Valenti, qui testamento suo liber-
tatem quibusdam adscriptae, nemine successore ab intestate existente, in ea
cia bona ejus esse caperent, ut suanire debeant, is, cuius de ea re notio est,
aditus
Lib. III. Tit. XII.

aditus rationem desiderii tui habebit, ut libertatum, tam earum, quae directo, quam earum, quae per speciem siedecommis sibi relicta sint, tuendarum gratia addicantur tibi, si idonee creditoribus caveris de solido, quod cuique debituro, solvendo. Et si quidem, quibus directa libertas data est, perinde liberis erunt, ac si baereditas adita est: ita autem, quos bares manumittere voluerat est, at libertatem confecerat; ita autem ut si non alia conditione velis tibi bona addici, quam ut ii etiam, qui directo libertatem accepserunt, tui libertatib: nam buce etiam voluntatis tuae, si ii, quorum de flatu agitur, conscient, auctoritate nostram accommodamur. Et, ne buiis rescriptiois nostra emolumentum alia ratione irritum fiat, si fiscus bona agnosceret voluerit, et ii, qui bonis nostris attendunt, siciant, commodo pecuniarior praferendum esse libertatis caussam, et iuxta bona cogenda, ut libertas eis salva sit, qui eam adiisse potuerint, ac si baereditas ex testamento adita est.

§ 1. And to the same effect is the rescript of the emperor Marcus to Pompeius Rufus; the words of which are these. “If the estate of Virginius Valens, who by testament hath bequeathed to certain persons their freedom, must necessarily be sold, and there is no successor ab integrato, then the magistrate, who has the cognizance of these affairs, shall upon application hear the merits of your cause, that, for the sake of preferring the liberty of those, to whom it was given, either directly or in trust, the estate of the deceased may be adjudged to you, on condition, that you give good security to the creditors, to pay them the whole of their just demands. And all those, to whom freedom was directly given, shall then become free, as if the inheritance had been entered upon by the written heir; but those, whom the heir was ordered to manumit, shall obtain their freedom from you only. And, if you are not willing, that the goods of the deceased should be adjudged to you on any other condition, than that even they, who received their liberty directly by testament, shall also become your freed-men, we then order, that your will shall be complied with, if the persons agree to it, who are to receive their freedom. And, lest the use and emolument of this our rescript should be frustrated by any other means, be it known to the officers of our revenue, that, whenever our exchequer lays claim to the estate of a deceased person, the cause of liberty is to be preferred to any pecuniary advantage; and that the estate shall be so seized, as to preserve the freedom of those, who could otherwise have obtained it: and this in as full a manner, as if the inheritance had been entered upon by the testamentary heir.”

Utilitas rescripti.

§ II. Hoc rescripto subventum est et libertatibus et defunctiis, ne bona eorum a creditoribus posse deantur et veneant. Certe, si fuerint hac de causa bona addicata, cessat bonorum venditio; exstitit enim defuncti defensor, et quidem idoneus, qui de solido creditoribus cavet.

§ 2. The contents of this rescript are calculated not only in favor of liberty, but also for the benefit of deceased persons, lest their effects should be seized and sold by their creditors: for it is certain, that, when goods are adjudged to a particular man for the preservation of liberty, a sale by creditors can never take

H h 2
effect: for he, to whom the goods are adjudged, is the protector of the deceased, and must always be a person, who can give security for the full payment of creditors.

Ubi locum habeat.

§ III. In primis hoc rescriptum toties locum habet, quoties testamento libertates datæ sunt. Quid ergo si quis intestatus decedens codicillis libertates dederit, neque adita sit ab intestato hereditas? Favor constitutionis debebit locum habere; certe, si testatus deceperit et codicillis dederit libertatem, competere eam, nemini dubium est.

§ 3. This rescript takes place, whenever freedom is conferred by testament. But, when a master dies intestate, having bequeathed freedom to his slaves by codicil, and his inheritance is not entered upon, what will then be the consequence? We answer, that the favor of the rescript shall extend to this case; but it is most certainly not to be doubted, that, if a master dies intestate and by codicil bequeaths freedom, the rescript shall be of full force.

§ IV. Tunc enim constitutioni locum esse verba ostendunt, cum nemo succesor ab intestato exsistat: ergo, quamdiu incertum erit, utrum exsistat, an non, cessebat constitution. Si vero certum esse coeperit, nemo exsistere; tunc erit constitutioni locus.

§ 4. The words of the rescript show, that it is then in force, when there is absolutely no successor for intestate. It therefore follows, that, as long as it remains doubtful, whether there is or is not a successor, the constitution shall not take place: but, when once it is certain, that no one will enter upon the succession, the ordinance shall then have its effect.

§ V. Si is, qui in integrum restitui poteft, absinuerit hereditate, an, quamvis poteft in integrum restitui, poteft admitter constitution, et bonorum addictioni fieri? Quid ergo, si post addictionem, libertatum confervantur, causa factam, in integrum sit restitutus? Utique non erit dicendum, revocari libertates; quia semel competierunt.

§ 5. But, if he, who has a right to be restored in integrum (as a minor for example) should delay to take upon him the inheritance of his father, it may then be asked, whether, notwithstanding this right of being restored, the constitution shall take place, and an adjudication of the goods passes to a stranger, or one of the slaves? And again, it may be demanded, what will be the consequence, if, after an adjudication has been made for the sake of liberty, the heir should be restored in integrum? We answer, that freedom, when once obtained, shall not afterwards be revoked.

Si libertates datæ non sunt.

§ VI. Hæc constitution libertatum tuendarum causa introducuntur; ergo, si libertates nullæ sint datæ, cessat constitution. Quid ergo, si vivus dederit libertates vel mortis causa, et, ne de hoc quæratur, utrum in fraudem creditorum, an non, factum sit, idcirco velint sibi bona addici, an audiendi sunt? Et magis est, ut audiri debeant, et si deficient verba constitutionis.
§ 6. This constitution was made for the protection of liberty; and therefore, when freedom is not given, the constitution has no effect. Suppose then, that a master hath given freedom to his slaves either inter vivos, or mortis causa, and that they, to prevent the creditors from complaining, that this was done to defraud them, should petition, that the estate of the deceased may be adjudged to them; are these persons to be heard? we answer, that we incline to grant their request, al-though in this case, the letter of the constitution is deficient.

De speciebus additis a Justiniano.

§ 7. But observing, that the rescript was deficient in many respects, we enacted a most express constitution, containing many cases, which explain the rights of succession in the fullest manner; of which every person, who reads that constitution, will be sensible.

Plenissima constitution.] vid. Cod. 7. 1. 15.

Titulus Decimus-tertius.

De successionibus sublatis, quæ siebant per bonorum venditiones, et ex senatus-consulto Claudiaiano.


Erant ante predictam successionem olim et alia per universitatem .successiones; qualis fuerat bonorum emptio, quæ de bonis debitoris vendendis per multas ambages fuerat introducita; et tunc locum habebat, quando judicia ordinaria in usu fuerant: sed, cum extraordinariis judiciis posteritas usaque fuit, ideo cum ipsis ordinariis judiciis etiam bonorum venditiones expiraverunt: et tantummodo creditoribus datur officio judicis bona possidere, et, prout utile eis vixum est, ea disponere: quod ex latioribus digestorum libris perfectius apparebit. Erat et ex senatus-consulto Claudiaiano miserasibilis per universitatem acquititio, cum libera mulier, servili amore bacchata, ipsam libertatem per senatus-consultum amittebat, et cum libertate subtantiam: Quod indignum nostris temporibus esse exsufflantes, et a nostris civitate deleri, et non inferi nostris digestissim cons-cessimus.

There were many other kinds of universal successions before that, which we treated of in the foregoing title; as the bonorum emptio, which was first introduced, that
LIB. III.  TIT. XIV.

the estates of debtors might be sold; but this was accompanied by many intricate and tedious proceedings; it continued nevertheless as long as the ordinary judgments were in practice; but, as soon as the extraordinary judgments were made use of, the solemn emptio bonorum ceased at the same time with the ordinary judgments. And creditors can now possess themselves of the goods of their debtors and dispose of them, as they think most proper, by the decree of a judge. But these points are treated of more perfectly and at large in the books of our digest. There was also, by virtue of the Claudian decree, another universal acquisition called miserabilis; for example, if a free-woman bad debased herself by being inamoured of a slave, she lost her freedom by the before named decree, and, together with her freedom, her estate and substance. But, it being our opinion, that this part of the decree was unworthy of our reign, and ought therefore to be expunged from our laws, we have not permitted it to be inferred in the digest.

Quis fuerat bonorum emptio.] "Bona debitoris, postquam aliquandiu celebreret in locis proscripta pendissent, ex edito posti- deri jubeantur; deinde magister postulabatur et creabantur, per quem adirebantur et emptor adiciceretur, qui omnibus in solit- dum satisfaciebat: aut, antequam emeret, cum creditoribus de certa parte decidet." vid. Theophilum in hunc locum, et Heineccii an- sig. Rom. jur. lib. 2. tit. 17. This exact species of sale is not in use in England; but there is a sale not very unlike it in the case of bankrupts, whose estates and goods are sold and divided among their creditors by commissaries, appointed for that purpose. vid. id. 19. Elch. cap. 5. 1 Jan. lib. cap. 15. 21 Jan. lib. cap. 19. 16 Jan. cap. 15. 7 Geo. 1. cap. 31. 5 Geo. 2. cap. 20.

Ex latoriibus digessorum labris.] D. 42. t. 3. De rebus auctoritate judicis possessionis. D. 42. t. 4. Quibus ex causis in possessibum estur.

Quod indignum nostris temporibus.] vid. Cod. 7. t. 24. De jenuatus-confulto Claudiano tellenda.

TITULUS DECIMUS-QUARTUS.

De obligationibus.


Continuatio et definitio.

Unc transeamus ad obligationes. Obligatio est juris vinculum, quon necessitate astringimur alicujus rei solven dam nostra civitatis jura.

Let us now pass to obligations. An obligation is the chain of the law, by which we are necessarily bound to make some payment, according to the laws of our country.

Divisio prior.

§ 1. Omniae autem obligationum summa divisio in duo generia de- ductitur; namque aut civiles sunt aut praeorae. Civiles sunt, quae aut legibus constituta, aut certo jure civili comprobata sunt. Praetoriae sunt, quas praetor ex sua jurisdictione constituit; quae etiam honoraria vocantur.

§ 1. Obligations are primarily divided into two kinds, civil and pretrorian. Civil obligations are those, which are constituted by the laws, or by any species of the
Lib. III. Tit. XV.

the civil law. Praetorian obligations are those, which the praetor hath appointed by his authority; and these are also called honorary.

Divisio posterior.


§ 2. The second or subsequent division of obligations contains four species: for some obligations arise by contract, others by quasi-contract; some by malefeasance, and others by quasi-malefeasance. We must first treat of those obligations, which arise from a contract; and of these there are also four kinds: for obligations are contracted by the thing itself, by word of mouth, by writing, or by the mere consent of parties. Let us now take a separate view of each of these methods of contracting.

Titulus Decimus-Quintus.

Quibus modis re contrahitur obligatio.


De mutuo.

Re contrahitur obligatio, veluti mutui datione. Mutui autem datio in is rebus consitit, quae ponendae, numero, mensuravr, constit; veluti vino, oleo, frumento, pecunia numerata, aere, argentio, auro, quas res, aut numerando, aut metiendo, aut appendendo, in hoc damus, ut accipientium fiant. Et, quoniam nobis non eadem res sed aliæ eundem naturæ et qualitatis redduntur, inde eam mutuum appellatum est;quia ita a me tibi datur, ut ex meo tuum fiat: & ex eo contractu nascitur actio, qua vocatur certi condicio.

An obligation is contracted by the thing itself; that is, by the delivery of it, as a loan or mutuum: and any particular thing, which consists of weight, number, or measure, as wine, oil, corn, coin, brass, silver, gold, may be delivered as a mutuum; and these substances, when so delivered, become in specie the absolute property of the receiver: and, since the very identical things lent cannot be restored, but others of the same nature and quality must be paid in lieu of them, this loan is therefore called a mutuum; for in this case I fo give, that what is mine may become yours: ut ex meo tuum fiat. From this contrahit arises that action, which is called certi condicio.
LIB. III. TIT. XV.

De indebito soluto

§ I. Is quoque, qui non debitum acceptit ab eo, qui per errorem solvit, re obligatur; daturque agenti contra eum propter repetitionem condictionis actio: nam perinde ei condici potest, si apparat, eum dare oporere, ac si mutuum acceptisset. Unde puppillus, si ei sine tutoris auctoritate indebitum per errorem datum est, non tenebitur indebiti conditione, non magis quam mutui datione. Sed haec species obligationis non videtur ex contractu consisteri; cum is, qui solvendi animo dat, magis voluerit negotium distrahere, quam contrahere.

§ 1. He also, who hath received what was not due to him, it being paid or delivered by mistake, is bound by the thing received, so that an action of condition lies against him for the recovery of the thing, at the suit of him, who paid or delivered it erroneously. And this action may be brought against the receiver in these words, si apparat, eum dare oporere; in the same manner, as if he had accepted the thing delivered, as a mutuum. And hence it is, that a pupil, when a payment of any thing not due hath been made to him without the authority of his tutor, is not subject to the action called conditioni indebiti; because he is not subject to an action on account of the delivery of the thing, as a mutuum. And yet this species of obligation does not seem to proceed from a contract; since he, who pays with an intention to satisfy his debts, appears more willing to dissolve, than to make, a contract.

De commodato:

§ II. Item is, cui res aliqua utenda datur, id est, commodatur, re obligatur, & tenetur commodati actione. Sed is ab eo, qui mutuum acceptit, longe difgit: namque non ita res datur, ut ejus fiat; & ob id de ea re ipsa restituenda tenetur. Et is quidem, qui mutuum acceptit, si quolibet fortuito causâ amiserit, quod acceptit, velut incendio, ruina, naufragio, aut latronum hostiumve incurfu, nihilominus obligatus manet. At is, qui utendum acceptit, sane quidem exactam diligentiam custodiendâ rei praestare tenetur: nec sufficit ei, tantam diligentiam adhibuisse, quantam suis rebus adhibere solitus est, si modo alius diligentior poterat eam rem custodire. Sed propter majorem vim, maiorque causâ, non tenetur, si modo non ipsius culpa is causâ interveniit: aliqui, si id, quod tibi commodatum est domi, peregre tecum ferre malueris, & vel incursu hostium praeconumve, vel naufragio, amiseris, dubium non est, quin de restituenda ea re tenearis. Commodata autem res tunc propriae intelligitur, si, nulla mercede accepta vel coniituta, res tibi utenda data est: aliqui, mercede interveniente, locatus tibi uius rei videtur; gratuitum enim debet esse commodatum.

§ 2. He also, to whom the use of any particular thing is granted or commodated, is bound by the delivery of the thing, and is subject to an action called commodataria. But such person widely differs from him, who hath received a mutuum: for a commodatum, or thing lent, is not delivered, to the intent that it should become the property of the receiver; and therefore be is bound to restore the identical
identical thing, which be hath received. There is also another difference; for be, who hath accepted a mutuum, is not freed from his obligation, if even by any accident, as by the fall of an edifice, fire, shipwreck, thieves, or the incursions of an enemy, he hath lost what he hath received: but be, who hath received a commodatum, or a thing lent for his use only, is indeed commanded to employ his utmost diligence in keeping and preserving it; (and it will not suffice, that be hath taken the same care of it, which he was accustomed to take of his own property, if it appears, that a more diligent man might have preferred it;) yet, if it is evident, that the loss of it was occasioned by a superior force, or some extraordinary accident, and not by any fault, be is then not obliged to make good the loss; but, if a man by choice will travel with what be has received as a commodatum or loan, and should lose it by shipwreck, or by the incursion of enemies, or robbers, it is not to be doubted, but that be is bound to make restitution, or to pay an equivalent. A thing is properly said to be lent or commodated, when one man permits another to enjoy the use of it, and receives nothing by way of hire: but, if a price for hire is paid, the thing is let, and not lent; for a commodatum, or loan, must be gratuitous.

De deposite.

§ 3. Praeterea & is, apud quem res aliqua deponitur, re obligatur, teneturque actione depositi; quia & ipse de ea re, quam accept, restituenda tenetur. Sed is ex eo solo tenetur, si quid dolo commiserit: culpae autem nomine, id est, deficiæ ac negligentiae, non tenetur. Itaque securus est, qui parum diligenter custodiat rem furto amiserit: quia, qui negligenter amico rem custodiendam tradit, non ei, sed suo facilitati, id imputare debet.

§ 4. Any person, who is intrusted with a deposite, is bound by the delivery of the thing, and is subject to an action of deposite, because he is under an obligation of making restitution of that very thing, which be received. But a depository is only thus answerable on account of fraud; for where a fault only can be proved against him, such as negligence, he is under no obligation; and he is therefore secure, if the thing deposited is stolen from him, even altho' it was carelessly kept. For be, who commits his goods to the care of a negligent friend, should impute the loss of them, not to his friend, but to his own facility and want of caution.

De pignore.

§ 4. A creditor also, who hath received a pledge, is bound by the delivery of it; for be is obliged to restore the very thing, which he hath received, by the action called pignersititia. But, insinuatur as a pledge is given for the mutual

service
service of both debtor and creditor, (of the debtor, that he may obtain the money the more easily, and of the creditor, that the repayment may be the better secured,) it will suffice, if the creditor shall appear to have used an exact diligence in keeping the thing pledged: for, if such diligence appears to have been used, and the pledge was lost by mere accident, the law secures the creditor, as to the loss of the thing pledged, and he is by no means impeded to sue his debt.

Titulus Decimus-sextus.
De verborum obligationibus.

Summa.

V E R B I S obligationis contrahitur ex interrogatione et responso.

Cum quid dari fieri vela nos stipulamur; ex qua duæ proicitur actiones, tam condicio certi, si certa sit stipulatio, quam ex stipulato, si incerta sit: quæ hoc nomine inde utitur, quod stipulum apud veteres firmum appellabatur, forte a stipite descendens.

An obligation in words is made by question and answer, when we stipulate, that anything shall be given or done; and from hence arise two actions, viz. the action called condition certain, when the stipulation is certain; and the action called condition ex stipulato, when the stipulation is uncertain. This obligation is called a stipulation, because whatever was firm was termed stipulum by the ancients; the word stipulum being probably derived from stipes, denoting the trunk of a tree.

De verbis stipulationum.


§ 1. The following words were formerly used in all verbal obligations.
Spondes? Spondeo.
Promittis? Promitto.
Fide-promittis? Fide-promitto.
Fide-jubes? Fide-jubeo.
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And it is not material, whether the stipulation is conceived in Latin, Greek, or any other language, if the stipulating parties understand it: neither is it necessary, that the same language should be used by each person; for it is sufficient, if a congruent and pertinent answer is made to each question. It is moreover certain, that two Greeks may contrah in Latin. Antiently indeed it was necessary to use those solemn words before recited; but the constitution of the Emperor Leo was afterwards enabled, which takes away this verbal solemnity, and requires only the apprehension and consent of each party, expressed in any form of words.

Leonina constitutio] Omnes stipulationes, etiam non solemnibus, vel directis, sed quibuscumque verbis, consistit consentientium composita sunt, vel

Quibus modis stipulatio fit. De stipulacione pura vel in diem.

§ II. Omnis stipulatio aut pure, aut in diem, aut sub conditione fit. Pure, veluti quinque aureos dare spondes? idque consensum petes. In diem, cum adjecis die, quo pecunia solvatur, stipulatio fit; veluti, decem aureos primis calendis Martis dare spondes? id autem, quod in diem stipulamur, statim quidem debetur; sed peti prius, quam dies venerit, non potest; ac ne eo quidem ipso die, in quem stipulatio facta est, peti potest; quia totus in dies arbitrio solvendis tribui debet; neque enim certum est, eo die, in quem promissum est, datum non esse, priusquam est dies praeterierit.

§ 2. Every stipulation is made to be performed simply, or at a day certain, or conditionally. A stipulation is made to be performed simply, when a man says, do you promise to pay me five aurei? and, in this case, the money may be instantly demanded. A stipulation is made to be performed at a day certain, when the day is added, on which the money is to be paid; as when a man says, do you promise to pay me ten aurei on the first of March? but note, than what we stipulate to pay at a day certain, it becomes immediately due, yet it cannot be demanded before the day comes; nor can it even then be sued, for the whole day must be allowed for payment; because it can never be certain, that there hath been a failure of payment on the day promised, until that day is quite expired.

De die adjecto perimendae obligationis causa.

§ III. At, si ita stipuleris, decem aureos annuus, quoad vivas, dare spondes? et pure facta obligatio intelligitur, et perpetuatur: quia ad tempus non potest deberi; sed hares petendo pacti exceptione submovebitur.

§ 3. But, if a man thus stipulates; viz. do you promise to give me ten aurei annually, as long as I live? the obligation is understood to be made purely or simply, and becomes perpetual so as to bind the heirs of the obliger; for an obligation cannot continue due for a time certain only: yet, if the heir of the stipulator demands payment, he shall be barred by an exception of agreement.

Quia
LIB. III. TIT. XVI.

Quia ad tempus] "Quod alicui debere con-
"pit, id certis modis debere definit; puta
"solute, acceptatione, novatione, &c.
"ff. 44. 4.7. l 44. Ulp. Sed tempus non est
"modus tollenda obligationis, cum tempus sit
"quodiam naturalit, et obligatio civilit quid-
"dam; naturalia autem non possunt tollere
"civilia, sed sunt illi modi a legibus pra-
"scripti, quibus extinguitur obligatio. Cum
"ergo tempus non possit tollere civilis obli-
"gationem, sequitur, te hæredi meo remane-
"re obligatum civiliter, etiam me mortuo; idque
"textus sensit in verbo, perpetuar. Hæc
"quidem subtili summéque jure procedunt;
"et, quia iniquum videbatur, ultra id, quam
"convenit eft, te cogis, elidituri hæc civilis
"obligatio per exceptionem paæri convertit;
"et igitur, quamvis hæres mens, rigore juria
"inspecto, possit abs te illos decem auræos
"annuos petere, tamen submovebitur per ex-
"ceptionem paæri convertit de non petendo;
"quasi videar taceat paæum facie, quod ego
"fipulator possem quidem annuos decem abs
"te petere, quamduo viverem, hæres autem
"meus non posset. Mnfr.

De conditione.

§ IV. Sub conditione stipulatio fit, cum in aliquem casum differtur
obligatio, ut, si aliquid factum fuerit, vel non fuerit, committatur stipu-
latio; veluti, si Titius consul fuerit factus, quinque aureos dare sponde?
Si quis ita stipuletur, si in capitolium non ascendero, dare sponde? per-
inde erit, ac si stipulatus esse, cum moreretur, fibi dari. Ex condi-
tionali stipulatione tantum est debitum in; eamque ipsam sper
in hæredem transmittimus, si prius, quam conditio extet, mors nobis
contigerit.

§ 4. A stipulation is conditional, when an obligation is referred to an accident,
and depends upon some thing to be done or not done, to happen or not to happen,
before the stipulation can take effect: for instance, if a man stipulates thus; do
you promise to pay me five aurei, if Titius is made a consul? or thus, do
you promise to pay me five aurei, if I do not ascend the capitol? which last
stipulation is in effect the same, as if he had stipulated, that five aurei should be
paid to him at the time of his death. It is to be observed, that, in every conditional
stipulation, there is only an hope, that the thing stipulated will become due, and this
hope a man transmits to his heirs, if he dies before the event of the condition.

De loco.

§ V. Loca etiam inferi stipulationi solent; veluti, Carthagini dare
sponge? quæ stipulatio, licet pure fieri videatur, tamen re ipfa habet
tempus adjunctum, quo promissor utatur ad pecuniam Carthaginam dandum.
Et ideo, si quis Romæ ita stipuletur, bodie Carthaginæ dare sponde? inu-
tilis erit stipulatio, cum impossibilis sit repromissio.

§ 5. Even places are often inferred in a stipulation; as for example, do you
promise to give me such a particular thing at Carthage? and this stipula-
tion, tho' it appears to be made simply, yet in reality carries with it a space of
time, which the obligor may make use of to enable himself to pay the money pro-
mised at Carthage. And therefore, if a man at Rome should stipulate in these-
words, do you promise to pay me a sum of money this day at Car-
thage? the stipulation would be null, because the performance of it would be
impossible.
De conditione ad tempus praesens vel præteritum relata.

§ VI. Conditiones, quæ ad praesens vel præteritum tempus referuntur, aut statim infirmam obligationem, aut omnino non differunt; veluti, si Titius confus fuit, vel, si Mævius vivit, dare spondes? nam, si ea ita non sunt, nihil valet stipulatio; sin autem ita se habent, statim valet. Quæ enim per rerum naturam sunt certa, non morantur obligationem, licet apud nos incerta sint.

§ 6. Conditions, which relate to the time present or past, either instantly annul an obligation, or instantly enforce it: for example, if a man should thus stipulate, do you promise me the payment of a sum of money, if Titius hath ever been a confus? or thus, if Mævius is now living? If these things are not so, that is, if Titius hath never been a confus, and Mævius is not now living, the stipulation is void; and if they are so, that is, if Titius hath been a confus, and Mævius is actually living, then the stipulation is good and may be enforced; for events, which in themselves are certain, delay not the performance of an obligation, alibis to us they are not certain.

Quæ in stipulatum deducuntur.

§ VII. Non solum res in stipulatum deduci possunt, sed etiam facta; ut si stipulemur aliquid fieri, et non fieri. Et in hujusmodi stipulatio-nibus optimum erit pænam subjicere, ne quantitas stipulacionis in incerto sit, ac necesse sit actori probare, quod ejus interfuit. Itaque, si quis, ut si aliquid, stipuletur, ita adjici pæna debet, si ita factum non erit, pæ-nae nomine decem aureos dare spondes? Sed si, quædam fieri, quædam non fieri, una eademque conceptione stipuletur quis, claufula hujusmodi erit adicienda; si adversus ea factum erit, irve quid ita factum non fuerit, tunc pænae nomine decem aureos dare spondes?

§ 7. Not only things, as a field, a slave, or a book, but also acts, may be the subject of stipulations; as when we stipulate, that something shall, or shall not be done. And, in such stipulations, it will be right to subjoin a penalty, lest the value of the stipulation should be uncertain, and the demandant should therefore be forced to prove how far he is interested in it. And therefore, if a man stipulates, that something shall be done, a penalty ought to be thus added; do you not promise to pay me ten aurei, as a penalty, if the act stipulated is not performed? But, if it is agreed in the same obligation, that some things shall be done, and that others shall not be done, then ought some such clause, as the following, to be added; do you promise to pay me ten aurei, as a penalty, if any thing is done contrary to agreement; or if any thing is not done according to our agreement?
Lib. III. Tit. XVII.

Titulus Decimus-septimus.

De duobus reis stipulandi et promittendi.


Quibus modis duo rei fieri possunt.

Et stipulandi et promittendi duo pluresve rei fieri possunt. Stipulandi ita, si post omnium interrogationem promissor respondat, Spondeo; ut puta, cum duobus separatim stipulantibus ita promissor respondat, utrique vestrum dare spondeo. Nam, si prius Titius spopondisset, deinde alio interrogante spondeat, alia atque alia erit obligatio, nec creduntur duo rei stipulandi effe. Duo pluresve rei promittendi ita sunt, Mævius, decem aureos dare spondeas? et Seius, eo dem decem aureos dare spondeas? si respondant singuli separatim, Spondeo.

Two or more persons may stipulate, and two or more may become obligors. The stipulating parties are bound, if, after all questions have been asked, the obligor answers, I promise; as when, for example, the obligor thus answers two persons separately stipulating, I promise to pay each of you. For, if he first promises Titius, and afterwards promises another, who interrogates him, there will then be two obligations, and not two stipulators to one obligation. Two or more become obligors, if, after they have been thus interrogated, Mævius, do you promise to pay us ten aurei? and, Seius, do you promise to pay us the same ten aurei? they each of them answer separately, I do promise.

De effectu hujusmodi stipulacionum.

§ I. Ex hujusmodi obligationibus et stipulacionibus solidum singulis debetur, et promittentes singuli in solidum tenetur. In utraque tamen obligatione una res vertitur; et vel alter debitum accipiendo, vel alter solvendo, omnium perimit obligationem, et omnes liberat.

§ 1. By these stipulations and obligations the whole sum stipulated becomes due to every person stipulating, and every obligor is bound for the payment of the whole. But as one and the same thing is due by each obligation, therefore any one of the stipulators by receiving the debt, and any one of the obligors by paying it, discharges the obligation of the rest, and frees all parties.

De stipulatione pura; et de die et conditione.

§ II. Ex duobus reis promittendi, alius pure, alius in diem, vel sub conditione, obligari potest; nec impedimento erit dies aut conditionio, quo minus ab eo, qui pure obligatus est, petatur.

§ 2. Where there are two obligors, the one may bind himself purely and simply, and the other may oblige himself only to make payment on a day certain, or upon condition:
Titulus Decimus-octavus.
De stipulationibus servorum.
D. xlvi. T. 3.

An servus stipulari possit.

Servus ex persona domini jus stipulandi habet; sed et hereditas in plerique personae defuncti vicem suffixa: ideoque, quod servus hereditarius ante aditam hereditatem stipulatur, acquirit hereditati; ac per hoc etiam heredi postea facto acquiritur.

A slave obtains the liberty of stipulating from the person of his master; but in many instances the inheritance represents the person of a master deceased: and therefore whatever an hereditary slave stipulates for, before the inheritance is entered upon, he acquires it for the inheritance; and of course for him, who afterwards becomes the heir.

Cui acquirat. De persona, cui stipulatur. De stipulatione impersonali.

§ I. Sive autem domino, sive fisci, sive conservo suo, sive imperfsonae litter servus stipuletur, domino acquirit. Idem juris est et in liberis, qui in potestate patris sunt, ex quibus causis acquirere possunt.

§ 1. A slave, let him stipulate how he will, for his master, for himself, for a fellow slave, or generally without naming any person, always acquires for his master. And the same obtains among children, who are under the power of their father, in regard to those things, which they can acquire for him.

De stipulatione facti.

§ II. Sed, cum factum in stipulatione continebitur, omnimodo persona stipulantis continetur; veluti, si servus stipuletur, ut fisci ire, agere, liceat; ipse enim tantum prohiberi non debet, non Etiam dominus ejus.

§ 2. But, when a fact or thing to be done is contained in a stipulation, the person of the stipulator is solely regarded; so that, if even a slave stipulates, that he shall be permitted to pass through a field, and to drive beasts or a carriage through it, it is not the master, but the slave only, who is to be permitted to pass.

De servo communi.

§ III. Servus communis stipulado unicuique dominorum, pro portione dominii, acquirit; nisi Juifius unius eorum, aut nominatim alicui eorum.
LIB. III. TIT. XIX.

eorum, stipulatus est; tunc enim soli ei acquiritur. Quod servus com-
munis stipulatur, si alteri ex dominis acquiri non potest, solidum alteri
acquiritur; veluti si res, quam dari stipulatus est, unus domini sit.

§ 3. If a slave, who is in common to several masters, stipulates, he acquires
a share for each master according to the proportion, which each has in the property
of him. But, if such slave should stipulate at the command of any particular
master, or in his name, the thing stipulated will be acquired solely for that master.
And, whatever a slave in common to two masters stipulates for, if part cannot be
acquired for one master, the whole shall be acquired for the other; as when the thing
stipulated already belongs to one of the two.

TITULUS DECIMUS-NONUS.

De divisione stipulationum.

Divisi.

STIPULATIONUM aliae sunt judiciales, aliae praetoriae, aliae conven-
tionales, aliae communes, tam praetoriae quam judiciales.

Some stipulations are judicial, others praetorian, others conventional, and others
common; that is, both praetorian and judicial.

De judicialibus stipulationibus.

§ 1. Judiciales sunt duntaxat, quae a mero judicis officio proficic-
cuntur; veluti de dolo cautio, vel de persequendo servo, qui in fuga est,
restituendo pretio.

§ 1. The judicial are those, which proceed merely from the office of the judge;
as when security is ordered to be given against fraud, or for pursuing a slave, who
has fled, or for paying the price of him.

De praetoriiis.

§ 2. Praetoriae sunt, quae a mero praetoris officio proficiscuntur; veluti
damni infecti vel legatorum. Praetorias autem stipulationes sic audiri
opertet, ut in iis etiam contineantur ædilitiae; nam et ha a jurisdicitione
praetoris veniunt.

§ 2. The praetorian stipulations are those, which proceed from the mere office of
the praetor; as when security is ordered to be given pro damnō infectō; that is,
on account of damage not yet done, but likely to happen; and for the payment of
legacies. And note, that under praetorian stipulations we comprehend the ædilitiae;
for these proceed from the jurisdiction of the praetor.

Ut in iis contineantur ædilitiae.]

De ædilitia et stipulationibus in senatu vindicatis: quibus
moribus et viis rerum venaliæ; putta, rem
moribus non effe, ferum et fugitivum non effe, et
de casibus, quae edicto ædiliis promittuntur.

ff. 21 t. 1. De ædilitia edito.

Praetoria ego vocabulum tice in senatu la-
ho accipit videtur pro quo quis magistratu,
cui et jurisdicition. Bin.
De conventionibus.

§ III. Conventionales sunt, quae ex conventione utriusque partis consipiuntur; hoc est, neque iusfus judicis, neque iusfus praetoris, sed ex conventione contrahentum; quarum totem funt genera, quot, (pene dixere- rim,) rerum contrahendarum.

§ 3. Conventional stipulations are those, which are made by the agreement of parties; that is, neither by order of a judge or praetor, but by the consent of the persons contrasting, and of these stipulations there are as many kinds, as of things to be contrainted for.

De communibus.

§ IV. Communes sunt, veluti rem salvam fore pupillo, (nam et praetor jubet rem salvam fore pupillo caveri, et inter dum judex, si alter hac res expediri non potest,) vel de rato stipulatio.

§ 4. Common stipulations are those, which are ordered for the security of the effect of a pupil, (for the praetor ordains a caution to be given on this account, and sometimes a judge decrees it, when there is an absolute necessity,) or for the ratification of a thing done in another’s name.

Nam et praetor jubet.] “Hac stipulatio, rem salvam fore pupillo, regulariter jussa praetoris interponitur, nullo interveniente judicio aut causa cognizione; et, nisi caveat tutor, pignoribus captis et mulcta indicta coeBeretur; quorum nihil est judicis, qui nudam duntaxat causa notionem habet. Sed finge, debitorem pupillni conventum a tutore poll litum confirmet, testes tam demum, inter moras judicii, cognos- visse non fatis dedisse tuto rem, atque ad hanc exceptionem con fugere, utique audiendus erit, et in hoc causo officio judicis injungitur stipulatio. Viam.

And, according to the laws of England, whoever is appointed a tutor or guardian by an ordinary, is bound to give security; and he must, before his admission, take an oath to administer all the affairs of his ward to his profit and benefit, and to give a true and faithful inventory of all his goods, chattels, and credits; and also to render an exact and true account of his office, when by law required. And besides this he must find fit and able sureties, who must be bound jointly and severally for his true and faithful administration. Cowel. 1. infl. 1. 24.

But in practice, (fays Dr. Strahan in his notes upon Domat,) this law is not now observed, to the very great detriment of minors.

Titulus Vigesimus.

De inutilibus stipulationibus.


De his, quae sunt in commercio.

O Mnis res, quae dominio nostro subjicitur, in stipulationem deduci potest, sive ea mobilis sit, sive foli.

Every thing, of which we have the property, may be brought into stipulation, whether it is moveable or immoveable.
De bis, quæ non existunt.

§ I. At, si quis rem, quæ in rerum natura non est, aut esse non potest, dari stipulatus fuerit, veluti Stichum, qui mortuus sit, quem vivere credebatur, aut Hippocentaurum, qui esse non posset, inutilis est stipulatio.

§ 2. But, if a man beth stipulated, that a thing shall be given, which does not, or can not exist, as for instance, that Stichus, the slave, who is dead, but is thought to be living, or that a Centaur, who cannot exist, should be given to him, the stipulation is of no force.

De bis, quæ non sunt in commercio.

§ II. Idem juris est, si rem sacraram aut religiosam, quam humanè juris esse credebatur, vel publicam, quæ usibus populi perpetuo exposta sit, ut forum, vel theatrum, vel liberum hominem, quem servum esse credebatur, vel cujus commercium non habuerit, vel rem suam dari, quis stipulatur: nec in pendenti erit stipulatio ob id, quod publica res in privatam deduci, et ex libero servus fieri potest, et commercium adipiscit stipulatorum potest; sed protinus inutilis est. Item contra, licet initio utiliter res in stipulatum deduxerit, si tamen postea in aliquam eorum causam, de quibus supra dictum est, sine facto promissoris deveniret, extinguitur stipulatio. At nec fratem ab initio talis stipulatio valebit; Lucium Titium servum erit, dare spondeas et similia: quæ enim natura sui dominio nostro exempta sunt, in obligationem deduci nullo modo posseunt.

§ 3. And the law is the same, if a thing sacred, which was thought to be not so, is brought into stipulation; or if a man stipulates for a thing of constant public use, as a forum or a theatre, or for a free person, who was thought to be bond; or for a thing, which he cannot acquire; or for some thing, which is already his own: nor shall any such stipulation continue in usufruct, because a thing public may become private, a freeman may turn slave, a stipulator may become capable of acquiring, or because what now belongs to the stipulator may cease to be his; but every such stipulation shall be instantly void. And, on the contrary, albo a thing may properly be brought into stipulation at first, yet, if it afterwards falls under the class of any of the things before mentioned without the fault of the obligor, the stipulation is extinguished. And such a stipulation, as the following shall never be valid:—for instance, do you promise to give me Lucius Titius, when he shall become a slave? for those things, which in their natures are exempt from our dominion, are by no means to be brought into obligation.

De facto vel datione alterius:

§ III. Si quis alium daturum facturumve quid promiserit, non obligabitur; veluti si spondeat, Titium quintus aureos daturum: quod est effecutum se, ut Titius dareat, spondebat, obligatur.

§ 3. If a man promises, that another shall give or do something, such promissor shall not be bound; as if a man should promise, that Titius shall pay five aurei:
Lib. III. Tit. XX.

Aurei: but, if he promises, that he will cause Titius to pay five aurei, his promise shall be binding.

De eo, in quem conferitur obligatio, vel solutio.

§ IV. Si quis ali, quam ei, cujus iuri subjicitus est, stipuletur, nihil agit. Plane solutio etiam in extraneam personam conferri potest; veluti, si quis ita stipuletur, mibi aut Seio dare spondes? ut obligatio quidem stipulatori acquiratur, solvi tamen Seio, etiam invito eo, recte poscit, ut liberatio ipsa jure contingat; sed ille adversus Seium habeat mandati actionem. Quod si quis fisci et ali, cujus iuri subjicitus non sit, dari decem aureos stipulatus est, valet quidem stipulatio. Sed, utrum totum debeatur stipulatori, quod in stipulationem deductum est, an vero pars dimidia, dubitatum est. Sed, placuit, non plus, quam dimidiam partem, ei acquiri. Ei vero, qui iuri tuo subjicitus est, si stipulatus sit, tibi acquiris; quia vox tua tamquam filius intelligitur in his rebus, quae tibi acquiri possunt.

§ 4. If a man stipulates for any other, than for him, to whom he is subject, such stipulation is a void all: but nevertheless a payment of a thing promised may be made to a stranger; as if a man should thus stipulate, do you promise to make payment to me, or to Seius? for, when the obligation is to the stipulator, the payment may well be made to Seius, the against his will; and this is allowed in favor of the debtor, that he may be legally freed from his debt: and the stipulator, if there is occasion, may have an action of mandate against Seius. And, if a man should stipulate, that ten aurei shall be paid to him and to another, not under his power, the stipulation would be good: yet it hath been a doubt, whether the whole sum due would be due to the stipulator, or only a moiety; and it hath been resolved, that the stipulator in this case acquires a moiety only. But, if you stipulate for another, who is subject to your power, you acquire for yourself: for your own words are reputed your sons, and your son's words are reputed yours, in regard to all those things, which can possibly be acquired for you.

De interrogatione et responsione.

§ V. Praeterea inutilis est stipulatio, si quis ad ea, quae interrogatus fuerit, non respondeat; veluti si quis decem aureos a te dari sibi stipuletur, tu quinque promittas, vel contra: aut si illae pure stipuletur, tu sub conditione promittas, vel contra: si modo scilicet id exprimas; id est, si cui sub conditione vel in diem stipulanti tu respondes, praesenti die spondes: nam, si hoc folum respondes, Promitto, breviter videris in eandem diem vel conditionem spondisse: neque enim necessit esse in respondendo, eadem omnia repeti, quae stipulator expresserit.

§ 5. A stipulation is void, if the party interrogated does not answer pertinently to the demand made; as when a person stipulates, that ten aurei shall be paid him, and you answer free; or, vice versa, if he stipulates for free, and you answer, I promise ten. A stipulation is also void, if a man stipulates simply, and you promise conditionally; or, on the contrary, if he stipulates conditionally, and you answer purely, and in express terms; that is, when a man is stipulating conditionally or at a day.
De bis, qui sunt, vel habent, in potestate.

§ VI. Item inutilis est stipulatio, si vel ab eo stipuleris, qui tuo juri subjectus est, vel si es a te stipuletur. Sed servus quidem non solum domino suo obligari non potest, sed ne quidem ulli aliis, filii vero familiarium aliis obligari possunt.

§ 6. A stipulatio is also void, if you stipulate with him, who is in subjectiam to your power, or if he stipulates with you. For a slave is not only incapable of entering into an obligation with his master, but is also incapable of binding himself to any other person. But the son of a family can enter into an obligation with any other person, except his father.

Filii vero familiarum.] "Inter servum et si. lium familias hoc intereat, quod servus non " filii autem familia, extra patrem et canam. " tantum domino, sed nec ulli aliis ex con- " mutui, ut reliqui cives, obliguntur. Eum...
" tractu civiliter obligari potest; quia, quod ad-

De muto et surdo.

§ VII. Mutum neque stipuli neque promittere possit, palam est; quod et in surdo receptum est: quia et is, qui stipulatur, verba promitteris, et is, qui promittit, verba stipulantis, audire debet. Unde appareat, non de eo nos loqui, qui tardi exauditat, sed de eo, qui omnino non audit.

§ 7. It is evident, that a dumb man can neither stipulate, nor promise: and the same law is received in regard to deaf persons; for he, who stipulates, ought to hear the words of the obligor; and he, who promises, the words of the stipulator. But we speak not of him, who bears with difficulty, but of him, who has no hearing.

De furioso.

§ VIII. Furiosus nullum negotium gerere potest, quia non intelligit, quod agit.

§ 8. A madman can transact no business, because he understands not what he does.

De impubere.

§ IX. Pupillus omne negotium recte gerit; ita tamen ut, ubi tutoris auctoritas necessaria sit, adhibeat tutor; veluti, si ipse obligetur; nam alium fibi obligare etiam fine tutoris auctoritate potest. Sed, quod diximus de pupillis, utique de iis verum est, qui jam habent aliquem intellectum. Nam infans, et qui infantia proximus est, non multum a furioso distant; quia hujusmodi aetatis pupilli nullum habent intellectum.
Lib. III. Tit. XX.

Sed in proximis infantiae, propter utilitatem eorum, benignior juris interpretatio facta est, ut idem juris habeant, quod pubertati proximi. Sed, qui in potestate parentis est impubes, ne auctore quidem patre obligatur.

§ 9. A pupil is capable of transacting any business, if his tutor consents, where his authority is necessary; as it certainly is, when the pupil would bind himself: but a pupil can stipulate or cause others to be bound to him, without the authority of his tutor. What we have said of pupils must be understood of those, who have some understanding; for an infant, or one next to an infant, differs but little from a person out of his senses: for pupils of such an age have no understanding: but a more favorable interpretation is given to the law in regard to these, who are but little removed from infancy, whenever their own utility is concerned; so that they are then allowed the same rights, as those, who are near the age of puberty. But a son, who is under the power of his father, and within the age of puberty, cannot bind himself, even albeit his father consents, and authorizes the transaction.

De condicione impossibili.

§ 10. If an impossible condition is added to an obligation, the stipulation is null; and that condition is reckoned impossible, of which nature forbids the event: as, for example, if a man should say, do you promise me ten aurei, if I touch the heavens with my finger? but suppose a stipulation to be thus made: do you promise me payment, if I do not touch the sky with my finger? such a stipulation would be understood to cause a simple obligation, the performance of which might be instantly demanded.

Si impossibilis conditio.] In England, if the condition of a bond is impossible at the time of making; as for instance, if it be, that the obli- ger shall arrive at Rome the next day, such a bond is not regarded as null, but as single, and the same, as if no condition was annexed to it. But, if the condition of a bond is possible at the time of making, and, before such condition can be performed, it becomes impossible by the act of God, by the act of the law, or by the act of the obligee, the obligation in such case is saved. Co. Lt. 256. a.

De absentia:

§ 11. Item verborum obligatio, inter absentes concepta, inutilis est. Sed, cum hoc materiam litium contentiosiss hominibus praebat, forte potius tales allegationes opponentibus, et non presentesuisse vel se vel adversarios suos contendentibus, ideo nostra constitutio propter celerita- tem dirimendarum litium introducba est, quam ad Caesaris advocatos scripsimus.
Lib. III. Tit. XX.

scripsimus; per quam disponsimus, tales scripturas, quae præsto esse partes indicant, omnino esse credendas, nisi is, qui talibus utitur improbis allegationibus, manifestissimis probationibus, vel per scripturam, vel per testes idoneos, approbaverit, toto eo die, quod conficiabatur instrumentum, se se vel adversarium suum in aliis locis fuisset.

§ 11. A verbal obligation, made between absent persons, is also void. But, when this doctrine afforded matter of strife to contentious men, alleging after some time past, that either they or the other parties were not present, we issued our constitution, addressed as a refutation to the advocates of Cæsarea, which effectually provided for the speedy determination of such suits: and by this we have ordained, that full credit shall be given to those written acts, or instruments, which declare, that the contracting parties were present, unless the party, who alleges absence, makes it evident by the most manifest proofs either in writing or by witnesses, that either he, or his adversary, was in some other place, during the whole day, in which the instrument was made.


De stipulacione post mortem, vel pridie quam alter contrabentium moriatur.

§ XII. Postr mortem suam dari sibi nemo stipulari poterat, non magis quam post mortem eum, a quo stipulabatur. Ac nec is, qui in allicius poetae esse est, post mortem eius stipulari poterat; quia patris vel domini voce loqui videretur. Sed et, si quis ita stipularet, pridie quam moriar, vel, pridie quam morteris, dare spondeas? inutilis erat stipulatio. Sed, cum, ut jam diximus est, ex consensu contrahentium stipulationis valeat, placuit nobis, etiam in hunc juris articulam necessariam inducere emendationem, ut, five post mortem, five pridie quam moriatur stipulator, five promissor, stipulatio concepta sit, stipulatio valeat.

§ 12. A man could formerly no more stipulate, that a thing should be given him after his own death, than he could stipulate, that a thing should be given him, after the death of the obligor. Neither could any person under the power of another stipulate, that any thing should be given him after his death, because such person would appear to speak the words of his father or master. And, if a man bad stipulated in this manner, do you promise to give me five aurei the day before I die? or the day before you die? the stipulation was also invalid. But since all stipulations, as we have already said, take their rise and force from the consent of the contracting parties, we have thought it proper to introduce a necessary emendation in this respect, so that, whether it is stipulated, that a thing shall be given after, or immediately before, the death either of the stipulator, or the obligor, the stipulation shall be good.

Inducere emendationem.) "Judaeismus sitroc-
pulam hanc veteris juris solum tam- lit nonnecessitas suam, quam extant, in Cod.
" 8. t. 38. l. 11. et Cod. 4. t. 11. l. un.
" In qua juris mutatione ait, se replexisse non " ad conceptionem verborum, sed ad lentiam " et mentem contrabentium; qui quippe qui stipu-
" latur, post mortem suam sibi dari, non debet " eximiam tam fluitus, ut sibi ipsi in id tempus " stipulatur; sed hoc perinde sic accipiendum, " ac si post mortem suam stipulatus effet hæredi " suo, in cujus persona quodammodo adhuc " vivere videatur. Fin.

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De stipulatione praepostera.

§ XIII. Item, si quis ita stipulatus erat, si novis cras ex Asia venerit, bode are sponde? inutilis erat stipulatio, quia praepostere concepta est. Sed, cum Leo inclytæ recordationis in dotibus eandem stipulationem, quæ praepostera nuncupatur, non esse rejiciendam exstipulaverit, nobis placuit et huic perfectum robur accommodari, ut non solum in dotibus, sed etiam in omnibus, valeat hujusmodi conceptio stipulationis.

§ 13. Also, if a man had stipulated in these words, do you promise me a sum of money to-day, if a certain ship arrives to-morrow from Asia? the stipulation would have been invalid, because praeviously conceived. But, since the emperor Leo, of renowned memory, was of opinion, that such stipulations ought not to be rejected in regard to marriage portions, it hath pleased us also to give a fuller force to this doctrine by ordaining, that every stipulation of like import shall hold good not only in marriage portions, but likewise in all other contrats.

Nobis placuit.] vid. Cod. 6. t. 23. l. 25. praeposteri reprebentione, &c.

De stipulatione collata in tempus mortis.

§ XIV. Ita autem stipulatio concepta, veluti si Titius dicat, cum moriar, dare sponde? vel cum morieris? et apud veteres utilis erat, et nunc valet.

§ 14. If a stipulation had been conceived in the following words, do you promise to give me ten aurei, at the time, when I shall die? or thus, at the time, when you shall die? it was good by the ancient law, and is now valid.

§ XV. Item post mortem alterius recte stipulamur.

§ 15. We may also legally stipulate, that a thing shall be given, after the death of a third person.

De promissione scripta in instrumento.

§ XVI. Si scriptum in instrumento fuerit, promississe aliquem, perinde habitur, atque si interrogatione praecedente responsum fit.

§ 16. If it is written in an act or instrument, properly attested, that a man hath entered into an obligation by promise, it will be always presumed, that the promise was in answer to a precedent interrogation, and that every thing was done regularly.

De pluribus rebus in stipulationem deducitis.

§ XVII. Quoties plures res una stipulatione comprehenduntur, sicut dem promissor simpliciter respondet, dare spondeo, propter omnes tene- tur. Si vero unam ex his, vel quâdam, daturum ã ipo ponderetur, obligatio in iis, pro quibus ipo ponderetur, contrahitur: ex pluribus enim stipulationibus una vel quædam videntur esse perfectæ, singulas enim res stipulari, et ad singulas respondere, debemus.

When.
§ 17. When many things are comprehended in one stipulation, a man binds himself to give them all, if he answers simply I promise. But, if he promises to give one, or some of the things stipulated, an obligation is contracted only in respect to those things, which be promised to give. For, where there are many stipulations, it may happen, that only one, or some of them may be made perfect by a separate answer; and strictly we ought to stipulate for every thing severally, and to answer severally.

De pæna adjecta stipulationi, alii dari.

§ XVIII. Alteri stipulari (ut supra dictum est) nemo potest. Inventæ enim sunt hujusmodi stipulationes vel obligationes ad hoc, ut unuisquœque acquirat sibi, quod fœa interesse; caæterum, si alii detur, nihil interesse stipulatoris. Plane, si quis velit hoc facere, pœnam stipulari conveniet, ut, nisi ida faction sit, ut est comprehensum, committatur pœnae stipulationis etiam ei, cujus nihil interesse. Pœnam enim cum stipulationis quis, non illud inspicitur, quod interfuit ejus, sed quæ sit quantitas in conditione stipulationis. Ergo, si quis ida stipuletur, Titio dari, nihil agit; sed, si adserit pœnam, nisi dederis, tot aureos dare spones? tunc committitur stipulationi.

§ 18. No man can stipulate for another, as we have already observed; for stipulations and obligations have been invented, that every person may acquire for himself whatsoever may be of advantage to him; and, if this is given to another, the stipulator has no interest. But, if a man would effectually contract for another, he should stipulate, that unless the covenants of his stipulation are performed, the obligor shall be subject to a penalty, payable to him, who otherwise would receive no advantage from the obligation: for, when a penalty is stipulated, the advantage or interest of the stipulator is not regarded, but the quantity of the penalty is the only thing considered. And therefore, if a man should stipulate, that a certain thing shall be given to Titius, it will not avail; but, if to the stipulation be added a penalty as thus, do you promise to give me ten aurei, if you do not give the thing stipulated to Titius? the stipulation of the penalty will take place, if the obligation is not performed.

Si interfuit ejus, qui alii stipulant.

§ XIX. Sed et, si quis stipuletur alii, cum ejus interesse, placuit stipulationem valere. Nam, si is, qui pupilli tutelam administrare coeperat, cesserit administrationem contutori suo, et stipuletur rem pupillis salvam fore, quoniam interesse stipulatoris fieri, quod stipulatus est, cum obligatus futurus sit pupillo, si male res cesserit, tenet obligatio. Ergo et, si quis procuratori suo dari stipulatus sit, habebit vires stipulatio. Et, si creditoris quo stipulatus sit quod sua interesse, ne forte vel pœna committatur, vel prædia disfrahantur, quæ pignori data erant, valet stipulatio.

§ 19. But, if any man stipulates for the benefit of another, whom he himself also receives an advantage from it, the stipulation is valid. Thus if he, who both began to administer the tutelage of a pupil, should afterwards cede or give up the administration to his co-tutor, and stipulate for the security of the estate of his pupil, in this
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this case, (inasmuch as such a stipulation is for the interest of the stipulator, who would be obliged to answer all damages to the pupil, if the co-tutor did not unjustly administer the pupillary trust,) the obligation would bind. And upon the same principle, if a man stipulates, that a thing shall be given to his protégé or attorney, the stipulation shall prevail. And a stipulation is also good, which is made by a debtor for the use of his creditor, because it is the interest of the debtor, either that the penalty, upon which he borrowed money of his creditor, should not be exacted from him, or that his goods, which are hypothecated with his creditor, should not be sold.

De poena adjecita promissioni facti alieni.

§ XX. Vice versa, qui alium facturum promisit, videtur in ea esse causa, ut non teneatur, nisi poenam ipse promiserit.

§ 20. On the contrary, he, who promises, that another, namely Titius, shall perform some particular act, is not bound by such promise, unless he makes himself subject to a penalty, if the act is not performed by Titius.

De re stipulantis futura.

§ XXI. Item nemo rem suam futuram, in eum casum, quo sua sit, utiliter stipulatur.

§ 21. No man can legally stipulate, that a thing shall be given him, when it shall become his own.

Item nemo.] The decision in this paragraph is ad eum casum peruenit, a quo non po- is founded upon the following rule of law.issent incipere, nullatenus valent. Ferriere.

De diis et eas.

§ XXII. Si de alia re stipulator senierit, de alia promissor, perinde nulla contrahitur obligatio, ac if ad interrogatum responsum non efficit; veluti si hominem Stichum a te quis stipulatus fuerit, tu de Pamphilo senieris, quem Stichum vocari credideris.

§ 22. If the stipulator stipulates in regard to one thing, and the obliger promises in relation to another, no obligation is contrasted; and the parties are as much at liberty, as if no answer had been made to the interrogation: and this would be the case, if a man should stipulate, that Stichus should be given to him, and the obliger should intend to give Pamphilus, upon a thorough persuasion, that Pamphilus is called Stichus.

De turpi causa.

§ XXIII. Quod turpi ex causa promissum est, veluti si quis homicidi- dium vel sacrilegium se facturum promittat, non valet.

§ 23. A promisse made for a dishonest purpose, as, for example, to commit homicide or sacrilege, is not binding.

De morte contrabentium.

§ XXIV. Cum quis sub aliqua conditione stipulatius fuerit, licet ante conditionem deceperit, poetae existentem conditionem hares ejus agere potest. Idem est et ex promissoris parte.

L

§ 24.
§ 24. If a stipulation hath been entered into upon condition, and the stipulator should die pending the event of it, his heir will be intitled to an action against the obligor, if the event afterwards happens. And, if the obligor should die before the condition happens, his heir may be sued by the stipulator.

Quando agi potest ex stipulatione.

§ XXV. Qui hoc anno aut hoc mense dari stipulatus est, nisi omnibus partibus anni vel mensis praeteritis, non recte petet. Si fundum dari stipuleris, vel hominem, non poteris continuo agere, nisi tantum spatium praetererit, quo traditio fieri poffit.

§ 25. Whoever stipulates, that a thing shall be given to him this year or this month, cannot legally sue the obligor, till the whole year or month is elapsed. And, if a man stipulates, that a piece of ground, or slave, shall be given to him, he cannot instantly sue the obligor, but must wait, till such a space of time hath past, in which a delivery might reasonably have been made.

TITULUS VIGESIMUS-PRIMUS.

De fidejussoribus.


Cur accipiuntur fidejussores.

Pro eo, qui promittit, solent alii obligari, qui fidejussores appellantur; quos homines accipere solent, dum curant, ut diligentius libi cautum fit.

It frequently happens, that others bind themselves for him, who promises. These bondsmen or sureties are called fide-jussors, and are generally required by creditors for their greater security.

In quibus obligationibus:

§ 1. In omnibus autem obligationibus assumi possunt; id est, five re, five verbis, five literis, five consenfu, contractae fuerint: ac nec illud quidem intereft, utrum civilis, an naturalis sit obligatio, cui adjicitur fidejussor; adeo quidem, ut pro servo quoque obligetur, five extraneus sit, qui fidejussorem a servo accepit, five ipse dominus, in id, quod libi naturaliter debetur.

§ 1. Fide-jussors may be received in all obligations, whether contracted by the delivery of the thing itself, by words, by writing, or the mere consent of parties: nor is it material, whether the obligation is civil or natural; for a man may intervene, and oblige himself, as a fide-jussor or surety, even on the behalf of a slave; and this may be done, whether the person, who accepts the fide-jussor, is a stranger.
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stranger or the master of the slave, when the thing due is a natural debt or obligation.

De haerede.

§ II. Fidejussor non tantum ipse obligatur, sed etiam haereditem relinquuit obligatum.

§ 2. A fide-jussor is not only bound himself, but by his death transmits the obligation to his heir.

Si fidejussor præcedat vel sequatur obligationem.

§ III. Fidejussor et præcedere obligationem et sequi potest.

§ 3. A fide-jussor may be accepted either before or after an obligation is entered into.

De pluribus fidejussoribus.

§ IV. Si plures sint fidejussores, quotquot sunt numero, singuli in solidum tenentur; itaque liberum est creditor, a quo velit, solidum petere. Sed ex epistolæ Divi Hadriani compellitur creditor a singulis, qui modo solvendo sunt litis contestatae tempore, partes petere; ideoque, si quis ex fidejussoribus eo tempore solvendo non fit, hoc cæteros onerat. Sed, si ab uno fidejussore creditor totum consectus fuerit, hujus solius detrimentum erit, si is, pro quo fidejussit, solvendo non fit: et sibi imputare debet, cum potuerit juvari ex epistolæ Divi Hadriani, et desiderare, ut pro parte in se detur actio.

§ 4. Where there are fide-jussors or sureties, let them be ever so numerous, they are each bound by law in solidum, i.e. for the whole debt; and the creditor is at liberty to sue, from whom he will demand it. But, by a rescript of the emperor Adrian, a creditor may be obliged to demand separately from every fide-jussor, who is solvænt at the time of contestation of suit, bis share of the debt pro-rata; and, if any of the fide-jussors, at the time of the contestation of the suit, is not solvænt, the burden falls upon the rest. But, if a creditor obtains his whole demand from one of the fide-jussors, the whole los his shall be bis, if the party principal, for whom he was bound, is insolvent: for such fide-jussor can impute this loss only to himself, since he might have called to his aid the rescript of the emperor Adrian, and have prayed, that an action should not have been given against him, obliging him to the payment of more than his share of the debt, as a surety.

Si plures sint fidejussores.] In England, when two or more are bound, without specifying whether they are bound jointly, or jointly and severally, nothing is more certain, than that each may be sued by the obligee for his whole debt: but the party, who was sued, may have his remedy over against the obligor or his fellow surety. But, when persons are bound jointly, they must be sued jointly; and, when they are bound jointly and severally, the obligee may sue them jointly or severally at his election. See Bacon's abridgement, verb. obligations. D.

In quam summam obligatur fide-jussor.

§ V. Fidejussores ita obligari non possunt, ut plus debeat, quam debet is, pro quo obligantur: nam eorum obligatio accessio est princi-
palis obligationis; nec plus in accessione potest esse, quam in principali re; at ex diverso, ut minus debeant, obligari possunt. Itaque, si reus decem aureos promiserit, fidejussor in quinque recte obligatur; contra vero obligari non potest. Item, si ille pure promiserit, fidejussor sub conditione promittere potest; contra vero non potest. Non solum autem in quantitate, sed etiam in tempore, minus aut plus intelligitur: plus enim est statim aliquid dare, minus est post tempus dare.

§ 5. Fide-jussors ought not to be bound in a greater sum, than the debtor owes, for whom they are bound; for their obligation is an accession to the principal obligation; and an accessory debt cannot be greater, than the principal, both it may be less. Therefore, if the principal obligor promises ten aurei, the fide-jussor may be bound in five; but the fide-jussor cannot be bound in ten aurei, when the principal obligor is bound only in five. Also, when the obligor promises simply, the surety may promise conditionally; but, if the surety is bound simply, when the principal debtor is bound only conditionally, the obligation is void. And the terms greater and less take place not only in quantity but also in time, for an obligation to give or deliver a thing instantly is greater, than an obligation to give or deliver it after a time.

De actione fidejussoris.

§ VI. Si quid autem fidejussor pro reo solverit, ejus recuperandi causa habet cum eo mandati judicium.

§ 6. If a fide-jussor hath been obliged to pay money for the person, for whom he was bound, the fide-jussor may have an action of mandate against him for the recovery of the sum paid.

Si fidejussor græce accipiatur.

§ VII. Græce etiam fidejussor ita accipitur, τη ἑσυν πισεν κελουω, λέγω. Sed et si dixerit, θελω, five βελουμαι, sed et, φημι, pro eo erit, ac si dixerit, λέγω.

§ 7. A fide-jussor may thus bind himself even in greek; τη ἑσυν πισεν κελουω, λέγω. that is, I answer or speak solemnly upon my faith. But, if a man should use the words θελω or βελουμαι, I am willing, or φημι, I promise, any of these would serve the same purpose, as κελουω or λέγω.

Si scriptum sit, aliquem fidejussisse.

§ VIII. In stipulationibus fidejussorum sciemdum est, hoc generaliter accipi, ut, quodcumque scriptum sit quasi actum, videatur etiam actum. Ideoque confit, si quis scripterit se fidejussisse, videri omnia solemniter acta.

§ 8. We must here observe, that it is a general rule in all fide-jussorial stipulations, that whatever is alleged in writing to have been done, is to be presumed to have been actually done: and therefore, if a man in writing confesses, that he hath made himself a fide-jussor, it is also presumed, that all the necessary forms were observed.

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Titulus Vigesimus-secundus.

De literarum obligationibus.


Olim scriptura siebat obligatio, quae nominibus fieri dicebatur; quae nomina hodie non sunt in usu. Plane, si quis debere se scripsisset, quod sibi numeratum non esset, de pecunia minime numerata, potest multum tempore, exceptionem opponere non potest: hoc enim sapientiae consitutum est. Sic fit, ut et hodie, dum quers non potest, scriptura obligetur; et ex ea nae factur conditionio, cessoante ictuicet verborum obligatione. Multum autem tempus in hac exceptione antea quidem ex principalibus constitutionibus usque ad quinquennium procedebat; sed, ne credores diutius possint suis pecuniiis foratian defraudari, per constitutionem nostram tempus coarctatum est, ut, ultra biennii metas, hujusmodi exceptione minime extendatur.

A species of written obligation antiently prevailed, which was effectuated by registering the names of the contractors; but these contracts, which were called nomina, are not now in use. But, if a man confesses in writing, that he owes, what in reality he never received, he cannot, when an action is brought against him for this confessed debt, oppose an exception to it, setting forth, that the money was never paid; if much time has elapsed after the date of the obligation: and the limitation of this time has frequently been prescribed by the constitutions. Hence it is, at this day, that a man must be bound by his written note, if he cannot legally bring an exception; and from this written contract arises an action called a condition, when no stipulation or verbal obligation can be proved. And formerly the imperial constitutions gave a large space of time, not less than five years, in which any man was allowed to bring an exception, pecuniae non numeratae, i.e. an exception of money not paid. But we, for the safety of creditors in general, have greatly contracted this allowance of time, by our imperial constitution, which ordains, that an exception shall not be brought after the expiration of two years.


"si certum, Myns. Per nostram constitutionem." wid. Cod. 4. t.
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TITULUS VIGESIMUS-TERTIUS.

De obligationibus ex consensu.

Continuatio.

Consensu sunt obligationes in emptionibus, venditionibus, locatio-
nibus, conduccionibus, societatibus, mandatis: ideo autem ilis
modis obligatio dicitur consensu contrahit, quia neque scriptura, neque
præsentia, omnimodo opus est: ac nec dari quicquam necesse est, ut
substantiam capiat obligatio; sed sufficit, eos, qui negotia gerunt, conen-
tire: unde inter absentes quoque talia negotia contrahuntur, veluti per
epistolam vel per nuntium. Item in his contrahibus alter alteri obligatur
in id, quod alterum alteri ex bono et æquo præstare oportet; cum aliquo
in verbórum obligationibus alius stipuletur, alius promittat.

Obligations are made by consent in buying, selling, letting, hiring, societies
or partnerships, and mandates. An obligation, entered into by any of these
means, is said to be contracted by consent; because neither writing nor the presence
of parties is absolutely requisite. Neither is it necessary, that any thing should be
given or delivered, to the intent, that the obligation should take effect; for it suffices,
that the contrahors consent; and, for this reason, these contrahs may be entered into
by absent parties, either by letters or messeengers. And note also, that, in these
contrahs by consent, the parties are bound to each other mutually to do what
is just and right; but in verbal obligations one party stipulates and the other
promises.

TITULUS VIGESIMUS-QUARTUS.

De emptione et venditione.


De emptione pura. De pretii conventione, arrhis, et
scriptura.

Emptio et venditio contrahitur, simul atque de pretio conveniért,
quamvis nondum pretium numeratum sit, ac ne arhra quidem data
fuerit; nam, quod arrhae nomine datur, argumentum est emptionis et
venditionis contractae. Sed hoc quidem de emptionibus et venditionibus,
quae sine scriptura conficiuntur, obtine re oportet; nam nihil a nobis in hu-
justmodi emptionibus et venditionibus innovatum est. In iis autem, quae
scriptura conficiuntur, non aliter perfectam esse venditionem et empto-

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nem constituimus, nisi et instrumenta emptionis fuerint conscripta, vel manu propria contrahentium, vel ab alio quidem scripta, a contrahentibus autem subscripsa; et si per tabellionem sunt, nisi et completiones acceperint, et fuerint partibus absoluta.Donec enim aliquid deest ex his, et poenitentiae locus est, et potest emptor vel venditor sine pena recedere ab emptione et venditione. Ita tamen impune recedere concedimus, nisi jam arrharum nomine aliquid fuerit datum; hoc enim subsecuto, five in scriptis, five fine scriptis, venditio celebrata est, is, qui recusat adimplere contractum, si quidem est emptor, perdit quod dedit; si vero venditor, duplum restituere compellitur; licet super arris nihil expressum sit. Pretium autem constitui oportet; nam nulla emptio sine pretio esse potest.

The contract of buying and selling is made perfect, as soon as the price of the thing to be sold is agreed upon, albo’ it is not paid; nor even an earnest of it given; for whatever is taken, as earnest, does not constitute a contract, but serves only for a proof of it. And this is the law in regard to those bargains and sales, which are not in writing; for in such we have made no innovation. But, where there is a written contract, we have ordained, that a bargain and sale shall not become absolute, unless the instruments of sale are written by the contracting parties or at least signed by them, if written by others. And, when the instruments of sale are drawn by a public notary, the contract is not binding, if any formality hath been omitted, or if the instruments are not complete in all their parts: for, if anything is omitted, either the buyer or seller may rescind from his agreement without penalty, if nothing hath been given in the name of earnest. But, if earnest hath once been given, then the buyer, whether the contract was written or unwritten, if be refuseth to fulfill it, loseth his earnest, and the seller, if he refuseth, is compellable to restore double the value of the earnest, albo’ no agreement of this kind was expressly made. But it is always necessary, that the price of the thing to be sold should be fixed; for, till then, there can be no emptio-venditio, i.e. buying and selling.

In iis autem.] vid. Cod. 4. tit. 21. De fide instrumentorum.

By the civil law all covenants of sale were good, whether written or unwritten, to whatever value they extended. But in England, it hath been enacted by 29 Car. cap. 3. sect. 17. “That no contract for the sale of any goods, wares, and merchandizes for the price of ten pounds foreign or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or unless some note, or memorandum in writing of the said bargain be made and signed by the parties to be charged by such a contract, or their agents thereunto lawfully authorized.”

De pretio certo, vel incerto, vel in arbitrio alienum collato.

§ I. Sed et certum esse pretium debet: alioqui, si inter aliquos ita convenerit, ut, quanti Titius rem aestimaverit, tanti fict empta, inter veteres fatis abundante hoc dubitabatur, consensum venditio, an non. Sed nostra decisi ita hoc constituit, ut, quotes sic composita fict venditio, quanti ille aestimaverit, sub hac conditione fatebatur contractus, ut liquidem ille, qui nominatus est, pretium definierit, tunc omnimodo secundum ejus aestimationem et pretium persolvatur, et res tradatur, et venditio ad effectum.
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Effectum perducatur; emptore quidem ex empto actione, venditore et vendito agente. Sin autem ille, qui nominatus est, vel noluerit, vel non potuerit, pretium definire, tunc pro nihil deesse venditionem, quasi nullo pretio statuto. Quod jus, cum in venditionibus nobis placuerit, non est absurdatum et in locationibus et in condicitionibus trahere.

§ I. The price, as we have before observed, ought to be certain. And formerly, when it was covenanted, that a thing should be sold, at whatever price Titius should value it, the ancient lawyers much doubted, whether such a sale was good, or not good. But we have ordained by our decision, that as often as it is agreed, that a thing shall be sold, at a price to be fixed by a third person, such contract shall be valid under that condition; so that, if the nominee, or arbitrator, determines the price, it ought instantly to be paid according to the determination, and the thing sold ought to be delivered, and the sale perfected; for otherwise the buyer may have an action ex empto, i.e. on account of the thing bought; and the seller may have an action ex vendito, i.e. on account of the thing sold. But, if the arbitrator either refuses, or is unable to determine the price, the sale is null. And, as it hath been our pleasure, that this shall be the law in relation to sales, it is but right, that the same law should prevail, in locations and conductions, i.e. in letting and hiring.

Sed nostra decido.] Cod. 4. t. 38. l. 15.

In quibus pretium consitiat. Differentia emptionis et permutationis.

§ II. Item pretium in numerata pecunia consistere debet; nam in cæteris rebus, an pretium esse possit, valde quaeretur; veluti, an homo, aut fundus, aut toga, alterius rei pretium esse possit. Et Sabinus et Cassius etiam in alia re putabant pretium posse consistere; unde illud, quod vulgo dicebatur, permutatione rerum emptionem et venditionem contrahit; eamque speciem emptionis et venditionis vetustissimam esse. Argumentoque utebantur Graeco poeta Homero, qui aliquam partem exercitus Achivorum vinum sibi comparasse ait, permutatis quibusdam rebus, his verbis.

Noes δ' ex Δημου θερασαν οιων αγνοι.  
Ευθεν αρ οινεντο καιπεκοιμουτες Αχαιοι,  
Αλλοι μεν χαλκοι, αλλοι δ' αιθων σινηοι,  
Αλλοι δ' ρωσις, αλλοι δ' αυτωι βοεσιν,  
Αλλοι δ' ανθρωποδεισι.

Hoc est.

Noes autem e Lemno appulerunt vinum vebentes:  
Illinc vinum emebant Achivi comantes caput,  
Alii quidem are, aliis autem ferro nigro,  
Alii pellibus, aliis ipsis bobus,  
Alii etiam mancipis.

Iliad. VII.

Diversia
Lib. III. Tit. XXIV.

Diversae scholarum auctores contra sentiebant; aliquid esse existimabat permutationes rerum, aliquid emptio et venditio; aliqui non posse rem expediri, permutatis rebus, quae videatur res vaniffe, et quae pretii nomine data esse; nam, utramque videri et vaniffe et pretii nomine datum esse, rationem non pati. Sed Proculi sententia, dicentis, permutationem pro priam esse speciem contractus a venditione separatum, merito praevalevit; cum et aliis Homericis veribus adjuvabatur, et validioribus rationibus argumentabatur: quod et antiores Divi Principes admisserunt, et in nostris Digestis latius significatur.

§ 2. The price of any thing bought should consist of cash or money told; for it hath been much doubted, whether the price of goods can be said to be paid, if any other thing is given for them than money; as, for instance, whether a slave, a piece of ground, or a robe, can be paid, as the price of a thing. The lawyers Sabinus and Cassius thought, that a price might consist of any thing, and from hence it has been commonly said, that emptio-venditio, or buying and selling, is contracted by commutation, and that this species of buying and selling is the most ancient. The advocates for this side of the question quote Homer, who relates in the following lines, that a part of the Grecian army bought wine by giving other things in exchange for it.

Wine the rest purchas’d at their proper cost,
And well the plenteous freight supplied the hoft:
Each in exchange proportion’d treasures gave,
Some brafs or iron, some an ox or slave.

Pope.

But the lawyers of another sect maintained the contrary, and declared, that commutation was one thing, and emptio-venditio another; for otherwise said they, in the commutation of any two things it can never appear, which has been sold, and which has been given, as the price of the thing sold; and it is contrary to reason, that each should appear to have been sold, and that each also should appear to have been given, as the price of the other. And the opinion of Proculus, who maintained, that commutation is a species of contract, separate from vendition, hath deservedly prevailed: for he is supported by other verses from Homer, and has enforced his opinion with the strongest arguments; and this is the doctrine, which our predecessors, the emperors Dioclesian and Maximian, have admitted, as it appears more at large in our Digests.

Sabinus et Cassius. These lawyers were of opinion, that emption and vendition might be constrained by an exchange of property, without the intervention of money; and in support of their opinion they used this argument; that, if there was such a contract as buying and selling, before any coin was made use of, it is plain, that money, or coin, is not essential to buying and selling. And to prove the antiquity of emption and vendition they urge the authority of Homer, who says, that the Greeks bought wine at Lemnos by giving brats, iron, oxen, and slaves in exchange for it. It is nevertheless observable, that Homer in this place uses the word orifcoro, which is but an ambiguous expression; but there is a passage in the Odyssey, urged by Paulus, which is much more applicable.

Τὸς τοῦ λαοῦ τοῦ πελεκητοὺς τούτους.
I.e. the slave Eurybia, whom Laertes bought with his possessions. Odys. lib. 1. sub. fin.

In this verse there can be no doubt of the sense of πελεκητοῦ; and, as to κτητοῦς, the poet in the next line ascertains the meaning of it by informing us, that twenty oxen were given for her. Eikozeiola. N ε δύνατον.

But those, who hold a contrary opinion to that of Cassius and Sabinus, quote Homer also in their turn; particularly that passage in the 6th book of the Iliad, where Diomed and Glaucon exchange their armour.

Min
Lib. III. Tit. XXIV.

De periculo et commodo rei venditae.

§ III. Cum autem emptio et venditio contracta sit, (quod effici diximus simul atque de pretio convenerit, cum fine scriptura res agitur,) periculum rei venditae sitam ad emptorem pertinet, tarnet si adhuc ea res emptori tradita non sit. Itaque, si homo mortuus sit, vel aliquum partem corporis laetus fuerit, aut aedes tota, vel aliqua ex parte, incendio consumpta fuerint, aut fundus vi fluminis totus vel aliqua ex parte ablatus sit, sive etiam inundatione aquae, aut arboribus turbine dejectis, longe minor aut deterior esse cœperit, emptoris damnun est; cui necessitatem, licet rem non fuerit nactus, pretium solvere. Quicquid enim sine dolo et culpa venditioris accidit, in eo venditor securus est: sed et, si post emptionem fundus aliquid per alluvionem accessorit, ad emptoris commodum pertinet; nam et commodo ejus esse debet, cujus periculum est. Quod si occurring homo, qui semnus, aut surreptus fuerit, ita ut neque dolus, neque culpa venditioris, intervenerint, animadvertendum est, an custodiam ejus usque ad traditionem venditor cum securerit: sane enim si suceperit, ad ipsum periculum is casus pertinet; si non succiperit, securus est. Idem et in cœteris animahibus cœteris rebus intelligimus. Utique tamen vindicatio rei et conditionem exhibere debet emptori; quia sanie, quia nondum rem emptori tradidit, ad hoc ipse dominus est. Idem etiam et de furti et de damnis injuriæ actione.

§ 3. When emption and vendition are once contracted, (and this, as we have observed, is effected, as soon as the price is agreed upon, when there is no covenant in writing,) then the buyer is liable to the risk of the loss of the thing sold, or of the damage, which may happen to it, also it hath not been delivered to him. And therefore, if a slave, thus sold, should die, or receive any hurt, or if a building, or part of it, should be consumed by fire, or if lands sold, or any portion of them, should be washed away by a torrent, or be made worse by an inundation, or a storm, which may destroy the trees, the loss in all these cases must be sustained by the buyer, who is obliged to pay the price agreed upon, also he never had possession of the thing; for whatever the accident is, if it happens neither by the fraud, nor fault of the seller, be is secure. But on the other hand, if, after the sale, any accession is made to the lands by alluvion or otherwise, this increase becomes the gain of the buyer; for it is just, that he should receive the profit, who must have sustained the loss. But, if a slave, who is sold, either runs away or is stolen, and neither fraud nor negligence can be imputed to the seller, it must be inquired, whether the seller undertook the safe custody of the slave, till delivery should be made; if he did, he is answerable for the accident; if he did not, he is secure. The same law takes place in regard
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To all other animals and things. But, when these accidents happen, and the buyer is to sustain the loss, the seller is obliged to make over his right of vindication and condition; that is, he must transfer to the buyer all right of action, whether real or personal, if necessary; for he, who has not delivered the thing sold, is still considered as the proprietor of it. Actions also of theft, or damage done, must be transferred by the seller to the buyer, when the thing sold is stolen, or damaged, before delivery.

De emptione conditionali.

§ IV. Emptio tam sub conditione quam pure contrahit potest: sub conditione, veluti, si Stichus intra certum diem tibi placuerit, erit tibi emptus aureis tot.

§ 4. A sale may be contracted conditionally, as well as purely: for instance, when the person, who is inclined to sell, speaks thus; if within a certain time you shall approve of the slave Stichus, he shall be yours for so many aurei.

De emptione rei, quae non est in commercio.

§ V. Loca sacra, vel religiosa, item publica, (veluti forum, basilicam,) fructa quis sciens emit; quae tamen si pro profanis vel privatis deceptus a venditore quis emerit, habebit actionem ex empto, quod non habere ei liceat, ut consequatur, quod sua interessit, eum deceptum non esse. Idem juris est, si hominem liberum pro servo emerit.

§ 5. Whoever knowingly purchases a place sacred, or religious, or a public place, such as a Forum or court of justice, he makes a void purchase. But, if a man should purchase any of the before-mentioned places, having taken them for profane or private, being imposed upon by the seller, then such purchaser, not being able to enjoy the possession of what he has bought, may have an action ex empto against the seller, and recover the damage suffered by the deceit. The same law also obtains, if any person, thro' error, should buy a freeman instead of a slave.

Titulus Vigesimus-quintus.

De locatione et conductione.


Collatio emptionis, et locationis. De mercedis conventione.

Locatio et conductio proxima est emptioni et venditioni, itidemque juris regulis conflittit. Nam ut emptio et venditio ita contrahitur, si de pretio convenerit, sic et locatio et conductio ita contrahit intelligitur, si merces constituta sit: et competit locatori quidem locati actio, conductori vero conducti.
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Location and conductio, i.e. letting and libering, are nearly allied to emption and vendition, i.e. to buying and selling; and are governed by the same rules; for as emption and vendition are contrasted as soon as the price of the thing is agreed upon, so location and conductio are contrasted, when the hire is once fixed by the parties. The locator, or person who lets, is intitled to an action, called actio locati, if he is aggrieved by the conductor or birer; and the conductor may have an action called actio conducti, against the locator.

De mercede collata in arbitrium alienum.

§ 1. Et, quæ supra diximus, si alieno arbitrio pretium permittum fuerit, eadem et de locacione et de conductione dicta est intelligimus, si alieno arbitrio merces permittu fuerit. Qua de causa, si fulloni poliendra curandave, aut farcinatori farcienda, vestimenta quis dederit, nulla statim mercede constituta, sed poleta tantum daturus, quantum inter eos conveni, non proprie locatio et conductio contrahi intelligentur; sed eo nomine actio praescriptis verbis datur.

§ 1. We are willing, that what we have before observed in regard to the sale of a thing, when the price is referred to a third person, should also be understood to have been said of location and conductio, when the quantity of the hire is not agreed upon between the parties, but left to arbitration. And therefore, if a man lends his cloaths to a fuller to be scoured, or to a taylor to be mended, and does not previously agree upon any price, in this case location and conductio are not understood to be properly contrasted; but an action may be brought by either party, praescriptis verbis, i.e. in words prescribed and adapted to the circumstances of the case.

Actio praescriptis verbis.) "Diet a et actu quoque cauam hac actio dictur in factum; praeceptis verbis, ex eo, quod praescriptis ver- actio " et inter alia oratione actio utilis praescrip- bis rem gestam demonstret. Ob candum " sive verbis in factum." Vinn.

In quibus rebus merces consistat.

§ II. Praeterea, sicut vulgo quaerabatur, an permutatis rebus emptio et venditio contraheretur, ita quæri solent de locacione et conductione, si forte rem aliquam utendam sive fruendum tibi aliquis dederit, et invicem a te utendam sive fruendum aliam rem acceperit. Et placuit, non esse locacionem et conductionem, sed proprium genus contractus; veluti, si, eum unum bovem quis haberet, et vicinus ejus item unum, placuerit inter eos, ut per densos dies invicem boves commodarent, ut opus face- rent, et apud alterum alterius bos pericerit; neque locati, neque conduc- ti, neque commodati competit actio; quia non fuit commodatum gratui- tum: verum praeceptum verbis agendum est.

§ 2. As it was formerly a question, whether emption and vendition could be contrasted by an exchange of things, so it hath also been doubted, whether location and conductio can be said to exist, when one man lends another a particular thing for his use; and receives in return some other thing, of which he is also permitted to have the use; and it has been determined, that this exchange does not constitute location and conductio, but is a distinct species of contract: for example, if two neighbours have each of them an ox, and each agrees to lend his ox to the
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other alternately for ten days, to do the labors of the field, and the ox of the one dies in the possession of the other, in this case, he, who has lost his ox, can neither bring the action locati, nor conducti, nor even the action commodati; for the ox was not lent gratuitously; but he may sue by virtue of an action called praescriptis verbis; i.e. by an action upon the cafe.

De Emphyteusi.

§ III. Adeo autem aliquam familiariatem inter se videntur habere empto et venditio, item locatio et conductio, ut in quibusdam causis quæri solet, utrum emptio et venditio contrahatur, an locatio et conductio; ut ecce de prædisis, quæ perpetuo quibusdam fruenda traduntur, id est, unus, quamdiu pensio sive reddita pro his domino præstetur, neque ipse conductori, neque heredi ejus, cuive conductor heresive ejus id prædium vendiderit, aut donaverit, aut dotis nomine dederit, alioque quocumque modo alienaverit, auferre liceat. Sed talis contractus quia inter veteres dubitatatur, et a quibusdam locatio, a quibusdam venditio eximiamatur, lex Zononiana lata est, quæ emphyteufoes contractus proprium statuit naturalis, neque ad locationem, neque ad venditionem, inclinantem, sed suis pactonibus fulciendam; et, si quidem aliquam paætum fuerit, hoc in obtinere, ac si naturalis effet contractus: fin autem nihil de periculo rei fuerit pactum, tunc, si quidem totius rei interitus accedere, ad dominum super hoc redundare pericum; fin autem particularis, ad emphyteutica: rium hujusmodi damnum venire; quo jure utimur.

§ 3. The contract of buying and selling, and that of letting and hiring, are so nearly connected, that, in some cases, it has been difficult to distinguish the one from the other; as when lands have been demised to be enjoyed for ever, upon condition, that, if a certain yearly pension, or rent, is conjointly paid to the proprietor, it shall not be in his power to take these lands from the tenant or his heirs, or from any other person, to whom such tenant or his heirs shall have sold them, given them gratuitously, or as a marriage portion, or otherwise disposed of them. But, when this contract, concerning which the ancient lawyers had great doubts, was by some thought to be an emption and vendition, and by others a location and conductio, the Zononian law was enacted, which settled the proper nature of an emphyteu-

 fis, making it to be neither the one nor the other of the before mentioned contra-

this contract) is a contract made by consent, by which houses or lands are given to be possessed for ever, or at least for a long term, upon condition, that the lands shall be improved, and that a small yearly rent or pension shall be paid to the proprietor. And this pension, rent, or canon, may be paid in money, grain, or any other thing. The perpetuity, or long term, granted, distinguishes this contract from letting and hiring: for an emphyteu-

fis, was originally made on account of barren lands, which no person would take for a short time, thro a fear of the charge of cultivating, but afterwards the-
De forma alicui facienda ab artifice.

§ IV. Item quæritur, si cum aurifae Titius convenerit, ut is ex auro suo certi ponderis certæque formæ annulos ei faceret, et acciperet, (verbi gratia,) decem aureos, utrum emptio et venditio, an locatio et conductio contrahit videatur? Caflius ait, materiæ quidem emptionem et venditionem contrahit, operœ autem locationem et conductionem: fed placuit, tantum emptionem et venditionem contrahit. Quod si füum aurum Titius dederit, mercede pro opera constituta, dubium non est, quin locatio et conductio sit.

§ 4. Alfo, si Titius, for example, should agree with a goldsmith to make a certain number of rings, of a particular size and weight, and to furnish the gold, for which Titius should promise him ten aurei, as the value both of the workmanship and the gold, it hath been a question, whether such a contract would be a buying and selling, or a letting and hireng. Caflius was of opinion, that it would be a buying and selling in regard to the matter, and a letting and hireng in regard to the work, but it is now settled, that, in this case, an emption and vendition would only be contracted. But, on the other hand, it is not to be doubted, that, if Titius should give his own gold, and agree to pay only for the workmanship, this contract would be a location and conductio.

Quid praætare debit conductor.

§ V. Conductor omnia fecundum legem conductionis facere debet, et si quid in lege praætermissum fuerit, id ex bono et æquo praætare. Qui pro usu aut vestimentorum, aut argentii, aut jumenti, mercedem aut debit aut promitterit, ab eo custodia talis desideratur, qualem diligentissimus pater familias fuis rebus adhibet; quam si praætiterit, et aliquid causa fortuito eam rem amiserit, de restituenia ea re non tenebitur.

§ 5. The conductor, or hiree, is not only obliged to observe strictly the covenants of the conductio, but is also bound in equity to perform whatever hath been omitted to be inserted. And whoever has given or promised hire for the use of cloaths, silver,
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horses, &c. is bound to take the same care of them, as the most diligent master of a family would take of his own property. But, if the usher does this, and yet loses the things hired by some fortuitous event, he shall not be answerable for the loss.

De morte conductoris.

§ VI. Mortuo conductorre intra tempora conductionis, hæres ejus eodem jure in conductione succedit.

§ 6. If the conductor, or usher, dies before the time of the conduction is expired, his heir succeeds to his right, and is intitled to the thing hired, for the remainder of the term.

Titulus Vigesimus-sextus.

De societate.


Divisio a materia.

Societatem coire solemus aut totorum bonorum, quam Graeci specialiter cohaequa appellant; aut unius alicuius negotiationis, veluti mancipiorum vendendorum emendorumque, aut olei, aut vini, aut frumenti emendi vendendique.

It is common for persons to enter either into a general partnership or society of all their goods, and this the Greeks emphatically call cohaequa, i.e. communion, or into a particular partnership, which regards only some single species of commerce, as that of buying and selling slaves, oil, wine, or corn.

De partibus lucri et damni.

§ I. Et quidem, si nihil de partibus lucri et damni nominatim convenierit, æquales eïcet partes et in lucro et in damno spectantur; quod si expressæ fuerint partes, hæ servari debent. Nec enim unquam dubium fuit, quin valeat conventio, si duo inter se pacti sint, ut ad unum quidem duas partes et lucii et damni pertineant, ad alterum tertia.

§ 1. If no express agreement has been made by the partners concerning their shares of profit and losses, the losses must be equally borne, and the profit must be equally divided. But, if any particular agreement has been made, it must be observed; for it was never yet doubted, but that the covenant would be binding, if two persons should agree, that two shares of the profit and losses should belong to one partner, and that only the third part of both should belong to the other.

De
De partibus inaequalibus.

§ 2. De illa fane conventione quœsitum est, si Titius et Seius inter se paæti sint, ut ad Titium lucrum duæ partes pertineant, damn qui tertia, ad Seiium duæ partes damn, lucrum tertia, an rata debeat haber in conventio? Quintus Mutius contra naturam societatis talem paetionem esse exstimavit, et ob id non esse ratam habendam: Servius Sulpitius (cuju sententia praevallit) contra senfinit; quia sepe quorumdam ita pretiosa est opera in societate, ut eos juustum sit conditione meliore in societatem admitti. Nam et ita posse coiri societatem non dubitatur, ut alter pecuniam conferat, alter non conferat, et tamen lucrue inter eos commune sit; quia sepe opera aliqua pro pecunia valeant. Et adeo contra Quinti Mutii sententiam obtinuit, ut illud quoque confitterit posse convenire, ut quis lucru partem ferat, de damn non teneatur; quod et ipsum Servium conveni­ere fibi fieri exstimavit. Quod tamen ita intelligi oportet, ut, si in alia re lucrum, in alia damnun illatum sit, compenfatione facta, solum quoq­ue superest, intelligatur lucro esse.

§ 2. But it has been questioned, if Titius and Seius should covenant between themselves, that Titius should receive two parts of the profit and bear but a third of the los, and that Seius should bear two parts of the los, and receive but a third share of the profit, whether such an agreement would be binding? Quintus Mutius was of opinion, that such a covenant was contrary to the nature of partnershhip, and ought not therefore to be ratified; but Servius Sulpitius, whose opinion prevailed, thought otherwise, and for this reason, because the labor of some is so highly valuable, that it is but just, that they should be admitted into society upon the most advantageous conditions; for no man doubts, but that partnership may be entered into by two persons, when one of them only finds money, inasmuch as it often happens, that the work, and labor of the other, amounts to the value of it, and supplies its place. And also, contrary to the opinion of Mutius, it hath obtained as law, that a partner may by agreement take a share of the profit, and not be accountable for any part of the los; for Servius thought, that this likewise might be done equitably; but it must be so understood, that, if profit accrues from one species of things and los from another, only what remains, after the los is compensated, shall be looked upon as profit.

De partibus expressis in una causa.

§ 3. Illud expeditum est, si in una causa pars fuerit expressa, (veluti in solo lucro, vel in solo damnno,) in altera vero omisita, in eo quoque, quod praetertimus est, eandem partem servari.

§ 3. It is also a settled point, that, if partners expressly mention their shares in one respect only, either solely in regard to gain, or solely in regard to los, their shares of that, which is omitted, shall be the same as of that, which is mentioned.
Quibus modis societas solvitur. De renunciatione.

§ IV. Manet autem societas eo usque, donec in eodem consensu perseveraverint: at, cum aliquis renunciaverit societati, solvitur societas. Sed plane, si quis callide in hoc renunciaverit societati, ut obveniens aliquid lucrum solus habeat, veluti, si totorum bonorum focius, cum ab aliquo hæres esset reliquit, in hoc renunciaverit societati, ut hereditatem solus luceri faceret, cogitur hoc lucrum communicare. Si quid vero aliud lucrum faciat, quod non captaverit, ad ipsum solum pertinet. Ei vero, cui renunciatum est, quicquid omnino post renunciatum societatem acquiritur, soli conceditur.

§ 4. A partnership lasts as long as the partners persevere in their consent to continue such; and, if one of them renounces the partnership, the society is dissolved. But, if a man renounces with a fraudulent intent, and for no other end, but that he may enjoy the sole benefit of some future fortune, which be except, his renunciation will not avail: for, if a partner in common, as soon as he finds, that he has been appointed an heir, should renounce his partnership, that he may possess the inheritance exclusive of all others, he would nevertheless be compelled to divide the inheritance equally with his former partners; yet, if an inheritance, which be did not except, should by accident fall to him after renunciation, the whole would be his own: but those, from whom a partner hath separated himself by renouncing, possess solely for themselves whatever they acquire, after the renunciation of that partner.

De morte.

§ V. Solvitur adhuc societas etiam morte socii; quia, qui societatem contrahit, certam personam fibi eligit. Sed et, si consensu plurium societas contrahata est, morte unius socii solvitur, et si plures superint; nisi in coeundi societate aliter convenerit.

§ 5. A partnership is also dissolved by the death of one of the partners; for he, who enters into partnership always chuses some certain known person to be his partner, upon whom he can depend. And, also a partnership is entered into by the consent of many, it is nevertheless dissolved by the death of one, also the rest survive; and this is the law, unless special covenants are made to the contrary at the time of forming the society.

De fine negotii.

§ VI. Item, si alicujus rei contrahata societas fit, et finis negotii impositus est, finitur societas.

§ 6. Also, if a partnership is entered into on account of some particular commerce, and an end is put to that commerce, the partnership is of course ended.

De publicatione.

§ VII. Publicatione quoque disfrahi societatem, manifestum est, scilicet: si universa bona socii publicentur; nam, cum in ejus locum alius succedat, pro mortuo habetur.

N  n  § 7.
§ 7. It is likewise manifest, that a partnership is dissolved by confiscation; to wit, if all the goods of a partner are confiscated; for when another (for example, the treasurer of the exchequer) succeeds in his place, he is reputed as civilly dead.

De cessione bonorum.

§ VIII. Item, si quis ex sociis mole debiti praegravatus bonis suis cesserit, et ideo propter publica et privata debita substantia ejus vaneat, solvitur societas. Sed hoc cau, si adhuc conscientiam in societatem, nova vi detur incipere societas.

§ 8. Also, if a man in partnership, being pressed by his debts, makes a cession or a surrender of his goods, and they are sold to satisfy either public or private demands, the partnership is dissolved. But, if the rest of the copartners should still desire to be in society either with or without this man, the first partnership would not continue, but a new one would commence.

Bonis suis cesserit.] In England the benefit of cession, or bankruptcy, is allowed only to persons concerned in trade, who may be discharged from their debts, if they surrender themselves, and make a full discovery of their goods, books, papers, &c. for the benefit of their creditors; and also conform themselves in all other respects to certain statutes of the realm, by which all possible care has been taken to prevent fraudulent bankruptcies, by making it felony without benefit of the clergy, to be guilty of any willful omission in their discoveries. [Hawk. pl. cap. 57. 4 Ann. cap. 17. Inf. 4. tit. 6.

De dolo et culpa a sociis praestandis.

§ IX. Socius socii utrum eo nomine tantum teneatur pro socii actione, si quid dolo commiserit, sic ut, qui deponit apud se pausi est, an etiam culpa, id est, desidia atque negligentiam nomine, quisquam est? Prævaluit tamen, etiam culpa nomine teneri eum. Culpa autem non ad exactissimam diligentiam dirigenda est; sufficit enim rem diligentiam communibus rebus adhibere socium, qualem quis rebus adhibere soleat. Nam, qui parum diligentem socium sibi affumit, de eo queri, sibique hoc imputare, debet.

§ 9. It has been a question, whether a partner, like a depositary, is accountable for fraud only, or whether he is also accountable for his negligence? And it now prevails, that he is answerable for all the damages, which happen through his fault. And, if a man fails in having used the most exact diligence, such a failure is not comprehended under the term culpa, or fault: for a partner is not liable to answer damages, if, in regard to the goods of the community, it appears, that he has used the same care and diligence towards them, which he has usually observed in keeping his own private property. And it is certain, that whoever abuses a negligent man for his partner, can lay the blame upon himself only and impute his misfortune to his own ill choice.
Titulus Vigesimus-septimus.

De mandato.


Divisio a fine.

Mandatum contrahit quinque modis, sive tue tantum gratia aliqua tibi mandet, sive tua et tua, sive aliena tatum, sive tua et aliena, sive tua et aliena. At, si tua tantum gratia tibi mandatum sit, supervacuum est mandatum; et ob id nulla ex eo obligatio, nec mandati inter vos colio nascitur.

A mandate is framed five ways; either when it is given solely for the benefit of the mandator; or partly for his benefit, and partly for that of the mandatory; or solely for the service of some third person; or partly for the profit of the mandator and partly for the service of a third person; or for the benefit of the mandator, and partly for the use of a third person. But, if a mandate is given solely for the sake of the mandatory, the mandate is usefully; for no obligation can arise from it, nor of course any action.

Si mandantis gratia mandetur.

§ I. 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 given solely for the benefit of the mandator, when he requires the mandatory to transact his business, to buy lands, or to become a surety for him.

Si mandantis et mandatorii.

§ II. Tua gratia et mandantis; veluti si mandet tibi, ut pecuniam sub usuris 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 given partly for the benefit of the mandator, and partly for the benefit of the mandatory, if the mandator requires you to lend money upon interest to Titius, who would borrow it for the use of the mandator; or if, when you are upon the point of suing a man on account of a fidejussory caution, or a suretyship, he should authorise you at his own risque to sue the principal debtor, or if he should impoverish you at his own hazarad to stipulate for the sum, which he owes you, from some other person, whom he appoints.
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Ut pecuniam sub ufuris.] "Nam mandata-
"rio prodeft id, quod agitur, propter ufurarum
"praefationem, et mandatori, in cujus rem pe-
"cunia vertenda est." Thucpl. 

Aut fi volente te.] "Commoodum hic fide-
"jusioris in eo, quod judicio liberatur, cum a-
"liqui agi cum eo ex caufa fide-jurifonis po-
"tuit, reo principali neglece; liquidem jure
"veteri fide-jurif ante reum principalem con-
"veniri potuit." Vinn.

Si aliena gratia.

§ III. Aliena tantum caufa intervenit mandatum; veluti fi tibi aliquis
mandet, ut Titii negotia gereres, vel ut Titio fundum emeres, vel ut pro
Titio sponderses.

§ 3. A mandate is interpoled only for the fake of a third person, when the man-
dator requires the mandatory to perform some office for Titius, to buy lands for
him, or to become bis bail.

Si mandantis et aliena.

§ IV. Sua et aliena; veluti fi de communibus suis et Titii negotio
gerendis tibi mandet, vel ut tibi et Titio fundum emeres, vel ut pro eo
et Titio sponderses.

§ 4. A mandate tends to the benefit of the mandator, and also of a third per-
son, when the mandator requires you, who are the mandatory, to transact some affair
for the common benefit of both him and Titius, or to buy lands for them both, or to
be bound for them.

Si mandatarii et aliena.

§ V. Tua et aliena; veluti fi tibi mandet, ut Titio sub ufuris crederes;
quia, si fine ufuris pecuniam crederes, aliena tantum gratia intercedit man-
datum.

§ 5. A mandate is given in favor of the mandatory and of a third person,
when the mandator requires you to lend money to Titius, upon interest; but, if you
are required to lend money without interest, the mandate can only be in favor of him,
to whom it is lent.

Si mandatarii.

§ VI. Tua tantum gratia intervenit mandatum; veluti fi tibi mandet, ut
pecunias tuas in emptiones potius prædiorum colloces, quam fœneres;
vel ex diverso, ut pecunias tuas fæneres potius, quam in emptiones præ-
diorum colloces. Cujus generis mandatum magis consilium, quam man-
datum eft, et ob id non eft obligationum; quia nemo ex consilio mandati
obligerat, etiam fi non expediat ei, cui mandatatur, cum liberum cuique
fit apud fe explorare, an fibi expediat consilium. Itaque, fi otiofam pe-
cuniam domi te habentem hortatus fuerit alicius, ut rem alicium emeres,
vel eam crederes, quamvis non expediat eam tibi emiffæ, vel credidiffe, non
tamen
tamen tibi mandati tenetur. Et adeo hæc ita sunt, ut quæsitum sit, an mandati teneatur, qui mandavit tibi, ut pecuniam Titio fænerares. Sed
obtinet Sabini sententia, obligatorium esse in hoc cauf mandatum; quia
non aliter Titio credidisses, quam si tibi mandatum esset.

§ 6. A mandate is given solely for your own benefit, if the mandator requires
you rather to make a purchase of lands, than to lend your money upon interef; or,
on the contrary, rather to lend your money upon interef, than to buy lands. But a
mandate of this species seems rather to be good advice, than a mandate; and is
therefore not obligatory; for an action of mandate cannot be brought againſt a man
on account of the advice, which he has given, altho' it has not proved beneficia! to him,
to whom it was given; inasmuch as every one is at full liberty to consult his own
reason, whether the council given to him is expedient or not. And therefore, if you
should be advised to employ your money, which now lies dead, either by lending it out
at interef, or in making a purchase, and you shall become a lofe! by following this
advice, the adviser would not be liable to an action. And this is so true, that it
has even been a question, whether an action of mandate will lie againſt him, who hath
required you by mandate to lend money to Titius, who is insolvency. But the opinion
of Sabinus hath obtained, and a mandate in this case is now judged to be obligatory;
for you would never have trusted Titius, but in obedience to the mandate.

De mandato contra bonos mores.

§ VII. Illud quoque mandatum non est obligatorium, quod contra
bonos mores est; veluti si Titius de furto, aut de damno faciendo, aut de
injurya facienda mandet tibi; licet enim penam si!ius facti nomine præ-
fliteris, non tamen ullam habes adversus Titium actionem.

§ 7. A mandate contrary to good manners is not obligatory; as if Titius should
command Sempronius to commit theft, or to do some act to the damage or injury of a
third person; for, altho' Sempronius should suffer a penalty or punishment in con-
sequence of his obedience to such a mandate, he will not be intitled to any action
againſt Titius.

Veluti si Titius.] "Si Sempronius ex Titii
mandato aliquem occidit, aut vulneravit, aut
contumelia affexit, et! hic nulla ex contractu
inter eos obligatio oritur, uterque tamen obli-
gatur ex delitto; neque Titium, qui man-
davit, excusat, quod Sempronius facinus per-
petravit, neque Sempronium, quod Titius
mandaverit. "Vinn.

De executione mandati.

§ VIII. Is, qui exequitur mandatum, non debet excedere fines man-
dati; ut ecce, si quis uſque ad centum aureos mandaverit tibi, ut fun-
dum emeres, vel ut pro Titio fponderes, neque pluris emere debes, ne-
que in ampliorem pecuniam uidebere; alioqui non habebis cum eo
mandati actionem: adeo quidem, ut Sabino et Caffio placuerit, etiamsi
uſque ad centum aureos cum eo agere solueris, inutiliter te actu-
rum. Sed diversæ scholæ auètores recte uſque ad centum aureos te actu-
rum existimant; quæ sententia sane benignior est. Quod si minoris emeris, ha-
bebis scilicet cum eo mandati actionem; quoniam, qui mandat, ut sibi
centum
centum aureorum fundus emeretur, is utique mandasse intelligitur, ut
minores, si posset, emeretur.

§ 8. He, who executes a mandate ought not to exceed the bounds of it; for ex-
ample, if a mandator should require you to purchase lands, or to be bound for Titius,
to the amount of an hundred aurei; you ought not to buy the lands at an higher
price, or be bound for Titius in a greater sum: for, if you exceed the mandate, you
will not be intitled to an action for the recovery of the excess. And Cassius and
Sabinus were even of opinion, that, albo you were willing to bring an action of
mandate for no more than the hundred aurei, you could not recover them. But it was
held by the lawyers of a different school, that the mandatory might sue the mandator
for the hundred aurei; and this appears to be the more equitable opinion. But, if
you buy certain lands at a less price than that, which the mandator has allowed, you
will undoubtedly be intitled to an action of mandate: for, if he hath ordered, that
an hundred aurei shall be expended in the purchase of a particular estate, he will
certainly be understood to have ordered, that the same estate should, if possible, be
purchased at a less price.

De revocatione mandati

§ IX. Recte quoque mandatum contractum, si, dum adhuc integra
res fit, revocatum fuerit, evanescit.

§ 9. A mandate, properly constituted, becomes null, if it is revoked whilst intire;
that is, before any act hath been done in consequence of it.

De morte.

§ X. Item, si adhuc integro mandato mors alterius interveniat, id est,
vulgo ejus, qui mandaverit, vulgo illius, qui mandatum susceperit, solvitur
mandatum. Sed utilitatis causa receptum est, si eo mortuo, qui tibi man-
daverat, tu, ignorans eum decehisce, executus fueris mandatum, posse te
agere mandati actione; aliqui justa et probabilis ignorantia tibi damnunm
afferet. Et huic simile est, quod placuit, si debitores, manumisso dispes-
fatore Titii, per ignorantiam liberto solverint, liberari eos; cum aliqui
stricta juris ratione non possent liberari: quia alli solvisissent, quam cui
solvere debuerint.

§ 10. A mandate also becomes null, if either the mandator, or the mandatory,
dies, whilst it continues intire. But it is allowed for the benefit of society, that, if
a mandator dies, and the mandatory, not knowing of his death, should afterwards
execute the mandate, he may bring his action against the heirs of the mandator:
for otherwise an unblameable and undoubted want of knowledge would be prejudicial.
And, in a similar case, if hath been determined, that, if the debtors of Titius, whose
steward has been manumitted, should, without knowledge of the manumission, pay this
freed-man what was due to Titius, they would be cleared from their debt, and the
payment would be good; albo, by the rigor of the law, it would be otherwise;
since they had made their payment to another than him, to whom it ought to have
been made.
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De renunciatione.

§ XI. Mandatum non suscipere cuilibet liberum est; suscepsit autem confümunmandum est, aut quam primum renunciandum, ut per fæmetipsum, aut per alium, eandem rem mandatorem exequatur. Nam, nisi ita renunciatur, ut integra causa mandatoris reservetur eandem rem explicandi, nihilominus mandati actio locum habet; nisi jusfa causa intercesserit aut non renunciandi, aut intempestive renunciandi.

§ XII. Every man is at liberty to refuse a mandate; but, if it is once accepted, it must be performed, or renounced, as soon as possible, that the mandator may transact the business himself, or by another. But, if the renunciation is made so late, that the mandator can have no opportunity of transacting this business properly, an action will lie against the mandatory, unless he can shew some just cause for his delay in not making a timely renunciation.

De die et conditione.

§ XII. Mandatum et in diem differri, et sub conditione fieri, potest.

§ 12. A mandate may be contracted to transact a particular business at a distant day, or upon condition.

De mercede.

§ XIII. In summa fieri cum mandatum, nisi gratuitum sit, in aliam formam negotii cadere: nam, mercede constituta, incipit locatio et conductio esse. Et, (ut generaliter dicamus,) quibus casibus, fine mercede suscepsit officio, mandati quive depositi contrahitur negotium, iis casibus interveniente mercede locatio et conductio intelligitur contrahi. Et ideo, si fulloni polienda curandave quis dederit vestimenta, aut farciniatori farcienda, nulla mercede constituta, neque promissa, mandati competet actio.

§ 13. In fine, it must be observed, that, if a mandate is not gratuitous, it then becomes another species of contract: for, if a price is agreed upon, the contract of location and conduct commences. And in general, when a trust or business is undertaken without hire, the contract regards either a mandate, or a deposit; but, when there is an agreement for hire, it constitutes location and conduct. And therefore, if a man gives his clothes to a fuller, that they may be cleaned, or to a tailor, that they may be mended, and there is no agreement or promise made, an action of mandate will lie.
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TITULUS VIGESIMUS-OCTAVUS.

De obligationibus, quæ quasi ex contractu nascuntur.

Continuatio.

POST genera contractuum enumerata, dispiciamus etiam de is obligationibus, quæ quidem non proprie nasci ex contractu intelliguntur; sed tamen, quia non ex maleficio substantiam capiunt, quasi ex contractu nasci videntur.

Having already enumerated the various kinds of direct obligations, we will now treat of those which can not be said properly to arise from a contract, but yet, inasmuch as they take not their origin from any thing criminal, seem to arise from an implied, or a quasi contract.

De negotiorum gestion.

§ I. Igitur, cum quis negotia absens gessisset, ultra citroque inter eos nascuntur actiones, quæ appellantur negotiorum gestionum. Sed domino quidem rei gessæ adversus eum, qui gessit, directa competit actio; negotiorum autem gessori contraria; quas ex nullo contractu proprie nasci manifestum est: quippe ita nascuntur istæ actiones, si fine mandato quisque alienis negotiis gerendis se obtulerit; ex qua causa ii, quorum negotia gessi fuerint, etiam ignorantes obligantur. Idque utilitatis causa receptum est, ne absentium, qui subita seftinatione coacti, nulli demandata negotiorum suorum administratiae, peregrè profecti essent, defecerentur negotia; quæ sane nemo curaturus esset, si de eo, quod quis impendisset, nullam habiturus esset actionem. Sicut autem is, qui utiliter gessit negotia, dominum habet obligatum negotiorum gestionum, ita et contra iste quoque tenetur, ut administratiae reddat rationem; quo causâ ad exactissimam quæque diligentiam compellitur reddere rationem: nec sufficit talem diligentiam adhibere, qualemuis rebus adhibere solet; si modo alius, diligentior eo, commodius administraturus esset negotia.

§ 1. When one person transacts the business of another, who is absent, they necessarily obtain a right to certain actions, called actions negotiorum gestionum; i. e. actions on account of business done: and it is manifest, that these can arise from no proper or regular contract; for they take place only, when one man assumes the care of the affairs of another without a mandate: and, in this case, those persons, for whom business is transacted, are always bound without their knowledge; and this is permitted for the public good, because the business of those, who are absent in a foreign country, and have not committed the administration of their affairs to any particular person, would otherwise be totally neglected: for no man would take this care
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Care upon himself, if he could not afterwards bring an action to recover what he had expended. But, as the principal is bound to reimburse the agent, who has negotiated his affairs properly, so is the agent bound to render a just account of his administration to his principal. And an agent, in this case, is obliged to use the most exact diligence; for it will not suffice, altbo he proves, that he has taken the same care of the affairs of his principal, which he usually took of his own, if it can by any means appear, that a more diligent man could have acted with greater advantage to his principal.

De tutela.

§ II. Tutores quoque, qui tutelæ judicio tenentur, non proprie ex contractu obligati esse intelliguntur; nullo enim negotium inter tutor-em et pupillum contrahitur. Sed, quia sanc non ex maleficio tenentur, quasi ex contractu teneri videntur; hoc autem cafu mutua damnatio actiones. Non tantum enim pupillus cum tutor habet tutelæ actionem; sed et contra tutor cum pupillo habet contrarium tutelæ, si vel impenderit aliquid in rem pupilli, vel pro eo fuerit obligatus, aut rem suam creditoribus ejus obligaverit.

§ 2. A tutor, altbo he is subject to an action of tutelage, is not reckoned to be bound by any pact, or agreement; for between a tutor and his pupil there is no express contract. But, because tutors are not subject to an action of malefeasance, they are understood to be bound by an implied, or quasi-contract; and thus both tutor and pupil may bring actions reciprocally; the pupil may bring a direct action of tutelage against his tutor, and the tutor, if he has expended his own money in the affairs of his pupil, or has been bound for him, or has mortgaged his own possessions to the creditors, is intitled to the action called contraria tutelæ.

De rei communione.

§ III. Item, si inter aliquos communis res sit fine societate, veluti quod pariter eis legata donative esset, et alter eorum alteri ideo teneatur communii dividendo judicio, quod solus fructus ex ea re perceperit, aut quod socius ejus solus in eam rem necessarius impensas fecerit, non intelligitur ex contractu proprie obligatus esse; quippe nihil inter se contraxerunt: sed, quia ex maleficio non tenetur, quas ex contractu teneri videtur.

§ 3. When a thing happens to be in common among persons, who have never entered into a voluntary partnership; as when the same field, or part of an inheritance, is devised, or given generally, between two; in this case the one may be called to answer the other by the action communi dividundo, either because the one hath taken to his use the whole produce of the ground; or because the other hath been at the sole expense of maintaining it in good order. But neither of these persons can properly be said to be bound by contract; since they made no agreement between themselves; but, inasmuch as they are exempt from any criminal action, they are accounted as bound by a quasi-contract.

De
§ IV. Idem juris est de eo, qui cohaeredi familiae ercißcundae judicio
ex his causis obligatus est.

§ 4. And the same law prevails in regard to him, who is bound to his co-heir
and is liable to the action familiae ercißcundae, for the partition of an universal
inheritance.

De aditione haereditatis.

§ V. Haeres quoque legatorum nomine non proprie ex contractu ob-
ligatus intelligitur; neque enim cum haerede, neque cum defunctoullo:
negotium legatarius gesfisse proprie dici potest: et tamen, quia ex malefi-
cio non est obligatus, quasi ex contractu debere intelligitur.

§ 5. An heir for the same reason cannot properly be said to be bound by contract
 to a legatory; for the legatory can never be supposed to have entered into any com-
 pact either with the heir, or with the deceased; but, as the heir cannot be pro-
 ced by an action of male-faßance, is is presumed to be indebted to the legatory by
 a quasi-contract.

De solutione indebiti.

§ VI. Item is, cui quis per errorem non debitum solvit, quasi ex con-
tractu debere videtur; adeo enim non intelligitur proprie ex contractu.
obligatus esse; ut, si certiorum rationem sequamur, magis (ut supra dixi-
mus) ex distraetu quam ex contractu possit dici obligatus esse: nam,
qui solvendi animo pecuniar dam, in hoc dare videtur, ut distrahat potius
negotium, quam contractum. Sed tamen perinde is, qui accepit, obliga-
tur, ac si mutuum ei daretur; etideo condìtione tenetur.

§ 6. He, to whom another has paid by mistake what was not due, appears to
be indebted by quasi-contract; for he is certainly not bound by an express agreement:
and, strictly speaking, he might rather be said, (as we have before observed,) to be
bound by the dissolution than by the making of a contract: for he, who paid the money
with an intent to discharge his debts, seemed rather inclined to dissolve an engage-
ment, than to contract one. But nevertheless, whoever receives money by the mistake
of another, is as much bound to repay it, as if it had been lent to him; and he is,
therefore liable to an action of condition.

Ideo condìtione.] vid. Cod. iv. 15. De conditions indebiti.

Quibus ex causis indebitum solutum non repetitur.

§ VII. Ex quibusdam tamen causis repeti non potest, quod per erro-
rem non debitum solutum sit; sic namque finierunt veteres, ex quii-
bus causis inficiendo lis crecidit, ex iis causis non debitum solutum repeti
non posse; veluti ex lege Aquilia, item ex legato: quod veteres quidem
in iis legatis locum habere voluerunt, quae certa constituta per dam-
nationem cuique legata fuerant: nofra autem constitutio, cum unus na-
turam omnibus legatis et fideicommissis indulsit, hujusmodi augmentum
im
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in omnibus legatis et fideicommissis extendi voluit: sed non omnibus legatariis hoc præbuit, sed tantummodo in iis legatis et fideicommissis, quæ facrosanctis Ecclesiis, et caeteris venerabilibus locis, quæ vel religionis vel pietatis intuuit honorantur, relicta sunt; quæ, si indebita solvantur, non repetuntur.

§ 7. In some cases money paid by mistake, when not due, cannot afterwards be demanded: for the antient lawyers have delivered it as a maxim, that where an action for double the value of the debt is given upon the denial of it, (as by the law Aquilia, and in the case of legacies) the debtor, who has by error paid money to him, to whom it was not due, shall never recover it. But these lawyers would have this rule to take place only in regard to fixed and certain legacies, devised per damnationem. But our imperial constitution, which reduced all legacies and trusts to one common nature, both caused this augmentation in duplum after denial to be extended to legacies and trusts in general: yet the privilege of not refunding what is paid by mistake is by our constitution only granted to churches and other holy places, which are honored on account of religion and piety.

Ex quibusdam causis. Cujus rei ratio per obcursa est; nec habebo, quod repindeam, nisi quod veritatem est, certis in causis recepta suffice, ut interrogati in jure, si negare rent, et mendacii convincenceurs, in duplum irent; unde poena indebitum, ut, qui, ex his causis conveniant, solvisset quantumvis indebitum, non repentet: quia simpliciter ideo solvere, ne inmiscendo periculum dupli subiret, erit, quia transigendo, hoc periculum a se amovere voluerit. Oportet vero aliquam causam subesse; verbi gratia, damnum esse datum, licet forte non ab eo, qui convenitur, sed ab alio; legatum aliquod ad pios usus reliquit esse, licet forte minus sollemniter. Nam, si nullum damnun datum fit, aut nihil reliquit, puto, locum esse reputationi. Excipianunt et aliae causae ex quibus indebitum per errorem solutum non repentur, ut causa dotis et transactio. Vinm. Ex lege Aquilia.] vid. f. s. t. l. q. p. 10. Nofra autem constitutio.] C. s. t. 43. 1. 2. Comm. de legat. qua constitutione legatis omnibus et fideicommissis eadem natura attributa est. Illa autem constitutio, qua jus, de quo hic agitur, ad legata et fideicommissa, religionis aut pietatis causa reliqua, coarctavit imperatorem, non extat. Vinm.

Titulus Vigesimus-nonus.

Per quas personas obligatio acquiritur.

C.iv. T.27.

De his, qui sunt in potestate.

Expositis generibus obligationum, quæ ex contractu vel quasi ex contractu nascuntur, admonendi sumus, acquiri nobis non solum per nofitetipos, sed per eas quoque personas, quæ in nostra potestate sunt, veluti per servos et filios nostros; ut tamen, quod per servos nostros nobis acquiritur, totum nostrum fiat; quod autem per liberos, quos in potestate habemus, ex obligatione fuerit acquisitum, hoc dividatur secundum imaginem rerum, proprietatis, et usufructus, quam nostra decrevit constitutio: ut, quod ab actione commodum perveniit, hujus usufructum
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Cum quidem habeat pater, proprietas autem filio servetur, siclicet patre actionem movente, secundum novellae nostrae constitutionis divisionem.

Having explained the various kinds of obligations, which arise from contracts or quasi-contracts, we must now observe, that we acquire obligations not only by means of ourselves, but also by those, who are under our power, as by our slaves, and our children: and whatever is acquired by our slaves is wholly our own; but that, which is acquired by our children, under our power, by virtue of their contrats, must be divided according to the decree of our constitution, which gives to the father the ususfruct of the thing gained, but reserves the property of it to the son. But a father, in bringing an action, must act in obedience to our novel constitution.

Quam nostra decrevit constitution.] vide Cod. 6. l. 61. 1. 6. cum oportet, &c.
Novellae constitutionis.] Cod. 6. 1. 61. 1. 8.

De bona fide possessis.

§ 1. Item per liberos homines et alienos servos, quos bona fide possedimus, acquiritur nobis: sed tantum ex duabus causis, id est, si quid ex operis suis, vel ex re nostra, acquirant.

§ 2. We may also acquire things by means of freemen, and the slaves of others, whom we posses bona fide: but this we can only do in two cases: to wit, when they have gained an acquisition by their labor, or by virtue of something, which belongs to us.

De servio fructuario, vel usuario.

§ II. Per eum quoque servum, in quo usum fructum vel usum habemus, similiber ex duabus itiss causis nobis acquiritur.

§ 2. We may always acquire in either of the above named cases, by means even of those slaves, of whom we have only the ususfruct or use.

De servio commun.

§ III. Communem servum pro dominica parte dominis acquireret certum est, excepto eo, quod nominatim uni stipulando, aut per traditionem acquiriendo, illi foli acquirit; veluti cum ita stipulatur, Titius domino meo dare fpondeas? Sed, si domini unius jussu servus fuerit stipulatus, licet antea dubitabatur, tamen postr nostram decisionem res expendita est, ut illi tantum acquirat, qui hoc ei facere jussit, ut supra dictum est.

§ 3. It is certain, that a slave, who is in common between two or more, acquires for his masters, in proportion to the property, which each of them has in him; unless he stipulates, or receives something, in the name of one of them only; as if he had thus stipulated, do you promise to give such a particular thing to Titius, my master? for although it was a doubt in times past, whether a slave, when commanded, could stipulate for the sole benefit of one of his masters; yet, since our decision, it has become a settled point, (as we have said before,) that a slave, in this case, can acquire for him only, who has ordered the stipulation.

Post nostram decisionem.] Cod. 4. t. 27. l. 2. 3. si duc, &c.
Titulus Trigesimus.

Quibus modis tollitur obligatio.

D.iv T. 2, 3, 4. C.viii. T. 42, 43, 44.

De solutione.

Tollitur autem omnis obligatio solutione ejus, quod debetur vel si quis consentiente creditore aliquid pro alio solverit. Nec interrestit, quis solvat, utrum ipse, qui debet, an alius pro eo; liberatur enim et alio solvente, sive sciente, sive ignorantem debitores, vel invito eo solutione fiat. Item, si reus solverit, etiam si, qui pro eo interveniatur, liberantur. Idem ex contrario contingit, si fide-jussor solverit: non enim ipse solus liberatur, sed etiam reus.

An obligation is dissolved by the payment of what is due; or by the payment of one thing for another, if the creditor consents: neither is it material, by whom payment is made, whether by the debtor himself, or by another for him; for a debtor becomes free from his debt, when another has paid it, either with or without his knowledge, or even against his consent. Also when a principal debtor pays his creditors, then those who have been bound for him, are freed from their obligation: and, on the contrary, when a fide-jussor or bondsmen clears himself from his obligation by payment, be not only becomes free himself, but the principal debtor is also cleared from his debt.

De acceptatione.


§ 1. An obligation is also dissolved by acceptation; which is an imaginary payment: for, if Titius is willing to remis what is due to him by a verbal contract, it may be done, if the debtor says; do you regard what I promised you, as accepted and received? and Titius answers, I do. An acceptation may also be made in Greek, if it is so worded, as to agree with the Latin form; εγὼ λαμβάνω δύνασθαι τοσά, εγώ λαμβάνω. But the obligations, which are thus dissolved, are verbal contracts, and no other: and it seems to be a just consequence, that an obligation,
De Aquiliana stipulacione et acceptatione.

§ II. Est autem probita stipulatio, quae vulgo Aquiliana appellatur, per quam contingit, ut omnium rerum obligatio in stipulatum deducatur, et ea per acceptationem tollatur. Stipulatio enim Aquiliana renovat omnes obligationes, et a Gallo Aquilio ita composita est. Quicquid tibi ex quacunque causa dare facere oportet oportebit, presens in diemve, aut sub conditione; quarumquacunque rerum tibi tectum actionis est, quaeque adversus te petitio, vel adversum te persectio, est erit; quoeve tu meum habes, tenes, possides, dolove malo fecisti, quo minus possideas; quanti quaeque earum rerum erit, tantum pecuniam dari stipulatus est Aulus Agerius, propoundit Numerius Nigidius. Quod Numerius Nigidius Aulo Agerio propoundit, id haberetne a se acceptum Numerius Nigidius Aulum Agerium rogavit: Aulus Agerius Numerio Nigidio acceptum fecit.

§ 2. There is another species of stipulation, called commonly the Aquilian stipulation, by virtue of which every other kind of obligation may be reduced to a stipulation, and may afterwards be dissolved by acceptation. For the Aquilian stipulation changes all obligations, and was constituted by Gallus Aquilius in the following manner. Do you promise, said Aulus Agerius to Numerius Nigidius, to pay me a sum of money, in lieu of what you was, or shall be, obliged to give me or to perform for my benefit, either simply, at a day to come, or upon condition; and in lieu of those things, which, being my property, you have, detain, or possess; or of which you have fraudulently quit the possession; and for which I may, or shall be, intitled to any species of action, plaint, or prosecution; Numerius Nigidius answered I do: and, when this was said, Numerius Nigidius asked Aulus Agerius, if he regarded the money as accepted and received, which he (Numerius) had promised to which Aulus Agerius answered, that he did regard it as accepted and received.

De novatione.

§ III. Praeterea novatione tollitur obligatio; veluti si id, quod tibi Sicinus debeat, a Titio stipulatus fuis. Nam interventu novae personae nova nascitur obligatio, et prima tollitur, translata in postierorem: adeo ut interdum, licet posterior stipulatio inutilis sit, tamen prima novationis iure tollatur; veluti si id, quod tu Titio debeat, a pupilio sine tutoris autoritate stipulatur fuerit; quo causa res amittitur: nam et prior debitor liberatur, et posterior obligatio nulla est. Non idem juris est, si a servo quis fuerit stipulatus: nam tunc prior perinde obligatus manet, ac si postea nul- lus stipulatus fuisset. Sed, si eadem persona sit, a qua postea stipuleris, in demum novatio fit, si quid in posteriori stipulatione novit; forte si condi-
ditio aut dies aut fide-jusus or adjiciatur aut destrahatur. Quod autem diximus, si conditio adiciatur, novationem fieri, sic intelligi oportet, ut ita dicamus factum novationem, si conditio extiterit; aliqui, si defeecerit, durat prior obligatio. Sed, cum hoc quidem inter veteres confabat, tane fieri novationem, cum novandi animo in secundam obligationem itum fuerat, per hoc autem dubium erat, quando novandi animo videtur hoc fieri, et quidem de hoc praefumtiones alii in alis causis introducebant, ideo nostra proceedit constitution, quae aperitus esse definit, tunc solum novationem prioris obligationis fieri, quiocis hunc inter contrahentes expressum fuerit, quod propter novationem prioris obligationis convenerunt; aliqui et manere primitam obligationem, et secundam ei accedere, ut maneat ex utraque causa obligatio, secundum nostra constitutionis definitionem, quam licet ex ipius lectione apertius cognoscere.

§ 3. An obligation is also dissolved by novation; as when you stipulate with Titius to receive from him what is due to you from Seius. For, by the intervention of a new debtor, a fresh obligation arises, by which the prior obligation is discharged, and transferred to the latter. And sometimes, also the latter stipulation is of no force, yet the prior contract is discharged by the mere act of novation; as if Titius should stipulate to receive a debt, which I owe him, from a pupil without the authority of his tutor; for in this case the debt is lost, because the first debtor is freed from his debt, and the second obligation is null: but it is not the same, if a man stipulates from a slave, with a design to make a novation; for then the first debtor remains bound, as if there had been no second stipulation. And, if you stipulate from the same person a second time, a novation arises, if any thing new is covenanted in the latter stipulation; as when a condition, a day, or a bondman is added, or taken away. But note, that, when a condition only is added, novation does not take place, till the event happens; and, till then, the prior obligation continues. It was observed as a rule among the ancient lawyers, that a novation arose, when a second contract was entered into with an intent to dissolve the former, but it was always a matter of great difficulty to know with what intent the second obligation was made; and the judges, having no positive proof before them, were forced to form their opinions upon presumptions, and according to the circumstances of every particular case. This uncertainty of judging gave rise to our constitution, which enacted, that a novation of a former contract shall only take place, when it is expressed by the contratists, that they covenanted with an intent to make a novation; and that, when this is not expressed, the prior contract shall continue valid; and the second be regarded as an accession to it; so that an obligation may remain by virtue of both contracts, according to the determination of our before named constitution, which may be better known by perusal.

Nostra procedit constitutione.] vid. Cod. 8. 1. 42. 18. De novationibus.

De contrario consensus.

§ IV. Hoc amplius, ex obligationes, quae consenunt contrahuntur, contraria voluntate diffolvuntur. Nam, si Titius et Seius inter se consenserint, ut fundum Tusculanum emptum Seius haberet centum aureis, deinde, racionem secuta, (id est, neque pretio soluto, neque fundo tradito,) placent.
cuereit inter eos, ut discederetur ab ea emptione et venditione, invicem liberantur. Idem est in conductione et locatione, et in omnibus contractibus, qui ex consensu descendunt, sicut jam dictum est.

§ 4. We must observe farther, that those obligations, which are contracted by consent, may be dissolved by dissent. For, if Titius and Seius have agreed by compact between themselves, that Seius shall have a certain ekate for an hundred aurei, and afterwards before execution, that is, before the price is paid, or livery is made of the lands, if the parties dissent from their agreement, they are mutually discharged from it. And the same may be said of location and conduction, and of all other contracts, which arise from consent.

FINIS LIBRI TERTII.
DIVI JUSTINIANI
INSTITUTIONUM
LIBER QUARTUS.

Titulus Primus.
De obligationibus, quae ex delicto nascentur.

Continuatio et divisio obligationum ex delicto.

Cum sit expostum superiore libro de obligationibus ex contractu et quasi ex contractu, sequitur, ut de obligationibus ex maleficio et quasi ex maleficio dispiaciemus. Sed illae quidem; ut suo loco tradidimus, in quattuor genera dividuntur; ha vero unius generis sunt: nam omnes ex re nascentur, id est, ex ipso maleficio; veluti ex furto, rapina, damno, injuria.

Having explained in the preceding book the nature of obligations, which arise from contract and quasi-contract, it follows, that we should here treat of those, which arise from malefeasance and quasi-malefeasance. The former, as we have showed in the proper place, are divided into four species; but the latter are of one kind only, for they all arise ex re, that is, from the crime or malefeasance itself; as from thei theft, rapine, damage, injury.

Definitio furti.

§ 1. Furtum est contraactio fraudulosa, lucri faciendi gratia, vel ipsius rei, vel etiam usus ejus, possessione; quod lege naturali prohibitum est admittere.

§ 1. Theft is a fraudulent substation of the thing itself, the use of it, or the possession, for the sake of gain. And this is prohibited by the law of nature.

Possessionis. In England theft is committed of the possession, when goods are stolen from a carrier, or a pledge from a creditor; and, if even the owner of such goods or pledge should take them away fraudulently, he would be guilty of larceny in regard to the possession; for though the property is in him, yet the right of possession is vested in another. 3 Co. rep. 110. Pp

Etymologia.
Etymologia.

§ II. Furtum autem vel a furvo, id est, nigro, dictum est, quod clam & obscure fiat, vel plerumque nocte: vel a fraude: vel a ferendo, id est, auferendo: vel a Graeco sermon, quod φωρας appellant fures: imo & Graeci, ἀπὸ τῆς φωρᾶς, φωρᾶς dixerint.

§ 2. The word furtum [thief] is derived from furvum; [black or dark;] because theft is committed privately, and generally in the night: — or from fraus [fraud]: — or from ferendo, which is of the same import with auferendo, and denotes a subtra∫tion, or taking away. Or perhaps furtum is derived from the Greek, for the Greeks call fures, φωρας; and φωρας is derived from φωραν, which signifies to take away.

Divisio.

§ III. Furto autem duo sunt genera; manifestum et nec manifestum: nam conceptum & oblatum species potius actionis sunt furto coherentes, quam generae furto, sicut inferius apparebit. Manifestum fur est, quam Graeci ἐν αὐτοφωρα appellant: nec solum is, qui in ipso furto deprehenditur, sed etiam is, qui eo loco deprehenditur, quo furto fit; velut qui in domo furto fecit, & nondo emeritam, deprehensius fuerit: & qui in oliveto olivare, aut in vineto uvarum, furto fecit, quamdiu in eo oliveto aut vineto deprehensus fuerit. Imo ulterior furto manifestum est extendendum, quamdiu eam rem fur tenens visus vel deprehensus fuerit, sive in publico, sive in privato, vel ab aliud, antequam eo pervenerit, quo deferre vel deponere deftinet. Sed, si pertulit, quo destinavit, tametsi deprehendatur cum re furtiva, non est manifestus fur. Nec manifestum furto quid sit, ex iis, quae diximus, intelligitur; nam quod manifestum non est, id scilicet nec manifestum est.

§ 3. Of theft there are two species, manifest and not manifest: for the thefts, called conceptum and oblatum, rather denote the species of action arising on account of theft, than the species of theft, as will appear in the next paragraph. A manifest thief, whom the Greeks call in αὐτοφωρα, is he, who is taken in the act of thieving, or in the place, where he committed it, as if a man, having committed a theft within an house, should be apprehended before he had passed through the outward gate of it: or, having stolen grapes or olives, should be taken in the vineyard or olive orchard. Manifest thief is also farther extended: for, if the thief is apprehended, whilst he is seen to have possession of the thing stolen, or if he is taken in public or in private, by the owner or by a stranger, at any time before his arrival at the place, to which he proposed to carry it, be is guilty of a manifest thief. But if he actually arrives, before apprehension, at the place proposed, then, aliothe thing stolen is found upon him, he is yet not reputed in law to be a manifest thief. By this description, which we have given of manifest theft, it may be clearly understand what is meant by theft not manifest.
De furto concepto, oblato, prohibito, non exhibito.

§ IV. Conceptum furtum dicitur, cum apud aliquem testibus praefentibus furtiva res quaestita, et inventa sit: nam in eum propria actio constituta est, quamvis fur non sit; quae appellatur concepti. Oblatum furtum dicitur, cum res furtiva ab aliquo tibi oblata sit, eaque apud te concepta sit; utique si ea mente tibi data fuerit, ut apud te potius, quam apud eum, qui dedit, conciperetur: nam tibi, apud quem concepta sit, propria adversus eum, qui obtulit, quamvis fur non sit, constituta est actio, quae appellatur oblata. Eft etiam prohibiti furti actio adversus eum, qui furtum quarete testibus praefentibus volenter prohibuerit. Pratera poena constituitur edicto pretoris per actionem furti non exhibiti adversus eum, qui furtivam rem apud se quaestam et inventam non exhibuit. Sed haec actiones, sicilicet concepti, et oblata, et furti prohibiti, nec non furti non exhibiti, in defuetudinem abierunt. Cum enim requirito rei furtivae hodie secundum veterem observationem non fiat, merito ex consequentia etiam praefata actiones ab usu communi recesserunt, cum manifestum sit, quod omnes, qui scientes rem furtivam suceperint, et celaverint, furti nec manifesti obnoxii sunt.

§ 4. A theft is called conceptum [i. e. found] when a thing stolen is searched for and found in the possession of some person in the presence of witnesses; and a particular action, called actio concepti, lies against such possessor, although he did not commit the theft. A theft is called oblatum, [i. e. offered,] when a thing stolen is offered for instance to Titius, and found upon him, it having been given to him by Seius, to the intent that it might rather be found upon Titius than upon himself; and in this case a special action, called actio oblata, may be brought by Titius against Seius, although Seius was not guilty of the theft. There is also an action, called prohibiting furti, which lies against him, who binders another to inquire of theft in the presence of witnesses. And farther, a penalty was constituted, by the edit of the praeator, to be sued by the action furti non exhibiti against any man for not having exhibited things stolen, which upon a search were found to have been in his possession. But these four actions are become quite obsolete; for, since a search after things stolen is not now made according to the ancient formalities, these actions never of consequence ceased to be in use; for it is a settled point, that all, who knowingly have received and concealed a thing stolen, are subject to the penalty of theft not manifested.

Requisitio rei furtivae.] This inquiry after things stolen was made lance & licio, and is at least so antient as the law of the twelve tables, in which it is mentioned. See Au. Gall. mot. att. lib. 11. cap. 19. But the commentators are not at all agreed in their very ideas of the lance and licium; much less in the reasons they assign for using them. Ex Felto autem diximus, [says Vinny.] lance & licium apud antiquos dicit, quod, qui furtum ibat quaerere in domo alia, licium cinctus intrabat, lanceaque ante oculos tenebat propter mairum-familiarum et virginum presentiam. Marcius vero putat, lanceam edictis opposuisse Licio cinctum, ne agnosceretur. Nisi tum saepe diximus ab institutis Atheniensibus: nam Plato, lib. 12. de legibus, sic erigit, "Si quis furus apud quemquam Audit quaerere, si id factum nubes, aut licium habens et dicitur," Nudi enim aeder subiectas ingrediebantur amici, tantum simplici cinctulo, quod hic veteri licium...
Lib. IV.  

Tit. I.  

§ 1. Pena: manifesta furta quadrupli est; tam ex servis, quam ex liberis persona; nec manifesti, dupli.

§ 5. The penalty of committing a manifest theft is quadruple, whether the thief is free or bond, and the penalty of committing a theft not manifest is double the value of the thing stolen.

Pena manifesti. The punishment of manifest theft was not always the same among the Romans; for, at different times, it had been a pecuniary mulct, whipping, the loss of eyes, the cutting off the offending member, and even death. The emperor Justinian indeed absolutely forbade, that any member should be cut off, or limb dislocated on account of theft, ordering only a pecuniary mulct, or banishment, to be the punishment of those, who were guilty of it. vid. nov. 134, cap. 13, De poenarum moderatione.

But succeeding emperors ordered severer punishments, uix. for the first offence, whipping; for the second, flagellating on the back, or cutting off a member; and, for the third, hanging; yet these punishments were often varied, and sometimes a theft was wholly forgiven, if it had been committed, through absolute necessity. But, altho' a criminal should undergo a corporal punishment, as whipping; yet by the Roman law the person injured might, notwithstanding this, maintain a civil action against the offender for restitution.

Theft or larceny is, by the law of England, divided into simple and mixed larceny. Simple larceny is divided into grand and petit. Grand larceny is committed, when the thing stolen is above the value of twelve pence; petit larceny is committed, when the thing stolen is of the value of twelve pence only, or under. The nature of the offence is the same in both, but the punishment of the first is death and loss of goods, and the punishment of the latter is loss of goods and whipping, but not death. But in grand larceny the jury may find the goods stolen of less value than twelve pence, and so convict the prisoner of petty larceny only. Hale 66. And this is often done.

Mixed larceny, or robbery, is a violent taking away of money or goods from the person of a man, putting him in fear, be the value of the thing taken above or under the value of one shilling: the punishment is death and forfeiture of all his estate. A felonious entering into a man's house in the night time, with an intent to commit felony, as to steal something, whether such intention is executed or not, is termed burglary; from the Saxons word burh, an house, and lara, a theft.

And, if such offence is committed in the daytime, it is called house-breaking. vid. 3, c. infra, 64, and Hale's hist. of the pl. of the crown. In regard to cases of necessity, some authors, and particularly Coxe, and Censorius, tom. 1. de furto et rep.
Quomodo furtum fit; de contrectatione.

§ VI. Furtum autem fit, non solum cum quis intercipiendi causam alienam amovet; sed generaliter, cum quis alienam rem, invito domino, contrectat. Itaque live creditor pignore, five is, apud quem reposita est, ea re utatur; five is, qui rem utendam acceptit, in alium utum transferat, quam cujus gratia ei data est, furtum committit; veluti, si quis argentum utendum acceperit, quasis amicos ad cœnām invitatūrus, & id peregre fecum tulerit; aut si quis equum, gestandī causā commodatum ibi, longius alīquo duxerit: quod veteres scripsertur de eo, qui in aemō equum perduxisset.

§ 6. Theft is committed not only, when one man takes the property of another for the sake of appropriating it to himself, but also in a more general sense, when one
Lib. IV. Tit. I.

Man uses the property of another against the will of the proprietor; thus, if a creditor makes use of a pledge, or a depositary of the deposit left with him, or if a man, who has only the use of a thing for a special purpose, converts it to other uses, a theft is committed. And, if any one borrows plate under pretense of using it, as an entertainment of his friends, and then carries it with him into a foreign country, or if a man borrows an horse, and rides it farther than he ought, theft is also committed: and the antients have held ibi to be law, in regard to him, who rides a borrowed horse into a field of battle.

Furum autem sit.] The law of England, where theft is more severely punished than it was formerly at Rome, is more sparing than the civil law in ranking certain offenses under the appellation of theft; for with us the malefices, mentioned in the text, are not reckoned thefts, and the persons guilty of them are only liable to a civil action.

De auctu furandi.

§ VII. Placuit tamen, eos, qui rebus commodatis alter uterentur, quam utendas acceperis, ita furutum committere, si se intelligant id, invito domino, facere; eumque, si intelleget, non permittat: at, si permittentur credant, extra crimen videri, optima fidele distinctione; quia furutum fine auctu furandi non committitur.

§ 7. But it hath nevertheless been adjudged, that whoever applies a thing borrowed to other uses than his, for which he borrowed it, is not guilty of theft, unless the borrower knew, that be so applied it, contrary to the will of the owner, who would not have permitted such application, if he had been apprized of it. But it has also been held, that the borrower in this case is not guilty of theft, if it appears, that be thought, that the owner would have given his consent. And this is a good distinction; for a theft can never be committed, unless there appears to have been a design and intention of stealing.

De voluntate domini.

§ VIII. Sed et, si credat aliquis, invito domino, se rem commodatam fibi contrectare, domino autem volente id fiat, dicitur furutum non fieri. Unde illud quasitum est, cum Titum servum Maviis folicitaerit, ut quaestam res domino surriperet, et ad eum perferret, et servus id ad dominum pertulerit; Mavius autem, dum vult Titum in ipso delicio deprehendere, permiferit servo quaestam res ad eum perferre; utrum furti, an servi corrupti, judicio tencatur Titus, an neutro? Et cum nobis super hic dubitatione suggeritum est, et antiquorum prudentium super hoc alterationes perpeprimus, quibusdam neque furti, neque servi corrupti, actionem prostantibus, quibusdam furti tantummodo, nos, hujusmodi calliditatis obviam euntes, per nostram constitutionem fancius, non solum furti actionem, sed et servi corrupti contra eum dari. Licet enim is servus deterior a sollicitatore minime facit us est, et ideo non concurrant regulara, qua servi corrupti actionem introducunt; tamen confilium corruptoris ad perniciem probatis servi introducitum est, ut sit ei poenalis actio imposita, tanquam si re ipsa fuerit servus corruptus; ne
ex hujusmodi impunitate et in alium servum, qui facile possit corrumpi, tale facinus a quibusdam perpetetur.

§ 8. But, if a man imagines, that he uses a thing borrowed in some manner contrary to the intention and will of the proprietor, when in reality the proprietor consents, that it should be so used, theft is not committed: and from hence arises a question upon the following case. Titius solicited the slave of Marvius to rob his master, and to bring him the things stolen; of this the slave informed his master, who, being willing to discover Titius in the fact, permitted the slave to carry certain things to Titius, as stolen; will Titius, in this case, be subject to an action of theft, or to an action for having corrupted a slave, or to neither? When this was proposed to us as a matter of doubt, and we perceived the alternations, which had formerly subsisted among the ancient lawyers upon the same point, some of them allowing of neither of the before-named actions, and others allowing an action of theft only, we therefore, being willing to obviate all subtleties, decreed by our constitution, that not only an action of theft might be brought, but also the action servii corrupti, which lies for having corrupted a slave. For also the slave became not the worse for the solicitation, and therefore the causes, which introduce the action servii corrupti, do not concur; yet inasmuch as such solicitation was intended to corrupt, it hath therefore pleased us, that a penal action shall lie against the party soliciting, in the same manner as if he had actually succeeded by corrupting the slave: and this we have ordained, lest impunity might encourage any evil-disposed persons to make the same attempt upon other slaves, who might have less strength of mind, and be more easily corrupted.

Per nostram constitutionem.] u. Cod. t. 2. 1. 20.

Quarum rerum furtum est. De liberis hominibus.

§ IX. Interdum etiam liberorum hominum furtum est; veluti si quis liberorum nostrorum, qui in potestate nostra sunt, surreptus fuerit.

§ 9. A theft may be committed even of free persons; as, for instance, when children, who are under power, are surreptiously taken from their parents.

Liberorum hominum furtum est.] This crime in England is called Kidnapping, which is stealing away a man, woman, or child; it is an offence at common law, and punishable by fine, pillory, &c. Rynm. 474. Wood's Inst. 426. By the 11 and 12 W. 3. cap. 7, if the master of a merchant ship shall during his being abroad force any man on shore, and willfully leave him behind, such master shall suffer three months imprisonment.

De re propria.

§ X. Aliquando etiam suæ rei furtum quis committit; veluti si debitor rem, quam creditores signis causa dedit, subtraxerit.

§ 10. A man may also possibly commit a theft even of his own property; as when a debtor hath taken away any particular thing, which he had left in pledge with his creditor.

Qui tenentur furti. De eo, cujus opera, consilio, furtum factum est.

§ XI. Interdum quoque furti tenetur, qui ipse furtum non fecit; qualis est is, cujus opera & consilio furtum factum est. In quo numero est,
§ 11. An action of theft will, in some cases, lie against persons, who did not actually commit the theft; it will lie, for example, against thieves, by whose aid and advice the theft was committed; and whoever strikes money out of your hand, to the intent that another may pick it up; or whoever doth assist you, as to give an opportunity to his accomplice to take your sheep, oxen, or any part of your property, must be reckoned in the number of aiding and abetting. The ancient lawyers also included him in this number, who frightened away a herd from its pasture with a red cloath.

But, if a man should do any of these acts wantonly, and without an intention of committing theft, then an action can lie only in factam; i.e. upon the case, or the fact done: but, when Titius commits theft by the aid of Mævius, they are both subject to an action of theft. Theft seems to be committed both by aid and advice, when a man puts a ladder to a window, or breaks open a door or window, to the intent, that another may commit theft; or when one man lends another iron bars, or ladders, knowing the bad purposes, to which they are to be applied. But it is certain, that he, who hath afforded no actual assistance, but hath only given his counsel by advising the crime, is not liable to an action of theft.

Non tenetur furti. By the law of England, for altho' petit larciny is felony, yet the smallman, who only advises another to commit, grand larciny, is an accessory before the fact; excludeeth accessories both before and after.

De his, qui sunt in potestate. Et de ope ac consilio extranei.

§ XII. Hi, qui in parentum vel dominorum potestate sunt, si rem eis furriisunt, furtum quidem faciunt, & res in furtivam causam cadit; nec ob id abullo ufucapi potest, aequaliam in domini potestatem revertatur: sed furti actio non nascitur, quia nec ex alia ualla causa potest inter eos actio nasci. Si vero ope & consilio alterius furtum factum fuerit, quia utique furtum committitur, convenienter ille furti tenetur: quia verum est, ope et consilio ejus furtum factum esse.

§ 12: When persons under the power of parents or masters take any thing surreptitiously from such parents or masters, a theft is committed, and the thing is looked upon as stolen; so that it cannot be prescribed to by any one, until it hath first reverted into the power of the proprietor; and yet an action of theft will not lie, for between parents and their children, or masters and slaves, no action can arise upon any account.
LIB. IV.  TIT. I.

account. But if the fact was done by the aid and advice of any other, inasmuch as a
theft is committed, an action of theft will lie against the aider.

Sed furti actio non nascitur.] No action was
allowed in this cause on account of the power,
which parents and masters had over their chil-
dren and slaves by the Roman law. Servi & filii
nistori furtum quidem nobis faciunt, ipsi autem furti
non tenentur: neque enim, qui potes in suum naturae,
neeesse habet adversus suum litigare; idcirco nec
actio ei a ueteribus praedita est. n. 47. t. 2. I. 17.
Ulpian.

Quibus datur actio furti.

§ XIII. Furti autem actio ei competit, cujus interest rem salvam
esse, licet dominus non sit: itaque nec domino aliter competit, quam
si ejus interest, rem non perire.

§ 13. An action of theft may be brought by any man, who has an interest in
the safety of the thing stolen, although he is not the proprietor of it: and the pro-
prietor himself can have no action, unless he has an interest.

Cujus interest rem salvam.] By the law of
England every person is deemed to have a suffi-
cient interest to prosecute another for the com-
mmission of a public crime, such as treason, rob-
ersy, theft, &c. by an indictment; which is de-

defined to be a brief narrative of an offence, com-
mitted by any person, who ought to be punished
for the good of the public: and it is therefore
said to be a prosecution at the suit of the king;
for which reason the party, who prosecutes, is
always admitted as a good witness to prove the

And, th'o' an indictment for theft should be of
the goods of an unknown person, it would yet
be good: for otherwise, in many cases, felons
would escape unpunished. Hift. pl. cor. 512.
Bacon's abridgment. indictment.

De pignore surrepto creditori.

§ XIV. Unde conflat creditori de pignore surrepto furti actione agere
psiff, etiam si idoneum debitorem habeat; quia expediat ei pignori potius
incumbere, quam in perfonam agere: adeo quidem ut, quamvis ipse de-
bitor eam rem surripuerit, nihilominus creditoris competit actio furti.

§ 14. From hence it follows, that a creditor may bring an action of theft, on
account of a pledge stolen, although his debtor is solvent; because it may be more expe-
dient for him to rely upon his pledge, than to bring an action against the person of
his debtor: and, although the debtor himself should have been the taker of the pledge,
yet an action of theft will lie against him.

De re fulloni, vel farcinatori, vel bona fidei emptori, surrepta.

§ XV. Item si fullo polienda curandave, aut farcinator farcienda,
veffimenta mercede certa constituta acceperit, eaque furto amiserit, ipse
furti haber actionem, non dominus; quia domini nihil interest, eam
rem non perire; cum judicio locati a fullone, aut farcinatore, rem sem
perfequi possit. Sed et bona fidei emptori surrepta re, quam emerit,
quamvis dominus non sit, omnino competit furti actio, quemad-
modum & creditoris. Fulloni vero & farcinatori non aliter furti
actionem competere placuit, quam si solvendo fuerint; hoc eft, si do-
mino rei asfisationem solvere posset. Nam, si solvendo non sint, tunc,
quia ab eis suum confessi non posset, ipsi domino furti competit
actio;
Actio; quia hoc casu ipsius interest, rem salvam esse. Idem est, et si in parte solvendo fuerit fullo aut farcinator.

§ 15. If a fuller receives cloaths to clean, and they are afterwards stolen from him, the fuller may bring an action of theft, but not the owner; for the owner is reputed to have no interest in their safety, because he has a right of action, called locati, against the fuller. But, if a thing is stolen from a bona fide purveyor, he is intitled, like a creditor, to an action of theft, alibi he is not the proprietor. But an action of theft is not maintainable by the fuller, or any tradesman in similar circumstances, unless he is solvent; that is, unless he is able to pay the owner the full value of the thing lost: for, if the fuller is insolvent, then the owner, who cannot recover from the fuller, is allowed to bring an action of theft, having in this case an interest. And note, that whoever is unable to pay the whole of what is due, such person is esteemed insolvent, let the deficiency be ever so small.

De re commodata.

§ XVI. Quae de fullerone et farcinatore diximus, eadem et ad eum, cui commodata res est, transferenda, veteres existimabant. Nam ut ille fullo, mercedem accipiendi, custodiam praestat, ita is quoque, qui commodatum utendi causa acceptit, similibus necesse habet custodiem praestare. Sed nostra providentia etiam hoc in nostris decisionibus emendavit, ut in domini voluntate sit, sive commodati actionem adversus eum, qui rem commodatum acceptit, movere desiderat, sive furti adversum eum, qui rem surripuit; et, alterutrum earum eleget, dominum non posse ex peccitentia ad alteram venire actionem; sed si quidem furem eleget, illum, qui rem utendam acceptit, penitus liberari; sin autem commodator veniat adversus eum, qui rem utendam acceptit, ipsi quidem nullo modo competere posset adversus furem furti actionem; eum autem, qui pro re commodata convenitur, posse adversus furem furti habere actionem; ita tamen, si dominus, scilicet rem esse surreptam, adversus eum, cui res commodata fuerit, pervenit. Sin autem neecessus et dubitans, rem esse surreptam, apud eum commodati actionem instituerit; posse autem, re comperta, voluerit remittere quidem commodati actionem, ad furti autem actionem pervenire, tunc licentia ei concedatur et adversus furem venire, obstaule nullo ei opponendo; quoniam incertus constitutus movit adversus eum, qui rem utendam acceptit, commodati actionem; nisi dominus ab eo satisfacit, fuerit; tunc etenim omnino furem a domino quidem furti actione liberari; suppositum autem esse ei, qui pro re ibi commodata domino satisfecerit; cuin manifestissimum sit, etiam ab initio dominus actionem commodati instituerit, ignarus rem esse surreptam, posse autem, hoc ei cognito, adversus furem transferit, omnino liberari eum, qui rem commodatum acceptit; quemcunque causa exitum dominus adversus furem habuerit: eadem definitione obtinente, five in parte, five in solidum, solvendo sit is, qui rem commodatum acceptit.

§ 16.
§ 16. The antients were of opinion, that what we have said of a fuller it equally applicable to him, to whom something is lent. For as the fuller, by agreeing for a certain price, is obliged to make good the cloaths committed to his custody, so is he also, who receives a loan for the sake of using it, under the like necessity of preserving it. But we have amended the law in this point by our decisions, so that it is now at the will of the owner either to bring an action of theft against the thief, or an action, on account of the thing lent, against the borrower. But, if the owner once makes an election of the one, he can never afterwards have recourse to the other; and, if he chooses to prosecute the thief, the borrower is altogether free from any action; and if the owner, or lender, brings a suit against the borrower, he can by no means bring an action against the thief. But the borrower, who is convened on account of the thing lent, may bring an action of theft against the thief, if the owner, who convened him, was apprized, that the thing was stolen; but, if the owner, either not knowing or doubting of the theft, institutes an action of loan against the borrower, and afterwards upon information is willing to withdraw it, and recur to an action of theft, he shall have liberty, in consideration of his uncertainty, to prosecute the thief without obstacle, if the borrower has not satisfied his demand; but, if the borrower has given the owner satisfaction, then the thief is freed from any action of theft, which can be brought by the owner; but be is nevertheless subject to the prosecution of the borrower, who has satisfied the owner. But it is most manifest, that, if the owner of any particular thing, not knowing, that it is stolen, should at first institute an action of loan against the borrower, but should afterwards, upon better information, choose to prosecute the thief by an action of theft, the borrower is secure, whatever may be the issue of the action brought against the thief. And this obtains as law, whether the borrower is able to answer the whole, or a part only, of the value of the thing.

De re deposita.

§ XVII. Sed is, apud quem res deposita est, custodiam non prestat; sed tantum in eo obnoxius est, si quid ipse dolo malo fecerit: qua de causa, si res ei surrepta fuerit, quia restitutione ejus rei, nomine deposit, non tenetur, nec ob id ejus interest rem salvam esse, furti agere non potest: sed furti actio domino competit.

§ 17. A depositary is not obliged to make good the thing deposited, unless he is himself guilty of some fraud, or malefeasance: and therefore, as a depositary is not obliged to make restitution, when the deposit is stolen, and as he has consequently no interest in the conservation of the deposit, he is not allowed to bring an action of theft, which in this case can only be maintained by the owner.

An impubes furti teneatur.

§ XVIII. In summa sciemum est, quidcumque esse, an impubes rem alienam amovendo furtum faciat? Et placuit, quia furtum ex affectu furandi constitit, ita demum obligari eo crimine impuberem, si proximus pubertati sit, et ob id intelligat se delinquere.

§ 18. Is hath been a question, whether a person within puberty, who hath taken away the property of another, can be guilty of theft? And is hath been determined, that, inasmuch as theft consists in the intention of defrauding, a person within puberty...
may be charged with theft, if he is near the age of puberty, and can be proved to have been sensible, that what he did was criminal.

Quæsitum est an impubes.] It is clear, that in England, a minor above fourteen is subject to capital punishment, as well as persons of full age; for it is a presumption of law, that minors after fourteen are delict capaces, and able to discern between good and evil. But an infant, under fourteen, and above twelve, is not presumed to be capable of fraud; yet, if it appears to the court, that he could discern between good and evil at the time of the offence committed, he may be convicted, and undergo judgment and execution of death, though he hath not completed his fourteenth year; but it is at the discretion of the judge to reprieve him before or after judgement, in order to obtain the king's pardon.

And farther, if an infant, even under twelve, and above seven, commits felony, tho' he is prima facie to be judged not guilty, because he is supposed not sensible of the nature of the crime; yet, if in this case it should appear by pregnant evidence and circumstances, that he had discernment to judge between good and evil, judgment of death may be given against him. 

æf. pl. cor. 26. 27. vol. 1.

Quid veniat in hanc actionem; et de affinibus actionibus.

§ XIX. Furti actio, five dupli, five quadrupli, tantum ad poenæ persectionem pertinent: nam ipius rei persectionem extrinsecus habet dominus, quam aut vindicando aut condicendo potest auferre. Sed rei vindicatio quidem adversus possessorum est, five fur ipse possidet, five alius quilibet: condicio autem adversus furem ipsum, hæredemve ejus, licet non possideat, competit.

§ 19. An action of theft can only be brought for the penalty, whether double or quadruple: for the owner of the thing stolen may recover the thing itself either by vindication or condition. An action of vindication may be brought against him, who hath possession, whether he be the thief or any other; but condition is maintainable only against the thief himself, or his heir; yet it will lie against either of them, whether be is or is not in possession of the thing stolen.

Titulus Secundus.
De vi bonorum raptorum.


Origo hujus actionis, et quid in eam veniat.

Qui vi res alienas rapit, tenetur quidem etiam furti; (quis enim magis alienam rem, invito domino, contrectat, quam qui vi rapit? ideoque recte dictum est, eum improbum furem esse;) sed tamens propriae actionem ejus delicti nomine praetor introdixit; qua appellatur vi bonorum raptorum; et est intra annum quadrupli, post annum simplici; quæ actio utilis est, etiam si quis unam rem, licet minimam, rapuerit. Quadruplum autem non totum pena est, sicut in actione furti manifesı
Lib. IV. Tit. II.

feci diximus; sed in quadruplo inest et rei persecutio; ut poena tripli fit, five comprehendatur raptor in ipso delicto, fivé non. Ridiculum enim est, levioris conditionis esse eum, qui vi rapit, quam qui clam amovet.

He, who takes the property of another by force, is liable to an action of theft; [for who can be said to take the property of another more against his will, than be, who takes it by force? and it hath therefore been rightly observed, that such a thief is of one of the worst kinds:] but the privator hath nevertheless introduced a peculiar action in this case, called vi bonorum raptorum; which, if brought within a year after the robbery, inforces the payment of the quadruple value of the thing taken; but, if it is brought after the expiration of a year, then the single value only is claimable; and this action is of such a nature, that it may be brought for any single thing, tho' it was of the least value imaginable, if it was taken by force. But the whole quadruple value is not exacted merely for the penalty, as in an action of manslaughter; for, in this quadruple value, the thing itself is included, so that, strictly, the penalty is only threefold; but then it is inflicted without distinguishing whether the robber was, or was not taken in the actual commission of the fact. For it would be ridiculous, that a robber, who uses force, should be in a better condition, than be, who is only guilty of a clandestine theft.

Licit minimam rapuerit.] Robbery is defined, by the English lawyers, to be a felonious and violent taking of money or goods from the person of another, putting him in fear, let the value of the thing, or things taken, be what it will, above or under one shilling. Hift. of the plea of the crown, p. 532.

Adversus quos datur.

§ I. Ita tamen competit hac actio, si dolo malo quis rapuerit; nam, qui aliquo errore ductus, rem suam esse existimans, et imprudens juris, eo animo rapuerit, quasi domino liceat etiam per vim rem suam auferre a possessoribus, absolvit debet: cui feliciter conveniens est, nec furti teneri eum, qui eodem hoc animo rapuit. Sed, ne, dum talia excogitatur, inveniatur via, per quam raptiores impune suam exerceant avaritiam, melius divallibus constitutionibus pro hac parte prospectum est, ut nemini liceat vi rapere vel rem mobilem, vel se moveantem, licet suam eandem rem existimet. Sed, si quis contra statutam principum fecerit, rei quidem suae dominio cadere; fin autem aliena res fit, post restitutionem ejus, etiam aequationem ejusdem rei praetare. Quod non solum in mobiliis rebus, qua rapit possessam, constitutiones obtinere contingunt, sed etiam in invasionibus, quas circa res soli fluiunt; ut, ex hac causa, ab omni rapina homines abstinant.

§ I. The action of a bonorum raptorum is only maintainable, when there is fraud usod, as well as force; for, if a man, being ignorant of the law and erroneously thinking any particular thing to be his own, should take it away by force from the possessor, upon a full persuasion, that he, as proprietor, could justify such a proceeding, he ought to be acquitted upon this action: neither is he subject, under the before-mentioned circumstances, to an action of theft. But, left robbers should from hence find out a way of practising their villanies with impunity, it is provided by the imperial constitutions.
tions, that no man shall be at liberty to take by force any moveable thing, or living creature, out of the possession of another, altho' be believes it to be his own; and that, whoever offends, by forcibly seizing his property, shall forfeit it; and that, whoever takes the property of another, imagining it to be his own, shall be obliged not only to restore the thing itself, but also to pay the value of it as a penalty. And the emperors have thought proper, that this should obtain, not only in regard to things moveable and moving, which may be carried away, but also in regard to invasions, or forcible entries, made upon things immoveable, as lands or houses, to the intent, that mankind may be deterred from committing any species of rape.

Sit ab omni rapina. vid. ff. 4. t. 2. l. 13. Cod. 8. t. 4. l. 7. It seems, that, by the common law of England, a man distinised of lands or tenements, is permitted to regain the possession by force: but this indulgence having been found by experience to be prejudicial to the public peace, by giving an opportunity to powerful men, under the pretence of seigned titles, forcibly to eject their weaker neighbours, and to retain their wrongful possessions, it hath been thought necessary to restrain all persons, by many severe acts of parliament, from the use of such violent methods of doing themselves justice. see 5 Ric. 2. flax. 1. cap. 8. 15 Ric. 2. cap. 2. 6 Hen. 6. cap. 9. 31 Eliz. cap. 11. 21 Jac. 1. cap. 15. Harv. plae of the crown. b. 1. cap. 64.

Quibus datur.

§ 2. Sane in hac actione non utique expectatur rem in bonis actionis esse; nam, five in bonis sit, five non, it tamen ex bonis sit, locum hanc action habebit. Quare five locata, five commodata, five etiam pignorata, five deposita, sit res apud Titium sic, ut inter sit ejus, eam rem per vinn non auferri, (veluti si in deposita re culpam quoque promisit,) five bona fide possideat, five ususfructum quis habeat in ea, vel quid aliud juris, ut inter sit ejus non rapi, dicendum est, ei competere hanc actionem, non ut dominium accipiat, sed illud solum, quod ex bonis ejus, qui rapinam passus est, id est, quod ex substantia ejus ablatum esse proponatur. Et generaliter dicendum est, ex quibus causis surti actio competit in re clam facta, ex ipsis causis omnes hanc habere actionem.

§ 2. In this action, it is not considered, whether the thing, taken by force, is, or is not, the property of the complainant; for, if he has an interest in it, the action is maintainable: and therefore, if a thing is let, lent, or pledged to Titius, or deposited with him, so that he becomes interested in the preservation of it, as he may be, even in the case of a deposit, if he hath promised to be answerable for it's safe custody; or, if Titius was a bona fide possessor, or intitled to the ususfruct, or has any other right, which gives an interest, he may bring this action, not for the recovery of the absolute property, but of that only, to which his interest extends. And we may in general affirm, that the same causes, which intitle a man to institute an action of theft, when any thing hath been privately stolen from him, will also intitle him to bring the action vi honorum raptorum, when force hath been used.

Titulus
Lib. IV. Tit. III.

Titulus Tertius.

De lege Aquilia.


Summa. Caput primum.

DAMNI injuria actio constituitur per legem Aquiliam; cujus primo capite cautum est, ut, si quis alienum hominem, alienamve quadrupedem, quae pecudum numero fit, injuria occiderit, quanti eae res in eo anno plurimi fuerit, tantum domino dare damnetur.

The action for injurious damage is given by the law Aquilia; which enacts, in the first chapter, that, if any man injuriously kills the slave, or four-footed beasts of another, which may be reckoned in the number of his cattle, he shall be condemned to pay the owner the greatest price, which the slave or beast might have been sold for, at any time within a year, computing backward from the day, when the wound was given.

Damni injuria actio. Almost all the suits, which may be instituted according to the civil law, under the law Aquilia, may be commenced in England by means of an action of trespass upon the case. Cow. inst. b. 1. The law Aquilia is supposed to have been a gloss, made by Aquilus, tribune of the people, anno U. C. 572. vid. Hein. instag. lib. 4 t. 3.

Injuriam occidit. It is enacted by 23 Car. 2. cap. 7. that, if any person shall maliciously maim or hurt any cattle, or destroy any plantation of trees, or throw down inclosures, he shall forfeit treble damages in an action of trespass.

In eo anno. See the ninth section of the third title of this book.

De quadrupede, quae pecudum numero est.

§ 1. Quod autem non precise de quadrupede, sed de ea tantum, quae pecudum numero est, cavetur, eo pertinet, ut neque de feris beffis, neque de canibus, cautum esse intelligamus; sed de iis tantum, quae gregatim proprie paeci dicuntur, quales sunt equi, muli, asini, oves, boves, caprae. De suis quoque idem placeuit. Nam et suus quoque pecudum appellatione continentur; quia et hi gregatim pastuntur. Sic denique et Homerus in Odysseia ait; (sicut Aelius Marcianus in suis institutionibus referat.)

Hoc est,

Affidet is suibus, quorum grex magnus in agris
Pascitur, ad Coracis saxum, fontemque Arethusa.

§ 2. As the law does not speak of four-footed beasts in general, but of those only, which may be reckoned cattle, we may collect, that wild beasts and dogs do not come within the intendment of the law, which can be understood to include only those animals, which feed in herds, as korse, mules, asses, sheep, oxen, goats, &c. It hath also been determined,
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determined, that swine are comprised under the term cattle, because they feed in herds; and this Homer testifies in the Odyss. for which he is quoted by Aelius Marcian in his institutions. — You will find him taking care of the swine, which feed in herds near the Corfuian rock, &c. Odyss. b. 13.

Ut neque de feris belliiis.] The law of England allows an action of trespass to be brought on account of multii, spaniel, greyhounds; and also on account of some things wild by nature, if they are reclaimed by art and industry, as bears, foxes, ferrets, &c. or their whelps. Hale’s b. 3. pl. 5. 12. And, when beasts, wild by nature, are fit for food, and reduced to tameness, it is agreed, that whoever takes any of these from the poletier, commits theft; and it appears to be the better opinion, that it is felony to take wild pigeons from a dove-house, or hares, or deer, in an house, or even a park, inclosed in such a manner, that the owner may take them whenever he pleases, without any danger of their escaping; in which cases, they are as much in his power as fish in a pond, or young pigeons, or hawks in a nest; in taking of which it is agreed, that felony may be committed. Hawk. pl. 5. of the cr. b. 1. c. 34.

De injuria.

§ II. Injuria autem occidere intelligitur, qui nullo jure occidit: itaque, qui latronem infidiatorem occidit, non tenetur; utique si aliter periculum effugere non potest.

§ 2. A man, who kills another without having a right or authority so to do, is understood to injure injuriously: but, when there is a right, there can be no punishment; and therefore he is not subject to the law, who kills a robber, or an assassin, if there was no other way of avoiding the danger threatened.

Itaque qui latronem.] At common law, if a thief had assaulted a man, with an intention to rob him, and he had killed the assailter, it had been pare defensor; but yet he would, according to some opinions, have forfeited his goods. 11 Co. rep. 82. b. tho’ other books hold the contrary. 26 Aff. 32.

But it is now provided by 24 H. 8 c. 10. that, if any person is indicted, or appealed for the death of any evil-disposed persons attempting to murder, rob, or break man-sion, houses, the person so indicted or appealed, "and by verdict so found, shall not forfeit any lands or goods, but shall be thereof acquitted, in like manner as if he had been acquitted of the death of the said evil-disposed persons." But this statute extends not to indemnify the killing a felon, when the felony is not accompanied with force; for it speaks of robbery; therefore the killing a man, who only attempts to pick a pocket, is not within the act; because there can, in such a case, be no necessity to kill. Hale’s b. 3. of the pl. of the crown, vol. 1. p. 488.

De caus. dolo, et culpa.

§ III. Ac ne is quidem hac lege tenetur, qui caus. occidit, si modo culpa ejus nulla inveniatur. Nam aliqui non minus ex dolo, quam ex culpa, quique hac legem tenetur.

§ 3. Neither is he subject to the Aquilian law, who hath killed another by accident; if no fault can be found in him. But the law does not punish a man less for damage, done by his fault or negligence, than for damage done by fraud or design.

De junctio.

§ IV. Itaque, si quis, dum jaculis ludit vel exercitatur, transeunte servum tuum trajecerit, distinguitur. Nam, si id a milite in eo campo, ubi solutum est exercitari, admission eff, nulla culpa ejus inteligitur; si alius tale quid admonerit, culpa reus est. Idem juris est de milite, si in
De putatione.

§ V. Item si putator, ex arbore ramo dejecto, servum tuum transemurtem occiderit, si prope viam publicam aut vicinalem id factum est, neque proclamavit, ut causas evitari posset, culpae reus est; sed, si proclamavit, nec ille curavit praecavere, extra culpam est putator. Aequa extra culpam esse intelligit, si seorum a via forte, vel in medio fundo cædebat, licet non proclamavit: quia in eo loco nulli extraneo jus fuerat versandi.

§ 5. If a man is lopping a tree, and happens to kill a slave, who is passing, the lopper is guilty of a fault, if he worked near a public road, or in a way leading to a village, without giving a proper warning by proclamation; but, if he made due proclamation, and the other did not take care of himself, the lopper is exempt from fault: and he is equally exempt from fault, alio modo he did not make proclamation, if he worked apart from the big road, or in the middle of a field; for a stranger has no right of passage thro’ such places.

De curatione relicta.

§ VI. Præterea, si medicus, qui servum tuum secuit, dereliquerit curationem ejus, et ob id mortuus fuerit servus, culpae reus erit.

§ 6. Alfo, si a physician, or chirurgeon, who has made an incision in the body of a slave, should afterwards neglect or for sake the cure, by which the death of the slave is occasioned, he is guilty of a fault.

De imperitia medici.

§ VII. Imperitia quoque culpæ annumeratur; veluti si medicus ideof servum tuum occiderit, quia male eum securerit, aut perperam ei medicamentum dederit.

§ 7. The want of skill in a profession is also regarded as a fault; thus a physician, for instance, is culpable, and of course subject to an action, who occasions the death of a slave by an unskillful incision, or a rash administration of medicines.

De imperitia et inforimitate mulionis, aut equo vesti.

§ VIII. Impetu quoque mularum, quas mulio propter imperitiam retinere non potuit, si servus tuus oppressus fuerit, culpæ reus est mulio.
lio. Sed et, si propter infirmitatem eas retinere non potuerit, cum alius firmior eas retinere potuisset, æque culpæ tenetur. Eadem placuerunt de eo quoque, qui cum equo vehetur, impetum ejus, aut propter infirmitatem, aut propter imperitiam suam, retinere non potuerit.

§ 8. If a mule-driver, by reason of unskilfulness, is unable to manage his mules, and a slave is run over by them, the mule-driver is in fault; and, if he wants strength to rein them in, when another man is able to do it, he is then equally culpable: and the same may be said of a rider, who, tho' want either of strength or skill, is not able to manage bis borë.

Quanti damnum æstimetur, et de hæredibus.

§ IX. His autem verbis legis, quanti id eo in anno plurimi fuerit, illa sententia exprimitur, ut si quis hominem tuum, qui hodie claudus, aut muncus, aut lucus erit, occiderit, qui in eo anno integer aut pretiosus fuerit, non tanti teneatur, quanti hodie erit, sed quanti in eo anno plurimi fuerit: qua ratione creditum est pœnalem esse hujus legis actionem; quia non solum tanti quisque obligatur, quantum danni dederit, sed aliquando longe ploris. Ideoque constat, in hæredem eam actionem non transire, quæ transitura fisset, si ultra damnum nunquam lis æstimaretur.

§ 9. These words of the law Aquilia, let him, who kills a slave, or beast of another, forfeit the greatest price, which either could have been sold for in that year, are to be understood in the following sense; as thus, if Titius accidentally kills a slave, who was then lame, or wanted a limb, or an eye, but had been within the space of a year perfect in all his parts, and very valuable, then Titius shall be obliged to pay, not what the slave was worth on the day, when he was killed, but what he was worth at any time within a year preceding his death, when he was in the fullest vigor. An admonition therefore, upon the law Aquilia, has always been regarded as penal; for it obliges a man to pay not only the full value of the damage done, but often much more than the full value; and of consequence can by no means pass against the heir of the offender: but it might legally have been transferred against the heir, if the condemnation had never exceeded the quantum of the damage.

Quid æstimatur.

§ X. Illud non ex verbis legis, sed ex interpretatione, placuit, non solum perempti corporis æstimationem habendam esse secundum ea, quæ diximus, sed eo amplius, quicquid praeterea, perempto eo corpore, damni nobis illatum fuerit; veluti si servum tuum hæredem ab aliquo institutum ante quis occiderit, quam is jussu tuo hereditatem adierit: nam hæreditatis quoque amissæ rationem esse habendam constat. Item, si ex pari mularum unam, vel ex quadrigis equorum unum, quis occiderit, vel ex comœdis unus servus occisus fuerit, non solum occisī fit æstimationi,
æstimatio, sed eo amplius id quoque computatur, quanti depretiati sunt, qui superfunct.

§ 10. If hath prevailed by construction, the not by virtue of the express words of the law, that not only the value of a slave is to be computed, as we have already mentioned; but that an estimation must be made of whatsoever further damage is occasioned by his death; as if Titius, for example, should kill a slave at the time, when he was instituted an heir, and before he bad actually entered upon the heirship at the command of bis master; for, in this case, the loss of the inheritance must be brought into the computation. Also if an horse, or mule is killed, by which a pair, or set, is broken, or if a slave is slain, who made one of a company of comedians, an estimation must be made not only according to the value of that slave or animal, but according to the value of those, which remain; for, if they are damaged, the diminution of their value is also taken into the account.

De concursu hujus actionis et capitalis.

§ XI. Librum autem est ei, cujus servus occisus fuerit, et ex judicio privato legis Aquilæ damnum persequi, et capitalis criminis eum reum facere.

§ 11. The master of a slave, who is killed, is at liberty to sue for damages by a private action, founded upon the law Aquilia, and at the same time to prosecute the offender publicly, for a capital crime.

Librum autem est ei.) It seems to be the better opinion, that a person in England, who is guilty of felony, and pardoned, or burned in the hand, may be proceeded against in a civil action at the suit of the party injured; for, when the offender hath been pardoned, or prosecuted, there can be no inconvenience in allowing the action, and the previous criminal prosecution ought to be no bar to it; for why should not the criminal answer in damages to the party injured, as well as be made an example for the sake of the public, whom he hath offended? Bacon's abridgment, vol. 1. p. 64.

But no action can be brought, whilst the felon is under indictment for the crime; for, if that were allowed, it might hinder all exemplary punishment. Style 346.

Caput secundum.

§ XII. Caput secundum legis Aquilæ in usu non est.

§ 12. The second chapter of the law Aquilia is not in use.

Caput tertium. Quod damnun vindicatur.

§ XIII. Capite tertio de omni cetero damno cavetur; itaque, si quis servum, vel eam quadrupedem, qua in pecudum numero est, vulneravit, five eam quadrupedem, qua in pecudum numero non est, veluti canem, aut feram beffiam, vulneraverit aut occiderit, hoc capite actio constituitur. In ceteris quoque omnibus animalibus, item in omnibus rebus, qua anima carent, damnun per injuriam datum hac parte vindicatur. Si quid enim usum, aut ruptum, aut fractum fuerit, actio ex hoc capite constituitur; quamquam poterat sola rupti appellatio in omnes itas causas, sufficeret: ruptum enim intelligitur, quod quoquo modo corruptum est; unde non solum fracta, aut usum

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etiam sciissa, et collissa, et effusa, et quocco modo perempta atque deteriora facta, hoc verbo continetur. Denique responsum est, si quis in alienum vinum aut oleum id mifuerit, quo naturalis bonitas vini aut olei corrumpetur, ex hac parte legis Aquiliae eum teneri.

§ 13. By the third chapter of this law, a remedy is given for every other kind of damage; and therefore, if a man wounds a slave, or four-footed animal, which is ranked among cattle, or which is not ranked among cattle, as a dog or wild beast, an action will lie against him by virtue of this third part of the law. A reparation may also be obtained, under this chapter, for all damage injuriously done to animals in general, or to things inanimate; and the same chapter appoints an action for the recovery of the value of whatsoever is burned, spoiled, or broken; but the term ruptum would alone be sufficient in any of these cases; for in whatever manner a thing is damaged, or corrupted, it is understood to be ruptum, or spoiled, in some degree; so ibat, wheneuer a thing is broken, burned, or even torn, bruised, spoiled, or in any manner made worse, it may be said to be ruptum. It hath also been determined, that, if a man intermixes any thing, with the wine or oil of another, so as to corrupt or impair it's natural goodness, he is liable to an action founded upon this chapter of the law Aquilia.

De dolo et culpa.

§ XIV. Illud palam est, sicut ex primo capite demum quique tenetur, si dolo aut culpa eis homo aut quadrupes occisus occisive fuerit, ita ex hoc capite, de dolo aut culpa, et de caetero damno quemque teneri: ex hoc tamen capite, non quanti in eo anno, sed quanti in diebus triginta proximis res fuerit, obligatur is, qui damnum dederit.

§ 14. It is evident, that the first part or chapter of the law subjects every man to an action, who tbro' design or accident kills the slave or beast of another, and that the third part gives a remedy for any other damage, so occasioned. But by this third chapter the person, who did the damage, is not obliged to pay the highest price, which the thing damaged might have been sold for, at any time within the year, but only the value of it at any time within thirty days, previous to the damage.

Quanti damnum aestimetur.

§ XV. Ac nec plurimi quidem verbum adjicitur. Sed Sabino recte placuit, perinde habendam aestimationem, ac si etiam hac parte plurimi verbum adjectum suffisset; nam plebem Romanam, que, Aquilio tribuno rogante, hanc legem tulit, contentam fuisset, quod prima parte eo verbo ufa effet.

§ 15. But it is not said in the third part of the law, that the highest value of the thing damaged shall be recovered by action. But, in the opinion of Sabinus, the valuation ought to be made, as if the word highest had not been omitted; for, when Aquilius, the tribune, proposed this law, the commonalty of Rome thought it sufficient to insert the word highest in the first chapter.
Lib. IV.    Tit. III.

De actione directa, uti], et in factum.

§ XVI. Ceterum placuit, ita demum directam ex hac lege actionem esse, si quis precipue corpore suo damnun dederit: ideoque in eum, qui alio modo damnun dederit, utiles actiones dari solent; veluti si quis hominem alienum, aut pecus, ita includerit, ut fame necaretur; aut jumentum ita vehementer egerit, ut rumperetur; aut pecus in tantum exagitaverit, ut præcipitataretur: aut si quis alio servo persuaserit, ut in arborem ascenderet, vel in puteum descendere, et is ascendendo, vel descendendo, aut mortuus, aut aliqua parte corporis laetus fuerit, utilis actio in eum datur: sed, si quis alienum servum aut de ponte, aut de ripa, in flumen dejecerit, et is suffocatus fuerit, eo quod projecit, corpore suo damnun dedisse non difficultur intelligent potest; ideoque ipfa lege Aquilia tenetur. Sed, si non corpore damnun fuerit datum, necque corpus laetus fuerit, sed alio modo aliqui damnun contigerit, cum non sufficiat neque directa, neque utilis legis Aquiliae actio, placuit, eum, qui obnoxius fuerit, in factum actione teneri; veluti si quis, misericordia ductus, alienum servum compeditum solverit, ut fugeret.

§ 16. It has been determined, that, if a man bath, with his own band or body, done damage to another, a direct actio will lie by virtue of this law. But when damage is done by any other means, as by imprisoning a slave, or impounding the cattle of another, till they die worshipful; by driving a beast of burden so vehemently as to spoil him; by chasing an herd of cattle, till they leap down a precipice; or by persuading a slave to climb a tree, or go down into a well, by which he is killed or maimed; then the actio, called utilis, is given, by which reparation may be obtained. And note, that, if Titius thrusts the slave of another into the water from the top of a bridge or bank, and the slave is drowned, in consequence of the fall, it is plain, that Titius occasioned this damage with his own hands, and he is therefore subject to a direct actio. But if the damage received was not done by the band or body of another, and is not corporal, so that neither a direct nor beneficial actio can be brought by virtue of the Aquilian law, then in those circumstances an actio upon the cae, or fact, will lie against the causor of the damage; and therefore, if any man thoro compassion should unchain the slave of another, and so promote his escape, a reparation may be obtained against him by an actio upon the fact.

Utiles actiones dari.] The actions, termed utiles, may, in general, be defined to be actions introduced by an equitable construction in all cases, where the strict letter of any particular law is deficient, and does not supply the necessary remedies.

In factum actione.] It may be proper here to observe in general, that for every right, and every injury, done to a man in person, reputation, or property, the law of England allows a remedy; but this remedy must, in general, be taken according to the writs and settled actions prescribed by law; as debt upon contract, trespass on a manifest and open invasion, &c. but where the law has made no provision, or rather, where no general actio could well be framed beforehand, the ways of injuring, and methods of deceiving, being so various, every person is allowed to bring a special actio on his own case; i.e. upon the fact. Bawon's abridg. vol. 1. p. 44.
De Injuriis.

§ 1. Injuria autem committitur, non solum cum quis pugno pulsatius, aut fusibus caesus, vel etiam verberatus erit; sed et si cui convitium factum fuerit; five cujus bona, qua! debitoris, qui nihil deberet, posset ex fuerint ab eo, qui intelligebat, nihil eum fibi debere; vel si quis ad infamiam alicujus libellum aut carmen (aut histrionum) scripserit, compouerit, ediderit, dolove male fecerit, quo quid eorum fieret; five quis matremfamilias, aut prætextatum prætextatamve, adfectatus fuerit: five cujus pudicitia attentata esse dicetur: et denique, aliiis plurimis modis admitti injuriam, manifestum est.

§ 1. An injury may be done not only by beating and wounding, but also by convititious language, or by seizing the goods of a man, as if he were a debtor, when the person, who seized them, well knew, that nothing was due to him. It is also manifest, that an injury may be committed by writing a defamatory libel, poem, or history; or by maliciously causing another so to do, also by continually soliciting the continuty of a boy, girl, or woman of reputation; and by various other means, which are too numerous to be specified.

Libellum aut carmen.] A libel, according to the definitions given of it in the law of England, is a malicious defamation, expressed either in words or writing, or by signs, pictures, &c. tending either to blacken the memory of one, who is dear, or the reputation or one, who is living. S Ce. rep. De libellis famosi, p. 125. By the Roman law the punishment of the author or publisher of an infamous libel, if it objected a capital crime, was death. Cest. 6. 1. 36. But
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But, if it brought no man’s life into danger, and affected only reputation, the offender was rendered incapable of giving testimony, and of making a will. § 47, t. 10. l. 5. In England the punishment may be by fine, pillory, or whipping, when the offender is proceeded against by indictment, or information; but in a civil action the punishment founds only in costs and damages. But as to mere words of defamation, they are at common law not actionable, except when they have been of real damage and injury to the person spoken against; for mere contumely is but of little consideration; and the ecclesiastical courts may be prohibited by the temporal courts from proceeding in a cause of defamation, when the suit is not wholly of a spiritual nature: as for calling a man an heretic, schismatic, adulterer, fornicator, &c. 4 Ch. rep. p. 20. Palmer v. Thorpe.

Qui et per quos injuriarum patiuntur. De parente et liberis, viro et uxore, socero et nuru.

§ II. Patitur autem quis injuriarum non solum per fœmetipsium, sed etiam per liberos suos, quos in potestate habet; item per uxorem suam; id enim magis prævaluit. Itaque, si filiæ alieius, quæ Titio nupta est, injuriarum fœcereis, non solum fœcia 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 viris, non viros ab uxoriis, æquum est. Sed et socer nurus nomine, cujus vir in ejus potestate est, injuriarum agere potest.

§ 2. A man may receive an injury not only in his own person, but in that of his children under his power, and also in the person of his wife; for this is now the more prevalent opinion: and therefore, if an injury is done to Scius’s daughter, who is married to Titius, an action may be brought not only in the name of the daughter, but in the name either of her father or her husband; but, if the husband receives an injury, the wife is not allowed to institute a suit in his defense; for it is a maxim, that wives may be defended by their husbands, but not husbands by their wives. And note, that a father-in-law may also commence a suit in the name of his son’s wife, on account of an injury done to her, if her husband is under the power of his father.

De servo.

§ III. Servis autem ipsis quidem nulla injuria fieri intelligitur, sed domino per eos fieri videtur: non tamen iisdem modis, quibus etiam per liberos et uxoros; sed ita, cum quid atrocissimum committerit, et quod aperte ad contumeliam domini respicit; veluti si quis alienum servum atrociter verberaverit; et in hunc casum actio proponitur. At, si quis servum convitium fecerit, vel pugno eum percuterit, nulla in eum actio domino competit.

§ 3. An injury is never understood to be done to a slave, but is reputed to be done to the master; ibid. the person of his slave: but what amounts to an injury in regard to a wife or child, does not amount to an injury, suffered ibid. the person of a slave; and therefore to constitute an injury, by means of the person of a slave, some considerable damage must be done to him, and something which openly afflicts his master; as if a stranger should beat a slave of another in a cruel manner: for in this case an action would lie; but, if a man should only give ill language to a slave, or strike him with his fist, the master can bring no action upon that account.
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De servo communi.

§ IV. Si communi servo injuria facta sit, aequum est, non pro ea parte, qua dominus quique est, aestimationem injuriae fieri, sed ex dominorum persona, qua ipsis sit injuria.

§ 4. If an injury is done to the common slave of many masters, the estimation of the injury received is not to be made according to their several proportions of property in the slave, but according to the quality of each master; for it is to them, to whom the injury is done.

De servo fructuario.

§ V. Quod si ususfructus in servo Titii est, proprietas Mævii, magis Mævio injuria fieri intelligentur.

§ 5. If Titius has the usufruct of a slave, and Mævius the property, then any injury, which is done to that slave, is understood to be done to Mævius the proprietor.

De eo, qui bona fide servit.

§ VI. Sed, si libero homini, qui tibi bona fide servit, injuria facta sit, nulla tibi actio dabitur, sed suo nomine est experiri poterit, nisi in contumeliam tuam pulsat us sit; tunc enim competit et tibi injuriarum actio. Idem ergo est et in servo alieno bona fide tibi serviente; ut toties admittatur injuriarum actio, quoties in tuam contumeliam injuria ei facta est.

§ 6. But, if an injury is done to a free person, who is in the service of Titius, Titius can bring no action of injury, but the servant must commence a suit in his own name, unless the person, who beat him, did it principally for the sake of affronting his master; and, in this case, Titius may also bring an action of injury. The same law likewise obtains, if your servant is the slave of another; for as often as he receives an injury, which was intended to affront you, you may yourself bring an action of injury.

Pœna injuriarum ex l. xii. tabb. et ex jure prætorio.

§ VII. Pœna autem injuriarum ex lege duodecim tabularum propter membrum quidem ruptum talio erat; propter os vero fractum nummariae pœna erant constituta, quasi in magna veterum paupertate. Sed postea prætores permitter sunt, qui injuriam passit sunt, eam æstimare; ut judex vel tanti reum condemnet, quanti injuriam passius æstimaverit, vel minoris, prout ei viustum fuerit. Sed poena quidem injuriae, quæ ex lege xii. tabularum introducta est, in desuetudinem abit: quam autem prætores introduxerunt, (quæ etiam honoraria appellatur,) in judiciis frequentatur. Nam, secundum gradum dignitatis vitaeque honorati, crescit aut minuitur aestimatio injuriae: qui gradus condemnationis
§ 7. The punishment of an injury, according to the 12 tables, was a return of the like injury, if any limb was broken; but, if a blow only was given, or a single bone broken, then the punishment was pecuniary, which was not without effect among the antients, who lived in great poverty. The pretors afterwards permitted the parties injured to fix their damages at a certain sum, which might serve as a guide to the judge, but not preclude him from levying the estimate at his discretion. The species of pecuniary punishment, which was introduced by the law of the 12 tables, fell by degrees into disuse, and that, which the pretors gave rise to, is now solely in use, and is termed honorary; for the estimation of an injury is either increased or diminished according to the degree and quality of the person injured; and this distinction of degree is not improperly observed even in regard to slaves; so that the same injury may be variously estimated, according to the state and condition of him, who suffered it; at an bigger rate, if he be held as steward or agent to his master, and at a lower estimation, if he was a slave of an inferior sort.

Pena autem injuriarum.] Aulus Gellius is of opinion, that retaliation was never executed even among the antient Romani, unless the party offending confessed; for he affirms, that the offender was always at liberty to commute his punishment on paying a certain sum of money in proportion to his circumstances. *Vid. Aul. Gell. lib. 20. cap. 1.* And it were to be wished, for the honor of antient Rome, that this opinion was rightly founded; for the law of retaliation, altho’ it has the appearance of great equity, is certainly full of absurdity and injustice upon various accounts. And, to obviate any objection, which may be made from the law of Moses, the best commentators upon the pentateuch have always looked upon such expressions, *as an eye for an eye,* and *a tooth for a tooth,* to be only proverbial. *Vid. Mr. Le Clerc in Exod. 21. v. 24. Deut. 19. v. 21.*

Sed potest pretor. The law of the 12 tables, as given by Gellus, is in these words. *Si injuriam faxit alteri, viginti quinque aeris pane sunt.* To which he adds; *Quis enim erit tam ingo, quem ab injuria facienda lubidini viginti quinque afferat? Itaque cum eam legem Q. Labo in libris, quos ad duodecim tabulas conferrebat, non probaret; quidam, inquit, Lucius Veratus fuit, egestis hominum improbus atque immuni accordia; in pro delictamento habebat os hominis liber iuris posuit, sua palma verberava. Eum severus sequebatur cruentam plenam affum petebat; et, quemcunque deplamaverat, numerari statim secundum duodecim tabulas viginti et quinque afferet jubebat. Pretor, inquit, pretoribus potestas banc aboleinque et reliquis cederebat; injusti quae a dimandis recuperaret se daturos edixerat. *Noct. att. lib. 20. cap. 1.*

De lege Cornelia.

§ VIII. Sed et lex Cornelia de injuriis loquitur, et injuriarum actionem introdixit, quæ competit ob eam rem, quod se pulsatum quis, verberatumve, vel domum suam vi introitam effe, dicat. Domum autem accipimus, sive in propria domo quis habitat, sive in conducta, sive gratis, sive hospicio receptus sit.

§ 8. The law Cornelio speaks also of injuries, and hath introduced an action, which lies, when a man alleges, that he hath been struck or beaten, or that another hath entered forcibly into his house; and any man is allowed in this case to allege an house to be his own, whether it is in reality his, or whether he be only hires or borrowes it, or even lives in it as a guest.

Sed et lex Cornelia.] “Tres sunt causa, ex quibus etiam lex Cornelia actionem injurias rum dedit; quod quis pulsatux, verberatue,

“domusve ejus vi introita sit. *ff. 47. t. 10. l. 3.*

“Nam etiam praxitaria ad omnes injurias pertinebat, tam que manu quam que verbis

§ 8. *Sunt*
De æstimatione atrocis injuriæ.

§ IX. AtroX injurXæ æstimatur vel ex fæcto, veluti si quis ab alio vulneratus sit, vel fuStibus cælus; vel ex loco, veluti si cui in theatro, vel in foro, vel in conspecitu praetoris, injuria facta sit; vel ex persona, veluti si magistratus injuriam passus fuerit, vel si senatrori ab humili persona injuria facta sit, aut parenti patronove fiat a liberis vel libertis. Ali- ter enim senatoris et parentis patronique, alter extranei et humilis personæ, injuria æstimatur. Nonnunquam & locus vulneris atrocem injuriam facit, veluti si in oculo quis percussus fuerit. Parvi autem referunt, utrum patri-familias, an filio-familias, talis injuria facta sit: nam et haec atrox injuria æstimabitur.

§ 9. An injury is esteemed atrocious, sometimes from the nature of the fact, as when a man is wounded by another, or beaten with a club — sometimes from the place, as when an injury is done in a public theatre, in an open market, or in the presence of the praetor — and sometimes by reason of the rank of the person, as when a magistrate, or a senator, receives an injury from one of mean condition; or when a parent is injured by his child, or a patron by his freed-man; for an injury; done to a senator, or to a parent by his child, or to a patron by his freed-man, must be attested for by an heavier punishment, than an injury done to a stranger, or a person of low degree. Also the part, in which a wound is given, may constitute an injury atrocious; as if a man should be wounded in his eye; but it makes no manner of alteration, whether such an injury is done to the father of a family, or to the son of a family; for the injury will neither be the more nor the less atrocious upon this account.

Locus vulneris.] This definition, between one part of the body and another, is also taken by the law of England. vid. 5 Hen. 4. c. 5. and 22, 23. Car. 2. c. 1.

De judicio civili et criminali.

§ X. In summa sciemendum est, de omni injuria eum, qui passus est, poße vel criminaliter agere, vel civiliter: et, si quidem civiliter agatur, æstimatione facta, secundum quod dictum est, pena reo imponitur; sin autem criminaliter, officio judicis extraordinaria penæ reo imponatur. Hoc vide licet observando, quod Zenoniana constitutio introduxit, ut viri illustres, quique super eos fund, et per procuratores possint aætionem injuriarum criminaliter vel persequi vel iudicarse, secundum ejus tenorem, qui ex ipsa manifestius apparat.

§ 10. In fine, it must be observed concerning every injury, that the party injured may sue the offending party either criminally or civilly. If the party injured sues civilly, the damage occasioned by the injury must be estimated, and the penalty enjoined accordingly, as we have before noticed: but, if he sues criminally, it is the duty of the judge to inflict on extraordinary punishment upon the offender; observing the constitution of Zeno, which permits all persons, who have a right to be called illustrious,
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and of consequence all, who enjoy a superior title, either to persue or defend criminally any action of injury by their proctors; but the tenor of this law will more fully appear by a persual of the ordinance itself.

Zononiana constitutio.] vid. Cod. 9. t. 35. l. 11.  Cod. 12. t. 8. l. 2. Ut dignitatem ordo servetur.

Qui tenentur injuriarum,

§ XI. Non solum autem is injuriarum tenetur, qui fecit injuriam, id est, qui percussit; verum ille quoque tenetur, qui dolo fecit injuriam, vel qui procuravit, ut cui mala pugno percuteretur.

§ XII. An action of injury does not only lie against him, who hath done an injury, by giving a blow, &c. but also against him, who by his craft and persuasion hath caused the injury to be done.

Quomodo tollitur hæc actio.

§ XII. Hæc actio diffimulatione aboleitur; et ideo, si quis injuriam de-reliquerit, hoc est, flatim pausus ad animum suum non revocaverit, postea ex pœnitentia remissam injuriam non poterit recolare.

§ 12. All rights to an action of injury may be lost by diffimulation; and therefore, if a man takes no notice of an injury at the time, in which he receives it, he cannot afterwards, albo'be repent of his former behavior, commence a suit on account of that injury.

TITULUS QUINTUS.

De obligationibus, quæ quasi ex delicto nascuntur.


Si judex litem suam fecerit.

S i judex litem suam fecerit, non proprie ex maleficio obligatus videtur: sed quia neque ex maleficio, neque ex contractu obligatus est, et utique peccasse aliquid intelligitur, licet per imprudentiam, ideo videtur quæ ex maleficio teneri; et, in quantum de ea re æquum religi- 

oni jucdicantis videbitur, penam sustinebit.

If a judge makes a suit his own, by giving an unjust determination, an action of male-feasance will not properly lie against him: but, albo'be he is not subject to an action of male-feasance, or of contract, yet, as he hath certainly committed a fault, albo'it was not by design, but by imprudence and want of skill, be
De dejectis vel effusis, et postis aut suspensis.

§ I. Item is, cujus ex cenaculo, vel proprio ipfius, vel conducito, vel in quo gratis habitat, dejectum effufumve aliquid est, ita ut alciui noceret, quasi ex maleficio obligatus intelligitur. Ideo autem non proprie ex maleficio obligatus intelligitur, quia plerumque ob alterius culpam tenetur, aut servi aut liberi. Cui similis est is, qui ea parte, qua vulgo iter fieri solet, id postum aut suspensum habet, quod potest, fi ceciderit, alciui nocere; quod cafu poena decem aureorum constituta est. De eo vero, quod dejectum effufumve est, dupli, quantum damned datum fit, constituta est actio. Ob hominem vero liberum occasum, quinquaginta aureorum poena constituitur. Si vero vivat, noctumque ei esse dicatur, quantum ob eam rem aequum judici videtur, actio datur. Judex enim computare debet mercedes medicis praefitas, ceteraque impendia, quae in curatione facta sunt; præterea operas, quibus caruit aut cariturus est, ob id, quod inutilis est factus.

§ 1. Whoever occupies a chamber, from whence any thing hath been either thrown or spilt, by which damage is done, he is liable to an action of quasi-male-feasance; and it is not material, whether the chamber is the property of the occupier; whether he pays rent for it; or whether he inhabits it gratis: and the reason, why such occupier is not liable for a direct male-feasance, is, because he is generally sued for the fault of another. Any man is also subject to the same action, who hath bung or placed anything in a public road, so as to endanger passengers by the fall of it; in which case, a penalty of ten aurei is appointed: but, when anything hath been thrown or spilt, the action is always for the double of what the damage amounts to. If a freeman is killed by accident, the penalty is fifty aurei; but, if he only receives some hurt, the quantum of the damage is at the discretion of the judge, who ought to take the fees of the physician into the account, and all other expenses, attendant upon the cure, over and above the time, which the patient hath lost in his illness, or may lose by being unable to perseue his business.

De filio-familias, seorsum habitante a patre.

§ II. Si filius-familias seorsum a patre habitaverit, et quid ex cenaculo ejus dejectum effufumve fuerit, quin positi sunt suspensumve habuerit, cujus cafus periculo usu est, Juliano placuit, in patrem nullam esse actionem, sed cum ipso filio agendum esse. Quod et in filio-familias judice observandum est, qui litteram suam fecerit.

§ 2. If the son of a family lives separate from his father, and any thing is either thrown, or spilt, from his apartment, or so bung, or placed, that the fall of it may do damage, it is the opinion of Julian, that no action will lie against the father, and that the son only can be sued. The same rule of law is also to be observed, in regard to the son of a family, who hath acted as a judge, and given an unjust determination.
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De damno aut furto, quod in navi, aut cauponæ, aut stabulo, factum est.

§ III. Item exercitor navis, aut cauponæ, aut stabuli, de damno aut furto, quod in navi, aut cauponæ, aut stabulo, factum erit, quasi ex maleficio teneri videtur; si modo ipsius nullum est maleficium, sed alicujus eorum, quorum opera navem, aut cauponam, aut stabulum, exercet. Cum enim neque ex maleficio, neque ex contractu, sit adversus eum constituta hic actio, et aliquatenus culpæ reus est, quod opera malorum hominum uteretur, ideo quasi ex maleficio teneri videtur. In his autem casibus in factum actio competet; quæ hæredi quidem datur, adversus hæredem autem non competit.

§ 3. The master of a ship, tavern, or inn, is liable to be sued for a quasi-maleficium, on account of every damage, or theft, done or committed in any of these places, by himself or his servants: for alioqui no action, either of direct or of quasi-maleficium, or of contract, can be brought against the master, yet, as he has, in some measure, been guilty of a fault in employing dishonest persons as his servants, he is therefore subject to a suit for a quasi-maleficium. But, in all these cases, the action given is an action upon the fact, which may be brought in favor of an heir, but not against him.

Item exercitor.] By the law of England an inn-keeper shall be charged, if there is any default in him or his servants in keeping the goods of a guest; for an innholder is bound by law to keep them safe; and it is no excuse to say, that he delivered the guest the key of the chamber-door, and that the guest left it open. And al-tho' the guest does not deliver his goods to the innholder to keep, yet, if they are stolen, even by persons unknown, the innholder is chargeable; for, in this case, either the innholder, or his servants, are in fault for their neglect. 8 Co. Rep. 32. Calye's case.

TITULUS SEXTUS.

De actionibus.


Continuatio, et Definitio.

S Uperæst, ut de actionibus loquamur. Actio nihil aliud est, quam jus persequendi in judicio, quod fibi debetur.

It now remains, that we should treat of actions. An action is nothing more, than the right, which every man has, of bringing an action at law for whatever is due to him.
Divisio prima.

§ 1. Omnium autem actionum, quibus inter aliquos apud judices arbitroves de quacunque re quaeritur, summum divisio in duo genera deductur: aut enim in rem sunt, aut in personam: namque agit uniuqueque aut cum eo, qui ei obligatus est, vel ex contractu, vel ex maleficio: quo caus pro dice funt actiones in personam, per quas intendit, adversarium ei dare aut facere oportere, et aliis quibusdam modis: aut cum eo agit, qui nullum iure ei obligatus est, movet tamen aliqui de aliqua re controversiam: quo caus pro dice actiones in rem sunt: veluti si rem corporalem possidet quis, quam Titius suam esse affirmet, possidet autem, dominum ejus esse dicit; nam, si Titius suam esse intendent, in rem actio est.

§ 1. All actions in general, whether they are determinable before judges or arbiters, may be primarily divided into two kinds, real and personal; for the plaintiff must sue the defendant, either because the defendant is obligated to him by contract, or hath been guilty of some male-faience; and, in this case, the action must be personal, in which the plaintiff alleges, that his adversary is bound to give, or to do something for his service, or some other matter, as the occasion requires: or otherwise, the plaintiff must sue the defendant, on account of some corporeal thing, when there is no obligation; in which case the action must be real: as for example, if Sempronius possesse land, which Titius affirms to be his property, the other denying it, Titius must bring a real action against Sempronius for the recovery.


In rem sunt, aut in personam] Actions, by the law of England, are divided into real, personal, and mixed. Actions real, or relating to lands, are either driotural, or possessorial; driotural, if they vindicate a right derived from an ancestor; and possessorial, if they complain of the violation of a right, of which we were possessors. But the law always distinguished between a right of entry and a naked right, and therefore gave different remedies in each case: for, in order to recover the naked right, the law only allowed a writ of right; and, in this action, the defendant, at his election, might either be tried by a jury, or wage battel: but, when the person dis sampled had a right of entry, it was presumed, that the possessor was fresh and recent, and therefore the trial was by twelve men. But, if the defendant did not come, till the heir of the possessor was seated in his possession, and had paid a relief, or fine, to the lord, then the entry of the defendant was taken away, and his title became doubtful; and then the judges appealed to providence in their decisions; so that, if any freeman would, with his own body, defend the title of his possessor, the defendant was obliged to find a champion to enter the lists for him.

But the antient way of recovering the right of possession was by a writ of entry, and then the issue, discussed, or not discussed, was always tried by a jury; for, when the defendant was recent, our ancestors made no appeal to providence, referring that remedy for those cases only, in which the long possession had rendered the right doubtful. Bac.abr. vol. 1. p. 27.

But it is here proper to observe, "that, in a writ of right, neither the tenant, nor the demandant, shall fight for themselves; but must find a champion to fight for them; because, if either tenant, or demandant, should be slain, no judgment could be given for the lands or tenements in question, yet, in an appeal for murder, the defendant shall fight for himself, and so shall the plaintiff; for, if the defendant is slain, the plaintiff hath the effect of his suit; i.e. the death of the defendant. Co. Litt. 295." As to the order and solemnity of a trial by battel, see the year-books, 29 Edw. 3. p. 12. 30 Edw. 3. p. 20. 1 H. 6. p. 7. Spec. gl. cap. campus. Orig. judic. p. 65.

But trial by combat, being thought by some to be unchristian, king Hen. the second referred it to the choice of the per son challenged [i.e. the supposed wrong doer, or defendant] whether he would defend his title to the land in question by
De actione confessoria, et negatoria.

§ II. Æque, si agat quis, jus sibi esse fundo forte, vel ædibus utendi fruendi, vel per fundum vicini eundi agendi, vel ex fundo vicini aquam ducendi, in rem actio est. Ejusdem generis est actio de jure praediorum urbanorum; veluti, si quis agat, jus sibi esse altius sedes suas tollendi, prospeciendive, vel proscriendi aliquid, vel immittendi tignum in vicini ædes. Contra quoque de usufructu, et de servitutibus praediorum rusticorum, item praediorum urbanorum, invicem quoque prodate sunt actiones; ut si quis intendat, jus non esse adversario utendi fruendi, eundi agendi, aquamve ducendi; item altius tollendi, prospeciendive, vel proscriendi, immittendi: itaque quoque actiones in rem sunt, fed negativa; quod genus actionis in controversiis rerum corporalium proditum non est; nam in his is agit, qui non possidet; ei vero, qui possidet, non est actio prodata, per quam negat rem actoris esse. Sane non uno caufi, qui possidet, nihilominus is actoris partes obtinet; sicut in latioribus digestorum libris opportunius apparebit.

§ 2. Allo, if any man brings an action, alleging, that he has a right to the usifruit of a field, or house, or a right of driving his cattle, or of drawing water in the land of his neighbour, such action is denominated real. And an action relating to the rights of houses or city estates, which rights are called services, is also of the same kind; as when a man commences a suit, and alleges, that he has a right of
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prope, a right to raise the height of his house, a right of making a part of it to project, or a right of laying the beams of his building upon his neighbour's walls. There are also contrary actions to these, which relate to usu-fruits, and the rights of country and city estates, as when the complainant alleges, that his adversary is not entitled to the usufruct of a particular ground, or to the right of passage, &c. &c. These actions are also real, but are negative in their nature, and cannot therefore be used in regard to things corporeal, for, in respect to things corporeal, the agent, or plaintiff, is the person out of possession; for a possessor can bring no action: there are however, many cases, in which a possessor may be obliged to act the part of a plaintiff; but we refer the reader to the books of the digests.

Sane non uno caufa.] Others read, sanus uno caufa, but the insertion of non seems most conformable to the words of Justinian, in the latter part of this section; for the emperor does not say, that the possessor of a corporeal thing can ever become plaintiff, by commencing a suit; but that he may perform the part of a plaintiff, partes auctoris: which is only saying, that he may be obliged to take the proof upon himself, which often happens. Fiiin.

De actionibus prætorii realibus.

§ III. Sed ista quidem actiones, quorum mentionem habuimus, et si quæ sunt similis, ex legitimis et civilibus causis descendunt. Aliæ autem sunt, quas prætor ex sua jurisdicione comparatas habet, tam in rem, quam in perfonam; quas et ipsas necessarium est exemplis offendere: ut ecce, plerumque ita permittit prætor in rem agere, ut vel actor dicat, se quasi usu-cupisse, quod non usu-ceperit, vel ex diverso possessor dicat, adversarium suum non usu-cepisse, quod usu-ceperit.

§ 3. The actions, of which we have mentioned, and all actions of a similar nature, are derived from the civil law; but the prætor, by virtue of his jurisdiction, hath introduced other actions, both real and personal, of which it will be necessary to give some examples: for he often permits a real action to be brought, either by allowing the demandant to allege, that he hath acquired by prescription, what he hath not so acquired; or, on the contrary, by permitting a former possessor to allege, that his adversary hath not acquired by prescription, what, in reality, he hath so acquired.

De Publiciana.

§ IV. Namque, si cui ex jutâ causa res aliqua tradita fuerit, (veluti ex causa emptionis, aut donationis, aut dotis, aut legatorum,) et necdum ejus rei dominus effectus est, si est ejus rei possessorum causa amissit, nullam habet in rem directam actionem ad eam persequendum: quippe ita proditæ sunt jure civili actiones, ut quis dominium suum vindicet. Sed, quia usque durum erat, eo cafu defecerit actionem, inventa est a prætore actio, in qua dicit is, qui possessorum amissit, eam rem se usu-cepisse, quam usu non cepit, et ita vindicat suam esse: quæ actio Publiciana appellatur, quoniam primum a Publicio prætore in edicto proposita est.

§ 3. If any particular thing, belonging to one man, should be delivered in trust to another, that it might be deposited with him upon some just account, as by reason of a purchase, a gift, a marriage, or a bequest, and it should so happen, that such trustee should
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should lose the possession, before he hath gained a property in the thing possessed, he could have no direct action for the recovery of it; inasmuch as real actions are given by the law for the re-vindication of those things only, in which a man hath a vested property or dominion. But, it being hard, that an action should be wanting in such a case, the pretor hath supplied one, in which the person, who hath lost his possession, is allowed to aver, that he hath a prescriptive right to the thing in question, alio est he hath not obtained it; and he may thus recover the possession. This action is called actio Publiciana, because it was first instituted by the edict of Publicius the pretor.

De rescissoria.

§ V. Rursum ex diverso, si quis, cum reipublicae causa abesse, vel in hostium potestate esset, rem ejus, qui in civitate esset, usuqueperit, permittitur domino, si possessor reipublicae causa abesse desiderit, tunc intra annum rescissi usucapione eam rem petere, id est, ita petere, ut dicat, possessorum usu non cessisse, et ob id suam rem esse. Quod genus actionis quibusdam et alis simili æquitate motus pretor accommodat; sic ex latiori Digestorum seu pandectarum volumine intelligere licet.

§ 5. On the contrary, if any man, whilst he is abroad in the service of his country, or a prisoner in the bands of the enemy, should gain a prescriptive title to a thing which belongs to another, who was not abroad, then the former proprietor is permitted at any time, within a year after the return of the possessor, to bring an action against him, the prescriptive title being rescinded, and the proprietor being allowed to allege, that the possessor hath not effectually prescribed, and that therefore the thing in litigation is his own. The same motive of equity hath also induced the pretor to allow the use of this species of action to certain other persons, as we may learn more at large from the digest.

Quibusdam et alii.] That is, to persons (for example) who had been absent upon a just account; for every man, who had been necessarily abroad, was also allowed to take the benefit of this action to recover his right of possession against those, who had resided at home. Cod. 8. t. 51. l. 18. Vin.

And to this we have something similar in the law of England; for, if any person is dispossessed of his estate, whilst he is in durance, and, if the land devolve to the heir of the dispossessor, the heiress has liberty, by his own proper act, to re-enter; and, if judgment is given against him, he may revert it afterwards by a writ of error, because his absence was not contumacious. And there is the same law for those, who are in the king's service, or are beyond the seas on any business, which concerns the commonwealth; and some affirm, that, if a man is abroad upon his own business, and is dispelled, he may, at his return, re-enter upon the heir of the disseisor, even without bringing an affiz. Co. Litt. § 436. 439. 440. continual claus. Any invasion of the right of persons in prison, or beyond sea, is also guarded against by various acts of parliament. § H. 4. c. 14. 4 H. 7. c. 24. etc.

De Pauliana.

§ VI. Item, si quis in fraudem creditorum rem suam alicui tradiderit, bonis ejus a creditoribus possis ex sententia praedidis, permittitur iphis creditoribus, rescis traditione, eam rem petere; id est, dicere eam rem traditam non esse, et ob id in bonis debitoris manifesse.

§ 6. If a debtor disposes of any thing, by delivering it to some person in order to defraud his creditors, the creditors are then permitted, notwithstanding the delivery,
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De Serviana et quasi-Serviana, seu hypothecaria.

§ VII. Item Serviana, et quasi Serviana, (quae etiam hypothecaria vocatur,) ex ipsius praeoris jurisdictione substantiam capiunt. Serviana autem experitur quis de rebus coloni, quae pignoris jure pro mercedibus fundi ei tententur. Quasi Serviana autem est, qua creditores pignora hypothecavt persequantur. Inter pignus autem et hypothecam, (quantum ad actionem hypothecariam attinet,) nihil interept; nam de qua re inter creditorem et debitorem convenerit, ut sit pro debito obligata, utraque hac appellatione continetur; sed in aliis differentia est: nam pignoris appellatione cum proprie rem contineri dicimus, quae simul etiam traditur creditoris, maxime si mobilis sit; at eam, quae sine traditione nuda conventione continetur, proprie hypothecae appellatione contineri dicimus.

§ 7. Also the action Serviana, and the action quasi-Serviana, (which is also called hypothecary,) both take their rise from the praeors jurisdiction. By the action Serviana, a suit may be commenced for the stock and estate of a farmer, which are obligated as a pledge for the rest of the ground, which be farms of bis landlord. The action quasi-Serviana is that, by which a creditor may sue for a thing pledged or hypothecated to him; and, in regard to this action, there is no difference between a pledge and an hypothecae, both in other respects they differ: for, by the term pledge, is meant, which hath actually been delivered to a creditor, especically if the thing was a moveable; and, by the word hypothecae, we comprehend what is obligated to a creditor by a nuda agreement only, without a delivery.

Item Serviana.] The law of England seems to go farther in this than the Roman law; for a lefem in England may, of proper right, distrain the effects and cattle, which are brought upon bis fen, and detain them, till bis rent is satisfied; for they are regarded as a gage or pledge: and even the cattle of a stranger, escaping into bis neighbour's grounds, and being there levated and caucas'd, may be distrained by the lefemor; for it shall be imputed to the owner's folly, that he did not provide against this mischief, by proper bounds and fences. Bras. I. 37. 99. Bastard's Abr. 108. 109. vol. 2. u. distrect.

De actionibus praeoriis personalibus.

§ VIII. In personam quoque actiones ex sua jurisdictione propositas habet praeor, veluti de pecunia constituta; cui similis videbatur receptitia. Sed ex nostra constitutione, (cum, et si quid plenius habebat, hoc in actionem pecuniae constituta transfusum est,) et ea quasi superfavca jussa est cum sua auctoritate a nostris legibus recedere. Item praeor pro-
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§ 8. Personal actions have also been introduced by the praeors, in consequence of their authority; such is the action de pecunia constituta, which much resembles that called receptitia; which we have now taken away by our constitution, as unnecessary; and whatsoever advantageous matter it contained, we have added it to the action de pecunia constituta. The praeors have likewise introduced the action concerning the peculium of slaves, and the sons of families; and also the actions, in which the only question is, whether the plaintiff hath made oath of his debt; they have likewise introduced many others.

De constituta pecunia.

§ IX. De constituta autem pecunia cum omnibus agitur, quicunque vel pro se, vel pro alio, soluturas se constituereint, nulla scilicet stipulatio interposita: nam alioqui, si stipulanti promiserint, jure civili tenentur.

§ 9. A suit may be commenced by the action de pecunia constituta, against any person, who hath engaged to pay money, either for himself or another, without stipulation; but, when there is a stipulation, the praetorians action is not wanted; for the performance of the promise may be enforced by the civil law.

De peculio.

§ X. Actiones autem de peculio ideo adversus patrem dominumque comparavit praeor, quia licet ex contractu filiorum servorumque ipso jure non teneantur; aequum tamen est, peculio tenus, (quod veluti patrimonium est filiorum hiliarumque, item servorum,) condemnari eos.

§ 10. The praeor hath also given actions de peculio against fathers and masters, inasmuch as they are not legally bound by the contracts of their children and slaves; for it is but equity, that parents and masters should be condemned to pay to the extent of a peculium, which is, as it were, the patrimony, and separate estate of a son, a daughter, or a slave.

De actione in factum ex jure jurando.

§ XI. Item, si quis postulante adversario juraverit, deberi sibi pecuniam, quam peteret, neque ei solvatur, justissime accommodat ei tamet actionem, per quam non illud quiritur, an ei pecunia debatur, sed an juraverit.

§ 11. Also if any man, at the prayer or request of the adverse party, makes oath, that the debt, which he sutes for, is unpaid and due to him, the praeor may justly indulge.
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Indulges him with an action upon the fact; in which no inquiry is made, whether the debt is due, but whether the oath hath been taken.

De actionibus poenalibus.

§ XII. Poenales quoque actiones praeator pene multas ex sua jurisdictione introduxit; veluti adversus eum, qui quid ex albo ejus corrupisset; et in eum, qui patronum vel parentem in jus vocasset, cum id non impetrasset; item adversus eum, qui vi exemeret eum, qui in jus vocaretur, cujusvis dolo alius exemerit; et alias innumerales.

§ 12. The praetors have also introduced a great number of penal actions, by virtue of their authority. But, to mention some only out of many, they have provided, for instance, an action against him, who hath wilfully damaged or erased an edict; again, an emancipated son, or a freed-man, who hath commenced a suit against his parent or patron, without a previous permission from the proper magistrate; and also against any person, who by force or fraud hath hindered another from appearing to the process of a court of justice. But these are only some instances out of a great number, which might be produced.

De praecipialibus actionibus.

§ XIII. Praecipialia actiones in rem esse videntur; quales sunt, per quas quaeritur, an aliquis liber, an libertus sit, vel servus, vel de partu agnoendo. Ex quibus fere una illa legitimam causam habet, per quam quaeritur, an aliquis liber sit: caeterae ex ipsius praetoris jurisdictione substantiam capiunt.

§ 13. Prejudicial actions are also real; such are those, by which it is inquired, whether a man is born free, or made free; whether he is a slave, or a bastard. But of these actions, that only proceeds from the civil law, by which it is inquired, whether a man is free born: the rest all take their rise from the praetor’s jurisdiction.

Praecipialia actiones. Brega gives the following account of prejudicial actions. Praecipialia sunt, quae orientur ex incidentibus quaestionibus vel emergentibus, in quibus quaeritur, utrum aliquis sit ingenuus vel libertinus, liber vel servus, filius an non; et, si filius, utrum legitimus vel bastardus, et byzmodi; et dicatur praecipialia actiones, quia prorsus judicantur, quam actio principalis.

Angl. “Those actions are called prejudicial, which arise from incident questions, in which it is inquired, whether a man is born free, or not; and, if not born free, whether he is a freed-man, or a slave: also, whether a man is the son of another, or not; and, if he is the son, whether he is the legitimate son, or a bastard.”

All these, and the like actions, or issues, are termed prejudicial, because they must be adjudged and determined before the principal action.” Brac. lib. 3. cap. 4. n. 9.

An res sua condici possit.

§ XIV. Sic itaque discretis actionibus, certum est, non posse actu-rem fum rem ita ab aliquo petere, si pare, eum dare oportere: nec enim, quod actuoris est, id ei dari oportet; scilicet, quia dari cuiquam id intelligitur, quod ita datur, ut ejus fiat: nec res, quae jam actuoris est, magis ejus fieri potest. Plane odio furum, quo magis pluribus actionibus
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nibus teneantur, effectum est, ut, extra poenam dupli aut quadrupli, rei recipienda nomine, fures etiam hae actione teneantur, si appareat, eos dare oportere: quamvis sit adversus eos etiam hae in rem actio, per quam rem suam quis esse petit.

§ 14. Actions being thus divided into real and personal, it is certain, that a man cannot sue for his own property by a condition, or a personal action in the following form, viz. if it appears, that the defendant ought to give it me: for the act of giving implies the conferring of property, and therefore that, which is the property of the plaintiff, can never be underlaid to be given to him, or to become more his own, than it already is. But, notwithstanding this, in order to shew a detestation for thieves and robbers, and to increase the number of actions, which may be brought against them, it hath been determined, that, besides the double and quadruple penalty, so which they are liable, they may be pursued by a condition for the thing taken, in the very form before recited, if it appears, that they ought to give it. And this is allowed, alio modo the party injured may also bring a real action against them, by which he may demand the thing taken, as his own.

De nominibus actionum.

§ XV. Appellamus autem in rem quidem actiones vindicationes; in perfosnam vero actiones, quibus dare aut facere oportere intenditur, conditiones: condicere enim est denuntiare, pritsa lingua: nunc vero abusive dicimus, condicionem actionem in perfosnam esse, qua actor intendit dari sibi oportere; nulla enim hoc tempore eo nomine denuntiatione fit.

§ 15. Real actions are called vindications; and personal actions, in which it is intended, that something ought to be done or given, are called conditions; for the word condicere was in our old language of the same import with denuntiare to denounce: but the term condition is now improperly used to denote a personal action, by which the plaintiff contends, that something ought to be given to him; for denunciations are not in use.


Divisio secunda.

§ XVI. Sequens illa divisio est, quod quaedam actiones rei perpetuandae gratia comparatae sunt, quaedam penae perpetuandae, quaedam mitte sunt.

§ 16. Actions are also farther divided into those, which are given, for the sake of obtaining the very thing in dispute; into those, which are given, for the penalty only; and lastly into mixed actions, which are given for the recovery both of the thing and the penalty.
De actionibus rei persecutorii.

§ XVII. Rei persequendae causa comparatae sunt omnes in rem actiones; earum vero actionum, quae in perfonam sunt, ex quidem, quae ex contrauctu nascentur, sese omnes rei persequendae causa comparatae videntur; veluti quibus mutuum pecuniam, vel in stipulatum deduc tantum, petit actior; item commodati, depositi, mandati, pro socio, ex empto, vendito, locato, conduto. Plane, si depositi agatur eo nomine, quod tumultus, incendii, ruinæ, naufragii causa depositum fit, in duplum actionem prætor reddit, si modo cum ipso, apud quem depositum fit, aut cum hærede ejus, de dolo ipsius agitur; quo calú mißa est actio.

§ 17. All real actions are given for the recovery of the thing in litigation; and almost all the personal actions, which arise from a contract, are also given for the recovery of the thing itself; as the action for a mutuum, a commodatum, or on account of a stipulation; also the action on account of a deposit, a mandate, partnership, buying and selling, letting and hiring. But, when a suit is commenced for a thing deposited by reason of a riot, a fire, or any other calamity, the prætor always gives an action for a double penalty, besides the thing deposited, if the suit is brought against the depositary himself, or against his heir, for fraud; in which case the action is mixed.

De actionibus pœnae persecutorii.

§ XVIII. Ex maleficiis vero prodite actiones, aliae sunt pœnae persequendae causa comparatae sunt; aliae tarn pœnae, quam rei persequendae; et ob id mißae sunt. Pœnam tantum persequitur quis actione surti; five enim manifesti agatur, quadrupli, five non manifesti, dupli, de sola pœna agitur: nam ipsam rem propria actione persequitur quis, id est, suam esse potest, five fur ipse eam rem possideat, five alius qui libet. Eo amplius adversus furem etiam condicio est rei.

§ 18. In cases of male-seasance, some actions are given for the penalty only, and some both for the thing and the penalty; and these are therefore called mixed actions. But, in an action of theft, whether manifest or not manifest, nothing more is sued for than the penalty, which, in manifest theft as quadruple, and, in theft not manifest, double: for the owner may recover by a separate action whatever hath been stolen from him, if he alleges, that the thing stolen is his own; and he is intituled to this action, not only against the thief, but against any other person, who is in possession of his property. The thief may also be sued by a condition, or personal action, for the recovery of the thing stolen.

De mifias; hoc est, rei et pœnae persecutorii.

§ XIX. Vi autem honorum raptorum actio mifia est, quia in quadruplo rei persecutio continetur; pœna autem tripli est. Sed et legis Aquilæ actio, de damno injuria dato, mifia est; non solum et adversius infa-
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Inficantem in duplum agatur, sed interdum esti in simplum quique agat; veluti si quis hominem claudum aut luscum occiderit, qui in eo anno integer et magni preti fuerit; tanti enim damnatur, quanti est homo eo in anno plurimi fuerit, secundum jam traditam divisionem. Item misita est actio contra eos, qui relicta sacrosanctis Ecclesiis, vel alii vererabilibus locis, legati vel fidei-commissi nomine, dare diffulerint, uidque adeo ut etiam in judicium vocarentur: tunc enim et ipsam rem vel pecuniam, quae relicta est, dare compelluntur, et aliud tantum pro poena; et idem in duplum ejus fit condemnatio.

§ 19. An aetion for goods taken by force is a mixed action; because the value of whatsoever is 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 law Aquilia, on account of damage injuriously done, is also a mixed action; not only when it is given for double value against a man denying the fact, but sometimes, when the action is only for single value; as when a man hath killed a slave, who at the time of his death was lame, or wanted an eye, but had within the year, previous to his decease, been free from any defect, and of great price, for in this case the defendant is obliged to pay as much as the slave was worth at any time within the year preceding his death, according to what has already been observed. B. 4. t. 3. A mixed action may also be brought against those, who have delayed to deliver a legacy, or gift in trust, given for the benefit of a church, or any other holy place, till they have been called before a magistrate for that purpose: for then they are compelled to deliver up the thing, or to pay the money bequeathed, and also the value of as much more, by way of penalty, and thus they are condemned to pay the double of what was due.

De misitis; id est, tam in rem, quam in personam.

§ 20. Quaestam aetiones misitam causam obtinere videntur, tam in rem, quam in personam; quales est familiali eresifundae actio, qua competet cohaeredibus de dividenda hereditate; item communi dividundo, quae inter eos redditur, inter quos aliquid commune est, ut id dividatur; item finium regundorum actio, quae inter eos agitur, quia confines agros habent. In quibus tribus judiciis permittitur judicii rem aliai ex litigatoriibus ex bono et aequo adjudicare; et, si unius pars praegravari videbitur, eum invicem certa pecunia alteri condemnare.

§ 20. There are also some actions, which are of a mixed nature, by being, in effect, as well real as personal, of this sort is the action familiali eresisfundae, which may be brought by breeders for the partition of their inheritance; also is the action de communi dividendo, given for the division of any particular thing or things, which, exclusive of an inheritance, are in common: and likewise the action finium regundorum, which takes place among those, whose estates are contiguous. And, in these three actions, it is wholly in the power of the judge to give the ground, or thing in dispute, to either of the parties litigant, and then to oblige that party, if necessity so requires, to recompense his adversary, by paying him a sum certain, in amends for any inequality in the adjudication.

Familia eresisfundae.] The word eresisfere is or inclosure. Cit. de orat. l. 1. Hein. Synagog.

made from the old verb eresisfere, or eresifere, to divide; which is derived from siles, an hedge, which answer all the purposes of the three actions mentioned.
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mentioned in the text, viz. the writs de partitione facienda — de rationalibus divisi — de perambulatione facienda — de curia claudenda — de reparatione facienda.

For a particular account of these writs, the reader is referred to Fitzherbert's natura brevium in 4to. p. 142. 300. 309. 297. 295.

Divisio tertia.

§ XXI. Omnes autem actiones vel in simplicem conceptae sunt, vel in duplum, vel in triplum, vel in quadruplum: uteriusque autem nulla action extenditur.

§ 21. All actions are for the single, double, triple, or quadruple value of the thing in litigation; for no action extends farther.

Uterius autem. On some actions, nothing more is given by the law of England, than the bare damages sustained; as in actions of trespass; but double and triple damages are given in many cases; and even ten-fold damages are recoverable against a juror, who receives a bribe for bringing a verdict. 38 Edw. 3. cap. 12. Coex. b. 1.

De actionibus in simplicem.

§ XXII. In simplicem agitur, veluti ex stipulatone, ex mutui datione, ex empto, vendito, locato, conduto, mandato, et denique ex aliis quam plurimis causis.

§ 22. The single value is sued for, when an action is given upon a stipulation, a loan, a mandate, the contrasts of buying and selling, letting and hiring; and also upon other very numerous accounts.

In duplum.

§ XXIII. In duplum agimus, veluti furti nec manifesti, damni injuriae ex lege Aquilia, depositi ex quibusdam causis: item servi corrupti, quae competit in eum, cujus hortatuv consiliove servus alienus fugerit, aut contumax adversus dominum factus est, aut luxuriose vivere ceperit, aut denique quolibet modo deterior factus sit; in quae actione earum etiam rerum, quas fugiendo servus abstulerit, aestimatione deducitur: item ex legato, quod venerabilibus locis reliquum est, secundum ea, quae supra diximus.

§ 23. The double value is sued for, in an action of theft not manifest, of injury, by virtue of the law Aquilia, and sometimes in an action of deposit. The double value is likewise sued for, in an action brought, on account of a slave corrupted, against him, by whose advice such a slave was fled from his master, grown disobedient, luxurious, or become in any manner the worse; and, in this action, an estimation is to be made of whatsoever things the slave was stolen from his master, before his flight. An action for the detention of a legacy, left to an holy place, is also given for double the value, as we have before remarked.

In triplum.

§ XXIV. Tripli vero agimus, cum quidam majorem vera aestimatione quantitatem in libello conventionis inferunt, ut ex hac causa viatores, id est, executores litiun, ampliorem summam sporturalum nomine
nomine exigerent: tunc enim id, quod propter eorum causam damnum paesius fuerit reus, in triplum ab actore conseqveitur; ut in hoc triplum etiam simpulum, in quo damnum paesius est, connumeretur. Quod nostra constitutio introduxit, quae in nostro codice fulget, ex qua procul dubio certum est, ex lege condictitiam emanare.

§ 24. A suit may be brought for triple value, when any person inflicts a greater sum, than is due to him, in the place of convention, to the intent, that the officers of any court may exact a larger fee, or sfortule, from the defendant; in which case the defendant may obtain the triple value of the extraordinary fee from the plaintiff, including the fee in the triple value. The fees of officers are regulated by our constitution, and it is not to be doubted, but that the action, called condictitio ex lege, may be given by virtue of that ordinance.

Nosra constitutio] not extant [vid. Thesb. in hunc locum.

In quadruplum.

§ 25. A suit may be commenced for quadruple or fourfold value, by an action for theft manifest, by an action for putting a man in fear, and by an action on account of money, given to bring on a litigious suit against some third person, or on account of money given to deft from it. A condition ex lege, for the quadruple value, arises also from our constitution against those officers of courts of justice, who demand any thing from the party defendant, contrary to the regulations of the said constitution.

Subdivisio actionum in duplum.

§ 26. But an action of theft not manifest, and an action on account of a slave corrupted, differ from the others, of which we have spokon, in that they always infirce a condemnation in double the value; but in an action, given by the law Aquilia for an injury done, and sometimes in an action of deposit, the double value may be exacted in case of a denial; yet whenever the party defendant makes a confession, then the single value is all, which can be recovered. But, when a demand is made by
by an action for a legacy to pious uses, due to any holy place or society, the penalty is not only doubled by the denial of the defendant, but also by any delay of payment, which may be adjudged to have given a just cause for citing the defendant before a magistrate: but, if the legacy is confessed and paid, before any citation issues at the command of the judge, the party complainant must rest satisfied with the single value.

Subdivisio actionum in quadruplum.

§ XXVII. Item actio de eo, quod metus causa factum sit, a caeteris, de quibus simul locuti sumus, eo differt, quod ejus natura tacite continetur, ut, qui judicis jujur ipsam rem auctori restitutur, absolvatur: quod in caeteris causibus non est ita, sed omnimodo quisque in quadruplum condemnatur; quod est et in furti manifesti actione.

§ 27. An action for putting a man in fear differs also from other actions in quadruplum, because it is tacitly implied in the nature of this action, that the party, who hath obeyed the command of the judge or magistrate, in restoring the things taken, may be dismissed; for, in all other actions for the fourfold value, every man must be condemned to pay the full penalty, as in the action of theft manifest.

Absolvatur.] The commentators give no satisfaction, in regard to the reason of this practice.

Divisiu quarta de actionibus bona fidei.

§ XXVIII. Actionum autem quaedam bona fidei sunt, quaedam strictiae juris. Bonae fidei sunt hae: ex empto, vendito, locato, conducto; negotiorum gestorum; mandati; depositi; pro socio; tutela; commodatia; pignoratitiae; familiae erciucundae; communi dividundo; prescriptis verbis; quae de aetimato proponitur; et ea, quae ex permutatione competit; et hæreditatis petito. Quamvis enim usque adhuc incertum erat, inter bona fidei judicia connumeranda hæreditatis petito esset, an non; nostra tamen constitutio aperte, eam effer bona fidei, dispofuit.

§ 28. The fourth division of actions is those of good faith, and those of strict right. Those of good faith are the following; viz. actions of buying and selling, leasing and hiring; of affairs transferred, of mandate, deposit, partnership, tutelage, loan, mortgage; of the partition of an inheritance, and of the division of any particular thing or things, which belong in common to different persons; also actions in prescribed words, which are either esfimatory, or derived from commutation; and lastly that action, by virtue of which we demand an inheritance; for albo it hath long been doubtful to what class this action belonged; yet it is now clearly determined: by our constitution, that the demand of an inheritance is to be numbered among the actions of good faith.

Actionum autem.] Altho' no such distinction is made by English lawyers in their writings, yet they make it in practice: — for the damages, which are received from contracts and trespasses, are always remitted to the equity of jurors, and judgment is given according to their estimation.

Cowel. b. l.

Nostra tamen constitution.] C. 3. t. 31. l. 3.
De rei uxorioræ actione in ex stipulatu actionem transfusa.

§ XXIX. Fuerat ante et rei uxorioræ actio una ex bonæ fidei judiciis: sed cum, pleniorem esse ex stipulatu actionem invenientes, omne jus, quod res uxorioria ante habebat, cum multis divisionibus in actionem ex stipulatu, quæ de dotibus exigendis proponitur, transfulerimus, merito rei uxorioræ actione sublata, ex stipulatu actio, quæ pro ea introduc̄ta est, naturam bonæ fidei judicii tantum in actione dotis meruit, ut bonæ fidei sit; sed et tacitam ei dedimus hypothecam. Præferri autem aliis creditoribus in hypothecis tunc censūmus, cum ipsa mulier de dote sua experiatur, cuius solius providentia hoc induximus.

§ 29. The action, called rei uxorioræ, which was given for the recovery of a marriage portion, was formerly numbered among the actions of good faith; but when, upon finding the action of stipulation to be more full and advantageous, we abrogated the action rei uxorioræ, and transferred all its effects, with the addition of many other powers, to the action of stipulation, which is given on account of marriage portions, we then not only thought, that this action of stipulation, as far as it related to marriage portions, deserved to be numbered with actions of good faith, but we also added to it, by implication, the full powers of an action of hypothecæ, and we have likewise judged it proper, that women, in whose sole behalf we enabled our constitution, should be preferred to all other creditors by mortgage, whenever they themselves sue for their marriage portions.

Rei uxorioræ.] Soluto matrimonio dabatur uxor aequo aequantide. Hoc induximus.] Scilicet, constitutione; Cod. pri aduersus maritum rei uxorioræ actio ad repente tendas res dotales. Theoph.
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the debt of the defendant is evident; so that actions of strict right, whether real, personal, or of whatever kind they are, may be diminished by compensation; except only an action of deposit, against which we have not judged it proper to permit any compensation to be alleged, lest the pretense of compensation should give a color and encouragement to fraud.

Sed nostra constitutio.] The constitution mentioned in this section may be found in the fourth book of the Code; t. 31. l. 14.

In the court of Chanery, where it is an established rule, that he, who would have equity, must do equity, the plaintiff, in a bill of account, has always been obliged to discount as much of his demand, as the defendant can prove to be due to him. But the common law does not allow of any foapage, or compensation; from whence there arose great inconveniences, which at length gave rise to the statutes of the 2d and 8th of George the second. By the 1st of which, it is enacted, "that where there are mutual debts between the plaintiff and defendant; or, if either party sue, or be sued, as executor or administrator, where there are mutual debts between the tesorator and intestate and either party, one debt may be set against the other; and such matter may be in evidence upon the general issue, or pleaded in bar, as the case shall require, if, at the time of pleading the general issue, notice be given of the particular sum or debt intended to be inficted upon."

"2 Geo. 2. cap. 22." And, by the second of these statutes, it is declared, "that mutual actions may be set against each other, either by being pleaded, or on the general issue, notwithstanding such debts are of a different nature, unless where either of the debts shall accrue by a penalty contained in a bond or specialty. And in all such cases the debts intended to be set off shall be pleaded in bar, in which plea shall be shewn how much is justly due on either side, and in case the plaintiff recovers, then judgment shall be entered for no more, than shall appear to be justly due, after one debt is set against another." § Geo. 2. cap. 24. § 5.

De actionibus arbitraris.

§ XXXI. Praeterea actiones quaestam arbitrariam, id est, ex arbitrio judicis pendentes, appellamus; in quibus nisi arbitrio judicis is, cum quo agitur, actores satisfaciat, veluti rem restitutat, vel exhibeat, vel solvat, vel ex noxali causa servum dedat, condemnari debet. Sed itae actiones tam in rem, quam in personam, inveniuntur: in rem; veluti Publiciana, Serviana de rebus coloni, quasi Serviana, quae etiam hypothecaria vocatur: in personam; veluti quibus de eo agitur, quod vi aut metus causa, aut dolo mals, factum est; item cum id, quod certo loco promissum est, petitur: ad exhibendum quoque actio ex arbitrio judicis pendet. In his enim actionibus, et ceteris similibus, permittitur judici ex bono et aequo, secundum cujusque rei, de qua actum est, naturam, æstimare, quemadmodum actores satisfieri oporteat.

§ 31. There are also some actions, which we call arbitrary, because they depend entirely upon the arbitration of the judge; for, in these, if the party does not obey the legal commands of the court, by exhibiting whatever is required, by restoring the thing in litigation, or by paying the value of it, or by giving up a slave in consequence of an action of male-feudance, the judge ought immediately to proceed to condemnation by his definitive sentence. Of these arbitrary actions some are real and some personal: some are real, as the action Publiciana, Serviana, and quasi-Serviana, which is likewise called hypothecary: others are personal, as those, by which a suit is commenced on account of something done by force, fear, or fraud: or on account of something, which was promised to be paid or restored in a certain place: and the action ad exhibendum, which was given to the intent, that something particular should be exhibited, is also
of the same kind: and, in all these and the like actions, the judge has full power to
determine, according to equity and the nature of the thing sued for, in what manner
and proportion the plaintiff ought to receive satisfaction.

Actiones arbitrar] The laws of Eng] take no notice of arbitrary actions, or actions
of good faith; but the Lord Chancellor, to
whole equity every one, who is without remedy
at common law, may appeal, is not bound
down or circumscribed by any rules of strict
law, but may decide a cause, properly brought
before him juxta boni viri arbitrium, i.e. ac-
cording to the judgment and conscience of a
good man. And he may incarcerate any par-
ty, who is contumacious, or refractory to his
decrees, and detain him in durance, till he sub-
mits himself to the orders of the court.

Quinta divisione, de incertae quantitatis petitione.

§ XXXI. Curare autem debeat judex, ut omnino, quantum possibile
et, certa pecunia vel rei sententiam ferat; etiam si de incerta quan-
titate apud eum actu et.

§ 32. A judge ought always to take as much care as possible to frame his sentence,
that it may be given for a thing or sum certain; also the claim, upon which the
sentence is founded, may be for an uncertain sum or quantity.

De pluris petitione.

§ XXXII. Si quis agens intentione sua plus complexus fuerit, quam
ad eum pertineat, causa cadebat, id est, rem amitiebat; nec facile in
integrum restitutur a pretore, nisi minor erat xxv annis; huic enim,
ficit in aliis causis, causa cognita, succurrebat, si lapsus juventute
fuerat; ita et in hac causa succurreri solutum erat. Sane, si tam magna
causa justi erroris interveniebat, ut etiam constantissimus quisque habi
posset, etiam majori xxv annis succurrebat; veluti si quis totum lega-
tum petierit, post deinde prolatis fuerint codicilli, quibus aut pars legati
adempta sit, aut quibusdam alis legata data sint; quae efficiebant, ut
plus petiisse videretur petitor, quam dodrantem; atque ideo lege Fal-
cidia legata minuebantur. Plus autem quatuor modis petitur; re,
tempore, loco, et causa. Re, veluti si quis pro decem aereis, quae ei
debantur, viginti petierit; aut si is, cujus ex parte res est, toto
eam, vel majorem partem, sium esse intenderit. Tempore, veluti
si quis ante diem vel ante conditionem petierit: qua enim ratione qui
tardius solvit, quam solvere deberet, minus solvere intelligitur, eadem
ratione, qui praemature petit, plus petere videtur. Loco plus petitur,
veluti cum quis id, quod certo loco fiii dari stipulatus est, aliis locis
petit sine commemoratione illius loci, in quo fiii dari stipulatus est;
verbi gratia, si is, qui ita stipulatus fuerit, Ephei dare spones? Romae
pure intendat, fiii dari oportere. Ideo autem plus petere intelligitur,
quia utilitatem, quam haberet promissor, si Epheii solveret, adimit ei
pura intentione: propter quam causam alio loco petenti arbitatoria actio
proponitur; in qua siciliet ratio habetur utilitatis, quae promissorii com-
petitura fuisset, si illo loco solveret, quo fu soluturum fpondita. Quae
utilitas
utilitas plerumque in mercibus maxima inventur; veluti vino, oleo, frumento, quæ per singulas regiones diversa habent pretia. Sed et pecunia numerata non in omnibus regionibus sub iisdem usuris foene-rantur. Si quis tamen Ephebi petat, id est, eo loco petat, in quo, ut fibi detur, stipulatus est, pura actione recte agit: idque etiam praetor demonstrat; scilicet, quia utilitas solvendi salva est promissori. Huic autem, qui loco plus petere intelligitur, proximus est, qui causa plus petit: ut ecce, si quis ita a te stipuletur, hominem Stichum, aut decem aureos, dare pondes? deinde alterum petat, veluti hominem tantum, aut decem aureos tantum. Ideo autem plus petere intelligitur, 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 conditionem meliorem facit, adversarii vero sui dete-riorem. Qua de causa talis in ea re prodita est actio, ut quis intendat hominem Stichum aut aureos decem sibi dari oportere, id est, ut eodem modo peteret, quo stipulatus est. Praeterea, si quis generaliter hominem stipulatus sit, et specialiter Stichum petat; aut generaliter vinum stipulatus sit, et specialiter campanum petat; aut generaliter purpuram stipulatus sit, deinde specialiter Tyriam petat; plus petere intelligitur, quia electionem adversario tollit, cui stipulationis jure liberum fuit alius solvere, quam quod peteretur. Quinetiam licet vilissimum sit, quod quis petat; nihilominus plus petere intelligitur; quia sepe accidit, ut promissori facilius sit illud solvere, quod majoris pretii est. Sed haec quidem antea in usu fuerant; postea vero lex Zenoniana, et nostra, rem coarctavit. Et, si quidem tempore plus fuerit petendum, quid statui oporteat, Zenonis divae memoriae loquitur constitutio. Sin autem quantitate, vel alio modo, plus fuerit petendum, in omne, si quod forte damnun ex hac causa accideret ei, contra quem plus petendum fuerit, comissa tripli condemnatione, ficit supra diximus, puniatur.

§ 33. Formerly, if a plaintiff claimed more in his libel, than was due or belonged to him, he failed in his cause; that is, he even lost that, which really did belong to him; nor was it easy for him to be restored to it by the praetor, unless he was under the age of 25 years: for in this, as well as in other cases, it was usual to aid minors, if it appeared upon examination, that the error was owing to their youth; and whenever an error was such, that one of the most knowing of men might have been led into it, then even persons of full age might have been aided by the magistrate: as for example, if a legatee had demanded his whole legacy, and codicils were afterwards produced, by which a part of it was revoked, or new legacies bequeathed to other persons, so that the plaintiff appeared to have demanded more than three fourths of his legacy; because it was subject to a diminution by the law falcida; yet, in such a case, the legatee would be relieved, notwithstanding the excess of his demand. It is here necessary to be observed, that a man may demand more than what is due to him in four several respects, viz. in respect to the thing itself, to time, to place, and to
In respect to the thing itself; as when the plaintiff, instead of ten aurei, which are due to him, demands twenty; or if, when he is, in reality, the owner but of part of some particular thing, he claims the whole as his own, or a greater share of it than he is intitled to. In respect to time, as when the plaintiff makes his demand before the day of payment, or before the time of the performance of a condition; or, as be, who does not pay so soon as he ought, is always understood to pay less than he ought, so, by a parity of reasoning, whoever commences a suit prematurely, demands more than his due. In respect to place; as when any person requires, that what was stipulated to be given, or delivered to him at a certain place, should be given or delivered to him at some other place, without taking any notice in his libel of the place specified in the stipulation; as if Titius, for example, should stipulate in these words: do you promise to give such a particular thing at Ephesus? and should afterwards declare simply in his libel, that the same thing ought to be given to him at Rome: for Titius would thus be understood to demand more than his due, by endeavoring to deprive his debtor of the advantage, which he might have had in paying his creditor at Ephesus. And, it is upon this account, that an arbitrary action is given to him, who would demand payment in another place than that, which was agreed upon; for, in that action, the advantage, which might have accrued to the debtor, by paying his debt in the place stipulated, is always taken into consideration at the discretion of the judge. This advantage is generally found the greatest in merchandise; as in wine, oil, corn, &c., which, in different places, bear different prices; and, indeed, money itself is not lent every where at the same interest. But, if a man would sue the performance of a stipulation at Ephesus, or at any other place, where it is agreed, that the stipulation should be performed, he may legally commence his suit by a pure action, that is without mentioning the place; and this the praetor allows of, inasmuch as the debtor does not lose any advantage. Next to him, who demands more than his due, in regard to place, is he, who demands more than his due, in regard to the cause; as for instance, if Titius stipulates thus with Sempronius;—do you promise to give either your slave Stichus or ten aurei? and then demands from Sempronius, either the slave specially, or the money specially: for in this case Titius would be adjudged to have demanded more than his due, the right of election being in Sempronius, by whom the promise was made; and therefore, when Titius sues either for the money specially, or for the slave, he deprives the adverse party of the power of election, and better his own condition, by making that of his adversary the worse: and it is upon this account, that an action has been given, by which the party agent may make his demand conformable to the stipulation, and claim either the slave, or the money. And farther, if a man should stipulate generally, that wine, purple, or a slave, should be given him, and should afterwards sue for the wine of Campania, the purple of Tyre, or the slave Stichus in particular, he would then be adjudged to have demanded more than his due; for the power of election would thus be taken from the adverse party, who was not bound by the stipulation to pay the thing demanded; and alfo, in any of these cases, the thing sued for should be of little or no value, yet the demandant would be thought to claim more than his due; because it is often easier for the debtor to pay the thing stipulated, alfo it may be of greater value than the thing demanded. Such was the law according to the ancient practice, in regard to an over-demand, viz: that the demandant should lose even that, which was really due to him. But this law has been greatly restrained by the constitution of Zeno the emperor, and by our own; for, if more than is due is demanded in regard to time, the judge must be directed in his proceeding by the constitution of
that emperor of glorious memory; but, if more is demanded, in respect to quantity, or on any other account, then the loss suffered by him, upon whom the demand is made, must be recompensed, as we have before declared, by the condemnation of the party agent in triple damages.

Lege Falcidia.] See Book the second, title of Zeno and Justinian, referred to in the text, are not extant.

Lex Zenoniana et nostrar.] The constitutions

De minoris summae petitione.

§ XXXIV. Si minus intentione sua complexus fueritactor, quam ad eum pertineat; veluti si, cum ei decem aurei deberentur, quinque sibi dari oportere intenderit; aut si, cum totus fundus ejus esset, parterem dimidiam suam esse petierit; sine periculo agit: in reliquum enim nihilominus judge adverbarium eodem judicio ei condemnat, ex constitutione divae memoriae Zenois.

§ 34. If a plaintiff sues for less, than what he has a claim to, demanding, for instance, only 5 aurei, when ten are due; or the moiety of an estate, when the whole belongs to him; he acts safely by this method; for the judge, in consequence of Zeno's constitution, may nevertheless condemn the adverse party, under the same process, to the payment or delivery of all, which appears of right to belong to the plaintiff.

Si aliud pro alio petatur.

§ XXXV. Si quis aliud pro alio intenderit, nihil eum periclitari placet, sed in eodem judicio, cognita veritate, errorem suum corrigere ei permititur; veluti si is, qui hominem stichum petere dereret, Erotem petierit; aut si quis ex testamento dari sibi oportere intenderit, quod ex stipulatu debetur.

§ 35. When a plaintiff demands one thing instead of another, he risks nothing by the mistake, which he is allowed to correct under one and the same process: as if a litigant should demand the slave Erotes, instead of the slave Stichus, or should claim, as due by testament, what is found to be due upon a stipulation.

Divisio sexta. De peculo.

§ XXXVI. Sunt praetera quaedam actiones, quibus non semper solidum, quod nobis debetur, persequimur, sed modo solidum persequimur, modo minus; ut ecce, si in peculio filii servive agamus: nam, si non minus in peculio sit, quam persequimur, in solidum dominus per terve condemnatur; si vero minus inveniatur, ratuens condemnat judex, quatenus in peculio sit. Quemadmodum autem peculium intelligi debat, suo ordine proponemus.

§ 36. There are also some actions, by which we do not always sue for the whole, which is due to us; but for the whole, or less, than the whole, as it proves to be most expedient; thus, when a suit is brought against the peculium of a son or a slave, if the peculium is sufficient to answer the demand, the father or master must be condemned to pay the whole debt; but, if the peculium is not sufficient, the judge can
De repetitione dotis.

§ XXXVII. Item, si de dote in judicio mulier agat, placet, eatenus maritum condemnari debere, quatenus facere posset; id est, quatenus facultates ejus patiuntur. Itaque, si dotis quantitati concurrant facultates ejus, in solidum damnatur; sin minus, in tantum, quantum facere potest. Propter retentionem quoque dotis repetitio minuitur; nam ob impfenfas, in res dotales factas, marito quasi retentio concessa est, quia ipso jure necessarifer sumptibus dos minuitur; sic ut ex latoribus digestorum libris cognosceri licet.

§ 37. Also, if a woman commences a suit for the restitution of her marriage portion, the man must be condemned to pay as far as he is able; i.e. as far as his income or faculties will permit: and therefore, if the portion demanded and the faculties of the man are equal, he must be adjudged to satisfy the whole demand; but, if his faculties are less than the claim, he must nevertheless be condemned to pay as much as he is able. But the claim of a woman may in this case be lessened by a retention; for the husband is permitted to retain an equivalent for whatever he hath necessarily expended upon the estate given him, as a marriage portion; but this will fully appear by a perusal of the digest, to which the reader is referred.

De actione adversus parentem, patronum, socium, et donatorem.

§ XXXVIII. Sed et, si quis cum parente suo patronove agat, item si socius cum socio judicio societatis agat, non plus actores consequrur, quam adversarius ejus facere potest. Idem est, si quis ex donacione sua con sequatur.

§ 38. And, if any person commences a suit against his parent or patron, or if one partener sues another, the plaintiff can by no means obtain sentence for a greater sum, than his adversary is able to pay; and the same is to be observed, when a donor is sued on account of his donation.

De compensationibus.

§ XXXIX. Compensationes quoque opposita plerumque efficiunt, ut minus quique conquitatur, quam ei debeatur. Nam ex bono et aequo habita ratione ejus, quod invicem actorem ex cadem causa praestare opor tet, potest judex in reliquum eum, cum quo actum est, condemnare; sic cut jam dictum est.

§ 39. When a compensation is alleged by the defendant, it generally happens, that the plaintiff recovers less than his demand; for it is in the power of the judge, as we have before declared, to make an equitable deduction from the demand of the plaintiff of whatever he owes to the defendant, and to condemn the defendant to the payment only of the remainder, as it hath already been observed.
§ XL. Cum eo quoque, qui creditoribus suis bonis cessit, si postea aliquid acquieserit, quod idoneum emolumentum habeat, ex integro in id, quod facere potest, creditores experiantur. Inhumanum enim erat, solum tiam fortunis suis in solidum damnari.

§ 40. Creditores also, to whom a debtor hath made a cession of his goods, may afterwards, if he hath gained any considerable acquisition, bring a fresh suit against him, for as much as he is able to pay, but not more; for it would be inhuman to condemn a man in solidum, who hath already been deprived of his whole fortune.

Si postea aliquid acquirerit.] The statute law of England, in regard to bankrupts and insolvent debtors, who have been discharged, is much of the same tenor with the Roman law: for it is enacted, by the 5th of Geo. 2d, “That in case any commission of bankruptcy shall issue against any person, who, after June 1732, shall have been discharged by virtue of this act, or shall have compounded with his creditors, or delivered to them his effects, and been released by them, or been discharged by any act for the relief of insolvent debtors, then the body only of such person conforming shall be free from suit; but his future estate shall be liable to his creditors (the tools of trade, necessary household goods, and necessity wearing apparel of such bankrupt and his wife and children excepted) unless the estate of such person shall produce clear fifteen shillings in the pound. 5 Geo. 2. cap. 3. § 9.

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TITULUS SEPTIMUS.

Quod cum eo, qui in aliena potestate est, negotium gestum esse dicitur.


Scopus et nexus.

Quia tamen superius mentionem habuimus de actione, qua in peculum filiorum servorumque agitur, opus est, ut de hac actione et de ceteris, quae eorundem nomine in parentes dominose dari solent, diligentius admonéamus. Et quia, sive cum servis negotium gestum sit, sive cum iis, qui in potestate parentum sunt, eadem fere jura servantur, ne verbo sa fiat disputatio, dirigamus sermonem in personam servi dominique, idem intellectului de libinis quoque et parentibus, quorum in potestate sunt; nam, si quid in proprio servetur, separatim ostendamus.

We have already made mention of the action, by which a suit may be brought against the peculum, or separate estate of a son or a slave; but it is now necessary to speak of it more fully, and also of some other actions, which are given on account of children.
Lib. IV. Tit. VII.

Children and slaves against their parents and masters. But, inasmuch as the law is almost the same, whether an affair is transferred with a slave, or with him, who is under the power of his parent, we will therefore, to avoid being prolix, treat only of

slaves and their masters, leaving what we say of them to be understood also of parents
and children under power; for, whenever there is any thing peculiar to be observed, in
regard to children and parents, we intend to point it out separately.

De actione quod justi.

§ I. Si igitur justi domini cum servum negotium gestum erit, in solidum
pretor adversus dominum actionem pollicetur; sic licet quia is, qui ita
contrahit, fidem domini sequi videtur.

§ 1. If any business is negotiated by a slave, who acts by the command of his master,
the pretor will give an action against the master for the whole value of the transaction;
for whoever makes a contract with a slave, is presumed to have done it upon a
confidence in the master.

Si igitur justi domini. In general by the law
of England, if a servant borrows money in his
master’s name, the master shall not be charged
with it, unless it comes to his use, and that by
his assent. And the law is the same, if a ser-
fant makes a contract in his master’s name; for
the contract shall not bind his master, unless it
were by his master’s command, or came to his
master’s use by his assent. Doctor and Student,
dial. 2. cap. 42. But in some cases the law
will presume the consent of the master, although
it is not particularly expressed, as in those con-
tracts, which are made by servants, whom
merchants place in their shops or warehouses, as
their factors. Coudet’s Inst. lib. iv. t. 7.

De exercitioria et institoria actione.

§ II. Eadem ratione pretor duas alias in solidum actiones pollicetur;
quorum altera exercitoria, altera institoria, appellatur. Exercitoria tunc
habet locum, cum quis servum suum magistrum navi praeposuerit, et quid
cum eo, ejus rei gratia, cui praepositus erit, contractum fuerit. Ideo aut-
tem exercitoria vocatur, quia exercitor is appellatur, ad quem quotidians
navigat qui pertinet. Institoria tunc locum habet, cum quis tabernae
forte, aut cullibet negotiationi, servum suum praeposuerit, et quid cum eo,
ejus rei causa, cui praepositus erit, contractum fuerit. Ideo autem institori-
oria appellatur, quia, qui negotiationibus praeponuntur, institores vocantur.
Itas tamen duas actiones pretor reddit, et si liberum quis hominem, aut
alienum servum, navi aut tabernae aut cullibet negotiationi praeposuerit;
scilicet, quia eadem æquitatis ratio etiam eo casu interveniat.

§ 2. The pretor also gives two other actions in solidum upon the same motive;
the one of which is called exercitoria, the other institoria. The action exercitoria
takes place, when a master hath constituted his slave to be the commander of a vessel,
and some contract hath been entered into with such slave merely upon that account;
and this action is named exercitoria, because he, to whom the profits of a ship or
vessel appertain, is called exercitor. The action institoria is made use of, when a
master hath given his slave the management of a ship, or committed any particular
affair to his direction, by which some one hath been induced to enter into a contrac-

X x 2

with
with such slave; and this action is called infritoria, because all persons, to whom a negotiation is committed, are denominated infritores. The praetor hath likewise been induced, by the same equity, to give these two actions against any man, who employs a free person, or the slave of another, in the management of a ship, a warehouse, or any particular affair.

De tributoria.

§ III. Introductit et aliam actionem praetor, quae tributoria vocatur; namque, si servus in peculiari merce, sciente domino, negotiatur, et quid cum eo ejus rei causa contractum erit, ita praetor jus dicit, ut, quicquid in his mercibus erit, quodque inde receptum erit, id inter dominum, si quid ei debeatibus, et ceteros credores, pro rata portione distribuatur: et ideo tributoria vocatur, quia ipsa domino distributionem praetor permitit. Nam, si quis ex creditoribus queratur, quasi minus ei tributum sit, quam oportuerit, hanc ei actionem accommodat, quam tributoria appellatur.

§ 3. The praetor hath also introduced another action called tributoria, or tributory; for, if a slave, without the command, but with the knowledge of his master, traffics with the product of his peculium, and persons are thus induced to contra traffic with him, the praetor ordains, that the merchandize, or money, arising from his traffic, shall be distributed between the master, (if he has any just claim,) and the rest of the creditors in a ratable proportion; and the master himself is always permitted to make the distribution: but, if any creditor complains, that too small a share hath been apportioned to him, the praetor will allow him to sue the before-named action, which is called tributoria, on account of the distribution.

De peculio, et de in rem verso.

§ IV. Praeterea introducunt et action de peculio, deque eo, quod in rem domini versum erit; ut quamvis sine voluntate domini negotium gestum erit, tamen, sive quid in rem ejus versum fuerit, id totum praefare debet; sive quid non sit in rem ejus versum, id eatenus praefare debet, quotenus peculium patitur. In rem autem domini verium intelligitur, quicquid necessario in rem ejus impenderit servus, veluti si mutatus pecuniam creditoribus ejus solverit, aut aedificia ruentia fullicerit, aut familiae frumentum eremit, vel etiam fundum, aut quamlibet aliam rem necessariam mercatus erit. Itaque, si ex decem puta aureis, quos servus tuus a Titio mutuo acceptit, creditor tuo quinque aurros solverit, reliquis vero quinque quolibet modo consumpsisset, pro quinque quidem in solidum damnari debes; pro ceteris vero quinque eatenus, quotenus in peculio sit. Ex quo fcilicet appareat, si toti decem aurei in rem tuam veri fuerint, totos decem aureos Titium consequi possit: licet enim una sit action, qua de peculio, deque eo, quod in rem domini versum sit, agitur; tamen duas habet condemnationes. Itaque judex, apud quem de ea actione agitur, ante dispicere folet, an in rem domini versum
§ 4. The action concerning a peculium, and things converted to the profit of the master of a slave, hath likewise been introduced by the prætor; for albo a contract hath been entered into by a slave, without the consent of his master, yet, where the money arising from it is converted to the benefit of such master, the master ought to be answerable for the performance of it; and, even albo the master should receive no emolument from the transaction, yet it is right, that he should be answerable for as much as the peculium of his slave is found to be worth. But, to be more explicit, we understand, that, whenever money, or any other thing, is necessarily used or expended by a slave upon his master's affairs, it is a conversion of it to his benefit; as for example, if a slave, who hath borrowed money, should pay the debts of his master, repair his buildings, purchase an estate, provision, or any other thing, which is useful; and therefore, if out of ten aurei, borrowed by a slave, he should pay only five to his master's creditors, and squander the rest, the master would nevertheless be condemned to the payment in solidum of the five aurei, which had been expended for his use; but, as to the other five, he could be obliged to pay only so much as the peculium would answer; and from hence it will appear, that, if all the ten aurei, which were borrowed, had been converted by the slave to his master's emolument, the lender might have recovered the whole ten from the master; for albo it is one and the same action, by which a suit is commenced against a peculium, and for the recovery of what a slave hath converted to his master's use, yet this action carries with it two different condemnations; and it is for this reason, that the judge does not begin to make an estimate of the value of the peculium, till he has previously examined, whether the whole, or any part of the money, arising from the slave's contract, hath been expended for the service of the master: but, when the judge proceeds to the valuation of the peculium, a deduction is made of whatever the slave owes to his master, or to any other under the power of his master, and the remainder only is under the strict rule of the peculium, and chargeable with debts due to strangers. But it sometimes happens, that what one slave owes to another, under the power of the same master, is not deducted; as when the slave, who is the creditor, composes a part of his debtor's peculium; for, if a slave is indebted to his vicarial slave, this debt cannot be deducted from the peculium.

Aliquando tamen.] When an action de peculio is brought for the full value of a peculium, which is worth, for example, an hundred aurei, and the slave, to whom the peculium belongs, owes 50 aurei to the son of his master, or to some other slave under the power of the same master, the judge must then deduct those fifty aurei; so that the plaintiff can only receive the remaining fifty. But, when a suit is commenced for 100 aurei against a peculium, which is worth but 100 aurei, and the slave, to whom this peculium, or separate estate, belongs, is indebted in 50 aurei to another slave, who is under the same master, but yet makes a part or parcel of the peculium, by being appendent to it, in this case the judge is not authorized to order the 50 aurei, due to this vicarial or subordinate slave, to be deducted, but must cause the payment of the 100 aurei, i.e. of the whole value of the peculium, to be made to
De concursu dictarum actionum.

§ V Cæterum dubium non est, quin is quoque, qui jus duii domini contraxerit, cuique initioria vel exercitioria aetio competet, de peculio, deque eo, quod in rem domini verfum est, agere possit. Sed erit multissimus, si, omissee actione, qua facillime solidum ex contractu consequi possit, se ad difficultatem perducat probandi, in rem domini verfum esse, vel habere servum peculium, et tantum habere, ut solidum si lobi solvi possit. Is quoque, cui tributioria aetio competet, aequo de peculio, et de in rem verfo, agere potest; sed sane huic modo tributioria expedit agere, modo de peculio, et de in rem verfo. Tributoria ideo expedit agere, quia in ea domini condition præcipua non est; id est, quod domino debetur, non deductur, sed eumdem juris est dominus, cujus et cæteri creditores: at, in actione de peculio, ante deductur, quod domino debetur; et in id, quod reliquum est, creditorum dominus condemnat. Rursus de peculio ideo expedit agere, quod in hac actione totius peculii ratio habetur; at in tributoria eis tantum, quo negotiatur: et potest quisque tertia forte parte peculii, aut quarta, vel etiam minima, negotiari; majorem autem partem in prædii aut fœnibri pecunia habere. Prout ergo expedit, ita quisque vel hanc actionem, vel illam, eligere debet. Certe, qui potest probare, in rem domini verfum esse, de in rem verfo agere debet.

§ 5. It is nevethless not to be doubted, but that he, who hath made a contract with a slave at the command of the master of that slave, and is intituled either to the action initioria or exercitioria, is also intituled to the action de peculio and de in rem verfo: but it would be highly imprudent in any party to reliquinque an action, by whibib he could most safely recover his wohole demand, and, by recurring to another, reduce himself to the difficulty of proving, that the money be lent to the slave was turned to the use of the master, or that the slave is possesed of a peculium sufficient to answer the wohole debt. He also, to whom the action tributoria is given, is equally intituled to the action de peculio, and de in rem verfo, but it is expedient, in some cases, to use the one, and in some cases the other: yet it is frequently most expedient to use the action tributoria: because, in this, the condition of the master is not principally regarded; i.e. there is no previous deduction made of what is due to him, his title being esteemed in the same light with that of other creditors: but, in the action de peculio, the debt due to the master is first deducted, and be is condemned only to distribute the remainder among the creditors. Again, in some cases, it may be more convenient to commence a suit by the action de peculio, because it affects the wohole peculium, whereas the action tributoria regards only so much of it as hath been made use of in traffic, and it is possible, that a slave may have trafficked only with a third, a fourth, or some very small part, and that the rest consists of lands, slaves, or money, lent at interest. Upon the whole therefore it greatly behoves every man to chuse that remedy, which may be most beneficial to him; but, if the creditor of a slave can
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prove a conversion to the use of the master of that slave, he ought most certainly to commence his suit by the action de in rem verio.

De filiis-familias.

§ VI. Quæ diximus de servo et de domino, eadem intelligimus et de filio et silia, et nepote et nepete, et patre avo, cujus in potestate sunt.

§ 6. We understand what we have said, concerning a slave and his master, to take place equally in regard to children under power, and their parents.

De senatus-consulto Macedoniano.

§ VII. Illud proprie servatur in eorum persona, quod senatus-consultum Macedonianum prohibit mutua pecunias dari eis, qui in potestate parentis sunt; et ei, qui crediderit, denegatur actio tam adversus ipsum filium filiamve, nepotem neptemve, (five adhuc in potestate sint, five morte parentis, vel emancipatione sua potestatis esse cepserint,) quam adversus patrem auumve, five eos habeat adhuc in potestate, five emancipaverit. Quæ ideo senatus prosperavit, quia sese onerati aere alieno creditarum pecuniarum, quas in luxuriam coniuncebant, vitae parentum insidiabantur.

§ 7. But children are, in some respects, particularly regarded by the Macedonian decree of the senate, which prohibits money to be lent them, whilst they are under the power of their parents; for creditors are not suffered to bring any action, either against the children, even after they are emancipated, or against their parents, who emancipated them. This was a caution, which the senate thought proper to take, because young heirs, who were loaded with their debts, contracted for the support of luxury, have often been disfavored, by private methods, to take away the lives of their parents.

Senatus-consultum Macedonianum.] This decree was called Macedonian from Macedon, the name of the person, who gave rise to it; but, whether this Macedon was a young patrician under the power of his father, or an old usher, the learned commentators are in very great doubt; and they are even far from being unanimous, as to the time when this decree was first made. But it is certain, that the emperor Claudius published a law, by which, to use the words of Tacitus, he restrained the cruelty of creditors; Saeueitiam creditorum coercuit; me in mortem parentum pecuniis filius-familiarum sanavi darent. Tac. lib. 11, annalium. And this law is conjectured to have been the Macedonian Senatus-consultum; which, in order to reconcile the two historians Tacitus and Suetonius, it supposed by some to have grown obsolete in the reign of Nero, and afterwards to have been revived by Vespasian; for Suetonius writes as follows in the life of that emperor, viz. Author senatus fuit Vespasianus decrenendi, ne filiorum-famil. sanatorius exigitur crediti jus unquam esset, nec offici ne post patris quidem mortem. Those, who have time and inclination to read more upon this subject, are referred to the Syntagma of Heinrici, lib. 4, t. 7. but particularly to Petri Fabri's Semestrinum, lib. 1, cap. 25.

De actione directa in patrem vel dominum.

§ VIII. Illud in summa admonendi sumus, id, quod jusfuisse dominato contra contractum fuerit, quodque in rem euss versum erit, directo quoque poa a patre dominove condici, tanquam si principaliter cum ipso negotium gestum esset. Ei quoque, qui exercitoria vel infitoria actione tenetur,
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tenetur, directo posse condici placet, quia hujus quoque jussu contractum intelligitur.

§ 8. But, in fine, we must observe, that whatever hath been contracted for at the command of a parent or master, and converted to their use, may be recovered by a direct action against the father or master in the same manner, as if the contract had been originally made with them. And it is likewise certain, that he, who is liable to the action infitoria or exhibitoria, may also be sued by a direct action, inasmuch as the contract is presumed to have been made at his command.

TITULUS OCTAVUS.

De noxalibus actionibus.


De Servis.  Summa.

Ex maleficiis servorum, veluti si furtum fecerint, aut bona rapuerint, aut damnum dederint, aut injuriam commiserint, noxales actiones prodite sunt; quibus domino damnato permittitur aut litis aestimationem sufferre, aut ipsum hominem noxae dedere.

Noxal actions are given on account of the offenses of slaves; as when a slave commits a theft or robbery, or does any other damage or injury. And, when the master or owner of a slave is condemned upon this account, it is in his option either to pay the valuation of the damage done, or to deliver up his slave as a recompense.

Ex maleficiis servorum. The action noxalis, which lies against masters for the crimes of their servants, was always unknown in England, for even villains, before the tenures in villenage were abolished, might have been convicted for their own crimes. Co. Inst. I.4. t.8. But there is something in the law of England similar to a noxal action, in regard to animals and things inanimate, by which the death of a man is occasioned: for, if a vicious horse, or bull, or a cart drawn by horses or oxen, occasions the death of any person, the thing, or animal, which did the mischief, becomes, as it were, sacred, and is called a Deodand. [i. e. a thing given to God] because it was fold in ancient times by the king’s almoner, who distributed the money to pious uses. But, in regard to Deodand, the law makes many distinctions; e. g. if a ship or boat is laden with merchandise, and a man is killed, or drowned by the motion, yet the merchandise are no Deodand, tho’ the accident happened in fresh water; but, if any particular merchandise falls upon a man, and kills him, that merchandise shall be Deodand, but not the ship. — See Hale’s Hist. of the Pl. of the Crown. Vol. 1. p. 422. Hawk. Pl. of the Crown. lib. 1. cap. 26.

Quid sit noxa et noxia.

§ 1. Noxa autem est ipsum corpus, quod nocuit; id est, servus: noxia ipsum maleficium; veluti furtum, rapina, damnum, injuria.
§ 1. The term noxa denotes the slave, by whom the male-seasance was done; and, by the word noxia, we understand the male-seasance itself, be it of what kind it will, theft, damage, rapine, or injury.

Ratio harum actionum.

§ II. Summa autem ratione permissum est noxae deditione fungi; namque erat iniquum, nequitiam eorum ultra ipsorum corpora dominis damnosam esse.

§ 2. It is with the utmost reason allowable, that a master should deliver the slave, who is culpable, as a full compensation to the party injured; for it was unjust, that it should be in the power of slaves to cause their masters to suffer any greater damage, than the value of their own bodies would amount to.

Effectus noxae deditione.

§ III. Dominus, noxali judicio servi sui nomine conventus, servum actori noxae dedendo liberatur; nec minus in perpetuum ejus servi dominium a domino transfrertur: fin autem damnum ei, cui deditus est, servus refacienur quasita pecunia, auxilio praetoris, invito domino, numimittetur.

§ 3. If a noxal action is given against a master, he may free himself from it by delivering his slave into the possession of the plaintiff, in whom the property in such slave will become absolutely vested; but, if the slave can pay his new master in money the value of the damage, the slave may be manumitted by the assistance of the praetor, altho' his new master is ever so unwilling.

De origine harum actionum.

§ IV. Sunt autem constituta noxales actiones, aut legibus, aut edicto praetoris; legibus, veluti fundi ex lege xii tabularum, damni injuriae ex lege Aquilia; edicto praetoris, veluti injuriarum, et vi bonorum raptorum.

§ 4. Noxal actions are constituted either by the laws, or by the edict of the praetor. They are constituted on account of theft by the law of the 12 tables, and, on account of damage injuriously done, by virtue of the law Aquilia. But, on account of injuries and goods taken by force, they are constituted by the edict of the praetor.

Qui conveniuntur noxali actio.

§ V. Omnis autem noxalis actio caput sequitur; nam, si servus tuus noxam commiferit, quamdui in tua potestate sit, tecum actio est; si autem in alterius potestate pervenerit, cum illo incipit actio esse: at, si manumissius fuerit, direcdto ipse tenetur, et extinguitur noxae deditio. Ex diverso quoque directa actio noxalis esse incipit; nam, si liber homo noxiam commiferit, et is servus tuus esse coeperit, quod quibusdam

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calibus
§ 5. Every noxal action follows the person of the slave, by whom the male-feasance was committed; but, as long as he continues under the power of his master, his master only is liable to an action; and, if he becomes subject to a new master, then the new master becomes liable: but, if the slave is manumitted, he may be prosecuted by a direct action; for then the noxae deditio is extinguished; because no surrender can then be made of him, by whom the male-feasance was committed. But, on the contrary, an action, which was at first direct, may afterwards become noxal; for if a man, who is free, does any male-feasance, and afterwards becomes a slave, (and we have in our first book declared in what cases this may happen,) then the action, which was before direct, begins to be a noxal action against his master.

Si servus Domino noxiam commiserit, vel contra.

§ VI. Si servus domino noxiam commiserit, actio nulla nascitur; namque inter dominum et eum, qui in potestate ejus est, nulla obligatio nasci potest. Ideoque, si in alienam potestatem servus pervenerit, aut manumissus fuerit, neque cum ipso, neque cum eo, cujus nunc in potestate sit, agi potest: unde, si alienus servus tibi noxiam commiserit, et est poeta in potestate tua esse cepserit, interdicitur actio; quia in eum calum dedueta sit, in quo consiliere non potuit. Ideoque, licet exierit de tua potestate, agere non potes; quemadmodum si dominus in servum suum aliquid commiserit, nec, si manumissus aut alienatus fuerit servus, ullam actionem contra dominum habere potest.

§ 6. Atquo a slave commits a male-feasance against his master, yet no action is given; for no obligation can arise between a master and his slave: and therefore, if that slave passes under the power of another master, or is manumitted, no action can be brought either against him in his own person, or against his new master; from whence it follows, that, if the slave of another should commit any male-feasance, for example, against Titius, and should afterwards become the slave of the same Titius, the action is extinguished; for it is a maxim, that an action becomes extinct, whenever it is brought into a state, in which it could not have bad a commencement: and hence it is, that atquo a slave, from whom a master hath received damage, should cease to be under the power of that master, yet no action can afterwards be given against such slave, neither can a slave, whom hath been alienated or manumitted, bring any action against his late master, by whom he hath been ill treated.

De filiis familiarum.

§ VII. Sed veteres quidem hoc in filiis-familiarum masculis et feminis admisit; nova autem dominum conveniatur hujusmodi alperitatem recte respondeam esse exsilievit, et ab usu communi hoc penitus recepit. Quis enim patiatur, filium suum, et maxime filiam, in noxam alii dari? ut pene per fili corpus pater magis quam filius periclitetur; cum in filiabus etiam pudicitiae favor hoc bene excludat. Et ideo placuit, in servos tantummodo, noxales actiones esse proponendas; cum, apud
§ 7. The antients indeed admitted this law of the forfeiture of the person to take place, even in cases, in which their children were concerned, whether male or female: but the later ages have rightly thought, that such a rigorous proceeding ought, by all means, to be exploded; and it hath therefore passed wholly into disuse: for who could suffer a son, and more especially a daughter, to be delivered up as a forfeiture to a stranger? for, in the case of a son, the punishment of the father would be greater, than that of the son; and, in the case of a daughter, the rules of modesty forbid such a practice. It hath therefore prevailed, that noxal actions should only take place in regard to slaves; and, in the books of the antient commentators of the law, we find it often repeated, that the sons of a family may themselves be convened for their own misdeeds.

Titulus Nonus.

Si quadrupes pauperiem fecisse dicatur.

D. ix. T. r.

De aetione, si quadrupes ex l. xii tab.

A Nimalium nomine, quæ ratione carent, si qua lascivia, aut pavore, aut feritate, pauperiem fecerint, noxalis actio lege xii tab. prodicta est: quæ animalia, si noxæ dedantur, proficiunt reo ad liberationem; quia ita lex xii tabularum scripta est, ut puta, si equus calcitrosus calce percurrerit, aut bos, cornu petere fœlitus, cornu poterit. Hæc autem actio in iis, quæ contra naturam moventur, locum habet; cæterum, si genitalis fit feritas, cæsæt actio. Denique, si urus fugerit a domino, et sic nocuerit, non potest quondam dominus conveniri, quia defuit dominus effe, ubi fera evasit. Pauperies autem est damnun fine injuria facientis datum; nec enim potest animal injuriam fecisse dici, quod sensu caret. Hæc quidem ad noxalem pertinent actionem.

A noxal actio is given by the law of the 12 tables, whenever any damage is done by brute animals, through wantonness, fright, or furiousness; but, if they are delivered up in atonement for the damage done, the defendant must be discharged from the actio: for it is thus written in the law of the 12 tables, if an horse, apt to kick, should strike with his foot; or if an ox, accustomed to gore, should wound any man with his horns, &c. But a noxal actio takes place only in regard to those animals, which are contrary to their nature; for, when the ferocity of a beast is innate, no actio can be given; so that, if a bear breaks loose from his master, and mischief is done,
done, the person, to whom this animal belonged cannot be convinced; for be ceased to be the master as soon as the beast escaped. But it is here to be noted, that the word pauperies denotes a damage, by which no injury is intended; for an animal, which hath no reason, cannot be said to have committed an injury. This is what relates to noxal actions.

De actione ædilitia, concurrente cum actione de pauperie.

§ I. Cæterum scierunt est, ædilitio edicto prohiberi nos canem, verrem, aprum, ursum, leonem, ibi habere, qua vulgo iter fit; et, si adversus ea factum erit, et nocitum libero homini esse dicatur, quod bonum et æquum judici videtur, tanti dominus condemnetur; cæterarum vero rerum, quanti damnunm datum sit, dupli. Præter has autem ædilitias actiones, et de pauperie locum habebit; nunquam enim actiones, præsertim penales, de eadem re concurrentes, alia aliam confunxit.

§ 1. It must be observed, that the edict of the Edile prohibits any man to keep a dog, a boar, a bear, or a lion, where there is a public passage or byway: and, if this prohibition is disobeyed, and any freeman receives hurt, the master of the beast may be condemned in whatever sum seems agreeable to equity in the opinion of the judge; yet, in regard to every other damage, the condemnation must be in the double of what the damage amounts to. It is here necessary to inform the student, that not only the Edilitian action, but also an action for the damage, called pauperies, may both take place against the same person; for, albo actiones, and more especially those, which are penal, concur together on account of the same thing, they are not destructive the one of another.

De eadem re concurrentes.] The same doctrine is delivered by Ulpian, ff. 44. t. 7. l. 60. ff. 50. t. 17. l. 130. which doctrine we must understand to regard penal actions, concurring on account of the same thing, but yet arising from different acts and offences; as for instance, if a man steals a slave, and afterwards murders him, such a criminal may be doubly prosecuted, for theft and injurious damage; for as the actions of theft and injurious damage would arise in this case from different offences, the one will not bar the other: but, on the contrary, if two penal actions, concurring on account of the same thing, should arise from the same offence, the one would destroy the other; and therefore the plaintiff must make his election. vid. Caj. observ. lib. 8. c. 24. Hotom. illuif. quæst. 29.
Titulus Decimus.

De iis, per quos agere possumus.

Per quos agere liceat.

Nunc admonendi sumus, agere posse quemlibet hominem aut suo nomine aut alieno. Alieno, veluti procuratorio, tutorio, curatorio; cum olim in usu fuisset, alterius nomine agi non posse, nisi pro populo, pro libertate, pro tutela. Praeterea lege Hostilia permittum erat furti agere eorum nomine, qui apud hostes essent, aut reipublicae causa absens, quive in eorum cujus tutela essent. Sed, quia hoc non minimam incommode habebat, quod alieno nomine neque agere, neque excipere actionem, licebat, caeperunt homines per procuratores litigare. Nam et morbus et aetas et necessaria peregrinatio, itemque aliae multae causae sese hominibus impedimento sunt, quo minus rem suam ipsi exequi possint.

Any man may commence a suit, either in his own name, or in that of another; as in the name of a proctor, a tutor, or a curator: but antiently, one person could not sue in the name of another, unless in a case of liberty, tutelage, or where a society was concerned. It was afterwards permitted by the law Hostilia, that an action of theft might be brought in the names of those who were captives in the hands of the enemy, — who were absent upon the affairs of the republic, — or who were under the care of tutors. But, as it was found in later times to be highly inconvenient, that any man should be prohibited, either from suing, or defending in the name of another, it by degrees became a practice to sue by proctors; for ill health, old age, the necessity of voyaging, and many other cases, continually prevent mankind from being able to prosecute their own affairs in person.

Aut suo nomine aut alieno.] In England the liberty of constituting an attorney to prosecute suits is given chiefly by the statute law. vid. 20 H. 3. cap. 10. 1 Edw. 2. cap. 1. 15 Edw. 2. cap. 1. 7 Ric. 2. cap. 14. 7 Hen. 4. cap. 13. 29 Eliz. cap. 5. For, by the common law, the plaintiff or defendant, demandant or tenant, could not appear by attorney without the king's writ, or letters patent, but ought to follow his suit in his own proper person. Abyssion est [says the author of the Mirror] a retinere attorney sans breve de la chancellerie. Co. Litt. 128. a.

Quibus modis procurator constitutur.

§ 1. Procurator neque certis verbis, neque praefente semper adversario, imo et plerumque eo ignorantae, constitutitur: cuicunque enim permiseris rem tuam agere, aut defendere, is tuus procurator intelligitur.

§ 1. It is not necessary to use any certain form of words in appointing a proctor, nor to make the appointment in the presence of the adverse party; for it is generally done even
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even without his knowledge: and note, that whoever is employed either to sue or to defend for another, is understood to be a proctor.

Quibus modis tutores vel curatores constituuntur.

§ II. Tutores et curatores quemadmodum constituuntur, primo libro expositum est.

§ 2. We have already explained in the first book of our institutions, how tutors and curators may be appointed.


Titulus Undecimus.

De satisfactionibus.


De judicio personali.

Satisfactionum modus alius antiquitati placuit, alium novitas per usum amplexa est. Olim enim, si in rem agebat, satisfari possessor compellebatur, ut, si victus esset, nec rem ipsum restituaret, nec litis aetimationem, potestas esset petitori aut cum eo agendi, aut cum sida-jusforibus ejus; quae satisfactione appellatur judicatum solvi: unde autem sic appelletur, facile est intelligere; namque stipulabatur quis, ut solved-retur sibi, quod sufficit judicatum; multo magis is, qui in rem actione conveniebatur, satisfari cogerabatur, si alieno nomine judicium accipiebat. Ipsa autem, qui in rem agebat, si suo nomine petebat, satisfari non cogerabatur. Procurator vero, si in rem agebat, satisfari jubebatur, rem ratam dominum habiturum; periculum enim erat, ne iterum dominus de eadem re experiret. Tutores vero et curatores eodem modo, quo procuratores, satisfari debere, verba edicti faciebant. Sed aliquando, quis agentibus satisfactione remittebatur. Hae ita erant, si in rem agebatur.

In taking security, the ancients pursued a different method from that, which the moderns have made choice of; for antiently, if a real action was brought, the defendant, or party in possession, was compelled to give security, to the end, that, if he left his cause, and would neither restore the thing itself, nor pay the estimation of it, the demandant might be enabled either to sue such defendant, or the parties bound for him, and this species of caution is termed judicatum solvi: nor is it difficult to understand, why it is so called; since every demandant stipulated, that the thing adjudged to him should be paid. We have already observed, that whoever defended his own cause, was obliged to give security, it is therefore with much greater reason, that the proctor in the cause of another should be compelled to give caution. But, if a demandant in a real
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a real action bad sued is his own name, he was under no necessity of giving security; yet, if, be sued only as a proctor, he was obliged to give caution, that his acts would be ratified by his principal, rem ratam dominum habiturum; for the danger was, left the client or party principal should bring a fresh suit for the same thing; and, by the words of the edict, even tutors and curators were compellable to give caution, as well as proctors, tho' it was sometimes remitted, when tutors, or curators, were demandants; and such was the practice in regard to real actions.

De judicio personali

§ I. Si vero in personam, ab actoris quidem parte eadem obtinebant, quæ diximus in actione, qua in rem agitur; ab ejus vero parte, cum quo agitur, si quidem alieno nomine aliquid interveniret, omnimodo fatisdaret; quia nemo defensor in aliena re fine satisfactione idoneus esse creditur. Quod si proprio nomine aliquid judicium accipiebat in personam, judicatam fuisse fatidare non cogebatur.

§ 1. The same rules, which were observed in real, obtained also in personal actions, in regard to the taking security on the part of the plaintiff; and, if the defendant in a personal action proceeded in another's name, he was obliged to give caution; for no one was reputed a competent defendant in the cause of another, unless security was given: but, whenever any man was convened in a personal action to defend his own cause, he was not compelled to give caution, that the thing adjudged should be paid.

Jus novum. De reo.

§ II. Sed hodie haec aliter observantur. Sive enim quis in rem actio convenit, five personali, suo nomine, nullam satiationem pro litis adhominem dare compellitur; sed pro sua tantum personam, quod in judicio permaneat uque ad terminum litis; vel committitur suo promissione cum jurejurando, quam juratoriam cautionem vocant; vel nudam promissionem, vel satiationem, pro qualitate personæ sua, dare compellitur.

§ 2. But at present we observe a very different practice; for, if a defendant is now convened either in a real or personal action, in his own cause, he is not compellable to give security for the payment of the estimation of the suit, but only for his own person; to wit, that he will remain in judgment till the cause is determined: and this security is sometimes given by sureties, sometimes by a promise upon oath, which is called a juratory caution; and sometimes by a simple promise without an oath, according to the quality of the person of the defendant.

De procuratore actoris.

§ III. Sin autem per procuratorem lis vel infra tert vel sustipit, in actoris quidem personâ, si non mandatum actis inventum est, vel praesens dominus litis in judicio procuratoris sui personam confirmaverit, ratam rem dominum habiturum, satiationem procurator dare com-

pellitur.
pellitum: eadem observando et si tutor vel curator, vel aliae tales personae, qua alienarum rerum gubernationem receperunt, litem quibusdam per alium inferunt.

§ 3. But, if a suit is commenced or defended by a procurator, the procurator of the plaintiff, if he does not either invol a mandate of appointment in the acts of court, or cause his client to nominate him publicly, is obliged to give security, that his client will testify his proceeding. The same rule is also to be observed, if a tutor, curator, or any person, to whom the management of the affairs of others is intrusted, commences a suit by a procurator.

De procuratore rei presentis.

§ IV. Si vero aliiquis convenitur, siquidem præfens procuratorum dare paratus est, potest vel ipse in judicium venire, et si procuratoris personam per judicatum solvi satisfactionem solvi stipulatione firmare; vel extra judgment satisfactionem exponere, per quam ipse si procuratoris ideijsolur existat pro omnibus judgment solvi satisfactionis clausulis: ubi et de hypotheca suarum rerum convenire compellitur, five in judicio promiserit, five extra judgment caverit, ut tam ipse quam heredes ejus obligentur. Alia insuper cautela, vel satisfactione propter personam ipsius exponenda, quod tempore sistentiae recitandae in judicium veniet, vel, si non veniret, omnia dabit sideo; quae in condemnatione continentur, nisi fuerit provocation.

§ 4. But, when a party is convened, if he is ready to nominate a procurator, such party may appear in open court, and confirm the nomination by giving the caution judgment solvi under the usual stipulation; or he may appear out of court, and become himself the surety, that his procurator will perform all the covenants in the instrument of caution; and whether the party convened does this in court, or out of court, he is obliged to make his estate chargeable, that his heirs, as well as himself, may be liable to an action. And a farther security must likewise be given, that he will either appear in person at the time of pronouncing sentence, or that his sureties, in case of his non-appearance, shall be bound to pay whatever the sentence exacts, if no appeal is interposed.

De procuratore rei absentis.

§ V. Si vero reus praefet ex quacunque causa non fuerit, et alius velit defectionem ejus subire, nulla differentia inter actiones in rem vel personales introducenda, potest hoc facere; ita tamen ut satisfactionem judgment solvi pro litis æquatione praebet. Nemo enim secundum veterem regulam (ut jam dictum est) alienæ rei fine satisfactione defenso idoneus intelligitur.

§ 5. When a defendant does not give an appearance, then any other person, who is willing, may take upon himself the defense for him, and this may be done either in a real or personal action, without distinction, if the caution judgment solvi is entered into for the payment of the estimation of the suit; for no man, (according to the ancient rule
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rul already mentioned,) can be said to defend the cause of another legally, unless security is given.

Unde haec forma discenda.

§ VI. Quae omnia apertius et perfectius quotidiano judiciorum usu in ipsis rerum documentis apparent.

§ 6. But all such formalities may be more perfectly learned, from the usage and practice of courts.

ubi haec forma observanda.

§ VII. Quam formam non solum in hac regia urbe, sed etiam omnibus nostris provinquis, (etsi propter imperitiam forte aliter celebratur,) obtainere cenfemus; cum necessis fit, omnes provincias caput omnium nostrarum civilaturn, id est, hanc regiam urbi, ejusque observantiam, sequi.

§ 7. We have judged it expedient, that these forms shall obtain not only in Constantinople, but also in all our other provinces, in which a different practice may have bisterto prevailed thro' the want of knowledge; for it is necessary, that all the provinces should be guided by the example of the capitol of our dominions, and follow the practice of our royal city.

Titulus Duodecimus.

De perpetuis et temporalibus actionibus, et quae ad hæredes et in hæredes transirent.

C. iv. T. xi.

De perpetuis et temporalibus actionibus.

Hoc loco admonendi sumus, eas quidem actiones, quæ ex lege, fenatwve consulto, sive ex facris constitutionibus, proficiscuntur, perpetuo solvere antiquitus competere, donec facrae constitutiones tam in rem, quam in personam, actionibus certos fines dederunt: eas vero, quæ ex propria prætoris jurisdictione pendent, plerumque intra annum vivere; nam et ipsius prætoris intra annum erat imperium. Aliquando tamen et in perpetuum extenduntur, id est, usque ad finem constitutionibus introducunt; quales sunt eæ, quas bonorum postrorí,
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cæterisque, qui hæredis loco sunt, accommodat. Furti quoque manifesti
actio, quamvis ex ipsius prætoris jurisdicctione proficiscatur, tamen perpe-
tuo datur; absursum enim esse extimavit, anno eam terminari.

All those actions, which took their rise from the law, the decrees of the senate, or
the constitutions, were antiently reputed perpetual; but the later emperors have by
their ordinances fixed certain limits both to real and personal actions. Actions, given
by virtue of the prætor's authority, are generally limited to the space of one year;
for such is the duration of his office: but sometimes the prætorian actions are made
perpetual; that is, they are extended to the limits introducted by the constitutions: such
are those actions, which the prætor gives to the possessors of goods, and to others,
who hold the place of heirs. The action of manifest theft is also perpetual, also it
proceeds from the mere authority of the prætor; for it was thought absurd, that this
action should determine within the space of a year.

Perpetuo solere.] It is certain, that the time
of bringing actions in England has been limited
by some of our earliest acts of parliament; and
from hence it hath become the general opinion,
that limitations were unknown to the common
law. Till the 20th of Henry the 3d's reign,
the limitation of a writ of right was from the
time of Henry the 3d, [a tempore regis Henrici
senioris] but, by the statute de morton, editum anno
20. Hen. 3. it is enacted, that the limitation of a
writ of right shall commence from the time of
Henry the 2d, who began his reign in 1154,
whence Henry the 1st began his reign in August
1109; so that this statute made the limitation
shorter by 54 years. Assizes of mort-sauceller
were also by the same statute reduced to com-
come from the last return of King John out of
Ireland, which was in the 12th year of his
regn, and, in regard to assizes of novel dif-
ficiln, it is likewise enacted, ut non excedant pri-
ma transfectionem domini regis, qui nunc est,
[Viz. H. 5.] in Paolo anno. The limitation of a
writ of right was afterwards reduced to a narrower
compass by the statute of Westminster, 3 Edw. 1;
which limits it to commence only from the time
of Richard the 1st; i.e. from the 1st day of his
reign. But these limitations from fixed periods
became in process of time too large and ex-
tended; so that, as lord Coke observes, many
suits, troubles, and inconveniences arose; and
therefore the makers of the statute of 32 H. 8,
took another and more direct course, which
might induce for ever; and that was, to im-
pose diligence and vigilance in him, who was
to bring his action; so that, by one constant
law, certain limitations might serve, both for
the time present and all future times. vid. Co.
Litt. 115, a. 2 Co. inf. 94, 95. The reader
is referred to the statutes of 32 H. 8. cap. 2.
and 21 Jac. 1. cap. 16. in which acts the time of
bringing almost every species of action is ac-
tained within permanent and salutary limits.

Constitutionibus introductis.] vid. Cod. 7.
1. 39, ll. 4, 5. Cod. 7. 1. 40. 12. 5. 1. 5.

De actionibus, quæ in hæredes transeunt vel non.

§ 1. Non autem omnes actiones, quæ in aliquem aut ipso jure com-
petunt, aut a prætore dantur, et in hæredem aequa competunt, aut
dari solent. Est enim certissima juris regula, ex maleficis poenales
actiones in hæredem rei non competere; veluti furti, vi bonorum
raptorum, injuriarum, damni injuria: sed hæredibus hujusmodi
actiones competunt, nec denegantur; excepta injuriarum actione, et
fi quota alia simillis inventatur. Aliquando tamen etiam ex contraetu
actio contra hæredem non competit; veluti cum têttator dolos verfa-
tus fit, et ad hæredem ejus nihil ex eo dolo pervenit: poenales autem
actiones, quas supra diximus, fi ab ipso principalibus perfons fuerint
contestatae, et hæredibus dantur et coëstra hæredes transeunt.

§ 1. But
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§ 1. But all actions in general, which either the law, or the praetor, gives against any man, will not also be given against his heirs; for it is a most certain rule of law, that penal actions, arising from a male-faience, will not lie against the heir of an offender; as for instance, actions of theft, rapine, injury, or damage injuriously done: but nevertheless these actions will pass to heirs, and are never denied, but in an action of injury, and in other cases of a similar nature; yet sometimes even an action of contract will not lie against an heir, as when a testator acts fraudulently, and nothing comes to the possession of the heir by reason of the fraud: but, if the penal actions, of which we have already spoken, are once contested by the principal parties concerned, they will afterwards pass both to, and against, the heirs of such parties.

Non autem omnes actiones.] It is a maxim in the law of England, “that personal actions die with the person; so that, if a tenant for years commits waste, and dies, an action of waste will not lie against his executors — or if the keeper of a prison permits a man in execution to escape and afterwards dies, no action will lie against his executors — or if a battery is committed upon a man, and either the aggressor, or the party aggrieved should die, the action is gone.”

Si, pendente judicio, reus actori satisfecerit.

§ II. Supereft, ut admoveamus, quod, si ante rem judicatam is, cum quo actum est, satisfaciat actori, officio judiciis convenit eum absolvvere; licet in ea causa sufflet judicii accipiendi tempore, ut damnari debet; et hoc est, quod ante vulgo dicebatur, omnia judicia absolutoria esse.

§ 2. It remains to be observed, that, if the defendant before sentence gives full satisfaction to the plaintiff, it is the duty of the judge to dismiss such defendant, also, at the time of contestation of suit, his cause was so bad, that he deserved to be condemned; and upon this account it was antiently a common saying, that all actions were dismissible.

TITULUS DECIMUS-TERTIUS.

De exceptionibus.


Continuatio. Ratio exceptionum.

Equitur, ut de exceptionibus dispiciamus. Comparatae autem sunt exceptiones defendendorum eorum gratia, cum quibus agitur; sese enim accidit, ut licet ipsa persequitur, qua actor experitur, justa fit, tamen iniqua sit adversum eum, cum quo agitur.

It follows, that we should treat of exceptions. Exceptions have been introduced into causes for the defense of the party cited; for it often happens, that a suit, which in itself is just, may yet become unjust, when commenced against a wrong person.
De exceptione, quod metus causa, de dolo, in factum.

§ I. Verbi gratia, si metu coactus, aut dolo inductus, aut errore lapsus, stipulanti Titio promissit, quod non debueras promittere, palam est, jure civili te obligatum esse, et actio, qua intenditur, dare te oportere, efficax est; sed iniquum est, te condemnari: ideoque datur tibi exception, quod metus causa, aut doli mali, aut in factum, composita ad impugnandum actionem.

§ 1. If a man, who is compelled by fear, or induced by fraud or mistake, makes a promise to Titius, for example, by stipulation; yet it is evident, that he is bound by the civil law, and that Titius may have an efficacious action; but it would be unjust, that a condemnation should follow; and therefore the party, who made such promise, is permitted to plead exceptive matter in bar to the action, by setting forth, that the promise was extorted by fear or fraud, or otherwise by alleging the peculiar circumstances of the case, whatever they are; and these are called exceptions in factum compositae; i.e. exceptions on the fact.

De non numerata pecunia.

§ II. Idem juris est, si quis quasi credendi causa pecuniam a te stipulatus fuerit, neque numeraverit. Nam, eam pecuniam a te petere posse eum, certum est; dare enim te oportet, cum ex stipulazione tenearis. Sed, quia iniquum est, eo nomine te condemnari, placet, exceptione pecuniae non numeratae te defendi debere; cuius temporae nos (secundum quod iam superieribus libris scriptum est) constitutionem nostra coarctavimus.

§ 2. The same practice prevails, if Sempronius, for example, causes Titius to stipulate to repay him money, which Titius never received from him. It is certain, that Sempronius in this case may bring an action, for Titius is bound by the stipulation; yet as it would be unjust, that he should be condemned upon that account, he is allowed to defend himself by an exception pecuniae non numeratae, i.e. on account of money not paid. But by our express constitution we have shortened the time allowed for bringing this exception, as we have already observed in the former book.

Constitutionem nostra. See Cod. 4. t. 30. l. 14. years; but Justinian restrained it to two years. The time limited for bringing the exception of money not paid was antemixit the space of five

De pacto.

§ III. Praeterea debitor, si pactus fuerit cum creditor, ne a se pecunia peteretur, nihilominus obligatus manet; quia pacto convento obligations non omnino dissolvuntur; quia de causa efficax est adversus eum actio, quam actor intendit, si paret, eum dare oportere: sed, quia iniquum est, contra actionem cum condemnari, defenditur per exceptionem pacti conventi.
§ 3. And farther, albo a debtor enters into a compatix with his creditor, that his creditor shall not sue him, yet the debtor remains bound; for obligations are not to be wholly dissolved by a mere agreement: and therefore an action in this form, si parext, curn dare oportere, would be efficacious against the debtor; but, as it would be unjust, that the debtor should be condemned to make payment, notwithstanding the agreement, he is therefore permitted to defend himself by an exception of compati.

De jurejurando.

§ IV. Aequie, si debtor creditore deferente 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, aequi necessariæ sunt exceptiones: veluti si petitore deferente possessor juraverit, eam rem suam esse, et nihil minus petitor eadem rem vindicet: licet enim verum sit, quod intendit, id est, rem ejus esse; iniquum tamen est, possessori condemnari.

§ 4. If an oath is administered to a debtor at the instance of his creditor, and such debtor swears, that nothing is due from him, yet he still remains obligated: but, as it would not be right, that the plaintiff should afterwards complain of perjury, the debtor may defend himself by alleging his own oath by way of exception. Exceptions of this sort are likewise equally necessary in real actions, as when the party in possession takes an oath at the request of the demandant, and swears, that the thing in dispute is his own, and the demandant will not beliefs endeavor to recover it: for albo the demandant's allegation is true; viz. that the thing claimed appertains to him; yet it is unjust, that the possessor should be condemned.

De re judicata.

§ V. Item, si judicio tecum actum fuerit, fide in rem, fide in personam, nihilominus obligatio durat; et ideo ipso jure de eadem re potest adversus te agi potest: sed debes per exceptionem rei judicatae adjuvari.

§ 5. If a man hath been sued either upon a real or personal action, the obligation nevertheless remains; and therefore, in strict law, he may again be sued upon the same account; but, in case of a second suit, he may be relieved, if he alleges by way of exception, that the cause beth already been adjudged.

De ceteris exceptionibus.

§ VI. Hæc exempli causa retulisse sufficiat; alioqui, quam ex multis varietque causis exceptiones necessarias sint, ex latioribus digestorum seu pandectarum libris intelligi potest.

§ 6. It may suffice to have given these instances of exceptions in general; but in how many and in what various cases they are necessary, may be more fully learned from the larger books of the digest.

Ex latioribus digestorum libris.] vid. f. 4. t. 1. cum sequ.
Divisio prima.

§ VII. Quarum quædam ex legibus, vel iis, quæ legis vicem obtinent, vel ex ipsius prætoris jurisdictione, substantiam capiunt.

§ 7. Some exceptions proceed from the laws themselves, or from those regulations, which hold the place of laws; but others take their rise from the authority of the prætor.

Divisio secunda.

§ VIII. Appellantur autem exceptiones aliae perpetuae et peremptoriae, aliae temporales et dilatoriae.

§ 8. Some exceptions are called perpetual and peremptory; others are termed temporary and dilatory.

De peremptoriiis.

§ IX. Perpetuae et peremptoriae sunt, quæ semper agentibus obstant, et semper rem, de qua agitur, perimunt; qualis est exceptio doli mali, et quod metus causæ factum est, et paci conventi, cum ita convenerit, ne omnino pecunia peteretur.

§ 9. The perpetual and peremptory are those, which always obstruct the party agent, and destroy the force of the action — of this sort is the exception of fraud, of fear, and of compæt, when it is agreed, that the money shall not be sued for.

De dilatoriis.

§ X. Temporales atque dilatoriae sunt, quæ ad tempus nocent, et temporis dilationem tribuunt; qualis est pacti conventi, cum ita convenerit, ne intra certum tempus ageretur, veluti intra quinquennium: nam, finito eo tempore, non impeditur actor rem exequi. Ergo ii, quibus intra certum tempus agere volentibus objicitur exceptione aut pacti conventi, aut alia similis, differre debent actionem, et post tempus agere; ideo enim dilatoria sunt exceptiones appellantur. Alloqui, si intra tempus egerint, objectaque sit exceptione, neque eo judicio quicquam consequebantur propter exceptionem, neque post tempus olim agere poterant, cum temere rem in judicium deducebant et confusabent; quia ratione rem amitterant. Hodie autem non ita stricte hoc procedere volumus; sed eum, qui ante tempus pactiorvis vel obligationis litem inferre auserit, Zenonianæ constitutione subjacere censémus, quam sacratissimus legislator de iis, qui tempore plus petierint, protulit: et inducas, quas ipseactor sponte indulserit, vel quas natura actionis continent, si contemptisset, in duplum habeat ii, qui tales injuriarum passi sunt; et, post eas finitas, non aliter litem sustiniant, nisi omnes expensas litis antea acciperint: ut actores, tali poena perterriti, tempora litió doceantur observare.

§ 10. Temp-
§ 10. Temporary and dilatory exceptions are those, which operate for a time, and create delay; such is the exception of an agreement not to pursue a debt within a certain time, as within five years; but at the expiration of that time the creditor may proceed; and therefore those, against whom an exception of agreement, or any other similar exception can be objected, must delay their action, and not sue, till the time agreed upon is expired; and it is for this reason, that those exceptions are termed dilatory; and formerly, if the parties agent had sued within the time, in which it was agreed not to sue, and an exception was interposed, it not only hindered such parties from obtaining in that cause, but it also disabled them from proceeding, even after the expiration of the time agreed on; for they were reputed to have lost their right, by having commenced a temerary suit. But we have been willing to mitigate this rigor, and have decreed, that whoever presumes to commence a suit before the time limited by the agreement, shall be subject to the constitution of Zeno concerning those, who demand more than their due: and, if a party agent breaks in upon the time, which he has before spontaneously allowed, or contends the limits, which the nature of some actions allow, the party defendant, who suffers such injurious treatment, becomes entitled to twice the time before allowed, and, even when that is expired, can not be obliged to give an appearance, till he has been reimbursed the whole of his expenses; and this we have ordained in toto, that all plaintiffs may be taught to observe the proper time of commencing their suits.

Subjacente cenemos.] Neither the constitution of Zeno, nor that of Justinian, is extant.

De dilatoriis ex persona.

§ XI. Præterea etiam ex persona sunt dilatoriae exceptiones, quales sunt procuratoriae; veluti si per militem, aut mulierem, agere quis velit: nam militibus nec pro patre, vel matre, vel uxore, nec ex facro re-scripto, procuratorio nomine experiri conceditur; suis vero negotiis supereffe fine ofïçna militaris disciplinae possunt. Eas vero exceptiones, quæ olim procuratorialibus propter infamiam vel dantis, vel ipsius procuratoris, opponebantur, cum in judicis frequentari nullo modo permiximus, conquieœcere fancimus; ne, dum de his altercatur, ipsius negotii disceptatio proteletur.

§ XI. Dilatory exceptions may also arise by reason of the person of the party suing; such are those, which are made against proctors; as if a suitor should employ a soldier, or a woman to act for him: for soldiers are not permitted to appear in any cause, even in behalf of a father, a mother, or a wife, although they obtain the sanction of an imperial rescript; but they are allowed to act in their own affairs, without offending against military discipline. But we have put a stop to the exceptions of infamy, which were formerly made, both against proctors and their constituents, having observed them to be little practised, and fearing, lest by means of such altercations, a dissatisfaction into the merits of causes should be retarded.

Titulus
Titulus Decimus-quartus.

De replicationibus.

De replicatione.

Interdum evenit, ut exceptio, quae prima facie justa videtur, tamen inique noceat: quod cum accidit, alia allegatione opus est, adjuvandi actoris gratia; quae replicatio vocatur, quia per eam replicatur atque resolvitur jus exceptionis; veluti cum pactus est aliquis cum debitore suo, ne ab eo pecuniam petat, deinde postea in contrarium pacti sunt, id est, ut creditori petere licet: si creditor agat, et excipiat debitor, ut ita demum condemnetur, si non convenerit, ne eam pecuniam creditor petat, necet ei exceptio; convenit enim ita: namque nihilominus hoc verum manet, licet postea in contrarium pacti sint. Sed, quia iniquum est, creditorem excludi, replicatio ei dabitur ex posteriore pacto convento.

Sometimes an exception, which appears at the first view to be valid, is nevertheless not so; and, when this happens, there is a necessity for an additional allegation in aid of the plaintiff, which is called a replication, because the force of the exception is replicated, that is, unfolded, and destroyed by it; as if a creditor should covenant with bis debtor not to sue him, and it should afterwards be agreed between them, that the creditor may sue, in consequence of which agreement the creditor brings an action, to which the debtor excepts, alleging the agreement of his creditor not to sue him; in this case, the exception would be of weight; for, as such an agreement was entered into, it remains good, also a subsequent one was afterwards made to a contrary effect: but, as it would be unjust, that a creditor should be concluded by the exception, he is allowed to make a replication, by reason of the subsequent compact.

De duplicatione.

§ I. Rursum interdum evenit, ut replicatio, quae prima facie justa est, inique noceat; quod cum accidit, alia allegatione opus est, adjuvandi rei gratia; quae duplicatio vocatur.

§ I. It also sometimes happens, that a replication at first appears to be concluded, tho' it is not so in reality; and, when it so happens, then another allegation, called a duplication, must be offered in support of the defendant.

De triplicatione.

§ II. Et, si rursum ea prima facie justa videatur, sed propter aliquam causam actori inique noceat, rursum alia allegatione opus est, qua actor adjuvetur; quae dicitur triplicatio.

§ 2. And
§ 2. And when a duplication carries with it an appearance of justice, but is, upon some account, injurious to the party agent, he may also, in his turn, give another allegation, which is termed a triplication.

De ceteris exceptionibus.

§ III. Quarum omnium exceptionum usum interdum ulterius, quam diximus, varietas negotiorum introducit; quas omnes apertius ex digestorum latiore volumine facile est cognoscere.

§ 3. But the great variety of business, which continually occurs, often extends the use of all these exceptions, much farther, than we have mentioned; but of these a fuller knowledge may be obtained by a perusal of the larger volumes of the digesta.

Quæ exceptiones fidieussoribus profunt vel non.

§ IV. Exceptiones autem, quibus debitor defenditur, plerumque accommodari solent etiam fidieussoribus ejus; et recte: quia, quod ab ipsis petitur, id ab ipso debitoare peti videtur; quia mandati judicio redditurus est eis, quod ei pro eo solverint. Qua ratione, et si de non petenda pecunia pactus quis cum eo fuerit, placuit, perinde succurrentum esse per exceptionem pacti convenit illis quoque, qui pro eo obligati sunt, ac si ipsis pactus esset, ne ab eis pecunia peteretur. Sane quaedam exceptiones non solent his accommodari. Ecce enim debitor, si bonis suis cessavit, et cum eo creditor experiatur, defenditur per exceptionem, si bonis cesserit: sed hæc exceptione fidieussoribus non datur; ideo scilicet, quia, qui alios pro debitoare obligat, hoc maxime prospicit, ut, cum facultatibus lapsus fuerit debitor, possit ab illis, quos pro eo obligavit, suum confequi.

§ 4. The exceptions, by which a debtor may defend himself, are generally allowed to be used by his bondmen; and this is a right practice: for a demand, made upon them, is, as it were, a demand upon the debtor himself, who is compellable by an action of mandate to pay over to his sureties whatever they have been obliged to pay upon his account: and therefore, if a creditor hath covenanted with his debtor not to sue him, the bondmen of such debtor may be aided by an exception of compati, in the same manner, as if the promise had been made expressly to them. But there are some exceptions, which can not be made use of in behalf of sureties; for altho', when a debtor hath made a cession of his goods, he may defend himself by alleging that cession, as an exception to a suit brought by a creditor, yet the same exception cannot be alleged by the bondmen; and the reason is evident: for whoever demands sureties hath always this principally in view, that he may be able to recover his debt from those sureties, in case of failure in the principal debtor.
Lib. IV. Tit. XV.

Titulus Decimus-Quintus.

De interdictionibus.

D. xliii. T. i. C. viii. T. i.

Continuatio et definitio.

Equitur, ut dixicipiamus de interdictionibus, quae pro his exsercentur. Erant autem interdictiones atque conceptiones verborum, quibus praetor aut jubebat aliquid fieri, aut fieri prohibebat; quod tunc maxime ficebat, cum de possessione aut quasi possessione inter alios contenedebatur.

We are now led to treat of interdictions, or of those actions, which supply their place. Interdictions were certain forms of words, by which the praetor either commanded or prohibited something to be done; and these were chiefly used, when any contention arose concerning possession, or quasi-possession.

Seu actionibus, quae pro his exsercantur.] Interdictions are wholly out of use among civilians, so that at this day there is no difference between interdictions and actions. See the last section of this title. And formerly the Roman praetors used them chiefly to suppress tumultuary and sudden violence, in regard to possessions; but, in these cases, our ancestors were accustomed to delegate justices of oyer and terminer, or justices of assize; and these, not to determine all causes at first times, as now, but upon every particular emergency, as soon as it first arose; but such affairs are now managed by judicial writs, or by the afflonture of the sheriff and justices of peace in every county. Vide Bracton, Britton, and Fleta, in their proper places. Curell's inst. b. l.

Divisio prima.

§ 1. Summa autem divisio interdictorum haec est, quod aut prohibitoria sunt, aut restitutoria, aut exhibitoria. Prohibitoria sunt, quibus praetor vetat aliquid fieri; veluti, vim fine vitio possidenti, vel mortuorum inferent, quod ei jus erat inferendi; vel in loco loco aedificari, vel in flumine publico ripave ejus aliquid fieri, quo pejus navigetur. Restitutoria sunt, quibus restitui aliquid jabet; veluti bonorum possessori possessionem, quae quis pro hærede, aut pro possessione, possidet ex ea hæreditate; aut cum jabet, ei, qui vi de possessione dejectus sit, restitui possessionem. Exhibitoria sunt, per quæ jabet exhiberi; veluti eum, cuius de libertate agitur; aut libertum, cui patronus operas indicere velit; aut parenti liberos, qui in potestate ejus sunt. Sunt tamen, qui putent, interdicta ea proprie vocari, quæ prohibitoria sunt; quia interdicere sit denuntiare et prohibere; restitutoria autem et exhibitoria proprie decreta vocari: sed tamen obtinuit, omnia interdicta appellari; quia inter duos dicuntur.

§ 1. The first division of them is into prohibitory, restoratory, and exhibitory interdictions. The prohibitory are those, by which the praetor prohibits something to be done,
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done, as when be forbids force to be used against a lawful possessor; or against a person, who is burying another, where he hath a right; or when he forbids an edifice to be raised in a sacred place, or hinders a work from being erected in a public river, or on the banks of it, which may render it less navigable. The resoratory are those interdicts, by which the praetor orders something to be restored, as the possession of goods to the universal successor, who has been kept out of possession by one, who hath no right; or when the praetor commands possession to be restored to him, who hath been forcibly ejected. And the exhibitory interdicts are those, by which the praetor commands some exhibit to be made, as of a slave, for example, concerning whose liberty a cause is depending; or of a freed-man, from whom a patron would exact the service due to him; or of children to their parent, under whose power they are. Some nevertheless imagine, that interdicts can with propriety be only prohibitory, because the word interdicere signifies to denounce and prohibit; — and that the resoratory and exhibitory interdicts might more properly be called decrees: yet it hath obtained by usage, that they should all be termed interdicts, because they are pronounced between two, [inter duos dicuntur,] the demandant and the possessor.

Divisi secunda.

§ II. Sequens divisio interdictorum hae est; quod quaedam adipiscendae possessionis causa comparata sunt, quaedam retinenda, quaedam recuperanda.

§ 2. The second division of interdicts is into those, which are given for the acquisition, the retention, or the recovery of a possession.

De interdictis adipiscendae.

§ III. Adipiscendae possessionis causa interdictum accommodatur bonorum possessori, quod appellatur, Quorum bonorum; ejusque vis et potestas hae est, ut, quod ex iis bonis quisque, quorum possessione alicui data est, pro hæredes aut pro possessori posuisse, id ei, cui bonorum possessione data est, restituere debeat. Pro hæredibus autem possessione videtur, qui putat se hæredem esse. Pro possessoris, qui nullo jure rem hæreditariam, vel etiam totam hæreditatem, sicis ad se non pertinere, possidet. Ideo autem adipiscendae possessionis vocatur interdictum, quia ei tantum utile est, qui nunc primum conatur adipisci possessionem; itaque, si quis adeptus possessionem amiferit eam, hoc interdictum ei inutili est. Interdictum quoque Salvianum adipiscendae possessionis causa comparatum est; eoque utitur dominus fundi de rebus coloni, quas est pro mercedibus fundi pignori futuras pepigisset.

§ 3. An interdict for the acquisition of possession is given to him, whom the praetor appoints to be the possessor of the goods of a deceased person. This interdict is called, Quorum bonorum, and the effect of it is, that it obliges all persons, who retain goods in their hands as heirs or possessors, to restore such goods to them, to whom the possession of them hath been committed by the magistrate: and note, that he is reputed to possess, as heir, who thinks and acts himself to be; and that he is deemed to possess, as possessor, who without authority retains a part, or the whole, of an inhe-
De interdictionis retinendae.

§ 4. The interdicts Uti possidetis and Utrubi have been introduced for the sake of retaining possession; for, when there is a controversy between two parties concerning property, it is necessary to inquire, which of them is in possession, that it may be known, who ought to be the demandant; for, till the possession is ascertained, an action of demand can not be instituted; and natural reason teaches us, that, when one of the parties is in possession, the other must of course be the demandant in the suit: but, as it is by far more advantageous to be the possessor, than the demandant, there is generally great contention for the possession; for albo the possessor is not in reality the true proprietor, yet the possession will still remain in him, if the plaintiff does not prove the thing in litigation to be his own: and therefore, when the rights of parties are not clear,
De retinenda et acquirenda possessione.

§ V. Possidere autem videtur quisque, non solum si ipse possideat, sed et si ejus nomine alius in possessione sit, licet is ejus juri subjectus non sit; qualis est colonus et inquilinus. Per eos quoque, apud quos deposuerit quis, aut quibus commodaverit, ipse possidere videtur; et hoc est, quod dicitur, retinere possessiorem possit aliquem per quemlibet, qui ejus nomine sit in possessione. Quinetiam animo quoque solo retineri possessoritem placet; id est, ut, quamvis neque ipse sit in possessione neque ejus nomine alius, tamen si non relinquendae possessiornis animo, sed possit reversurus inde decesserit, retinere possessiorem videatur. Adipisci vero possessiorem per quos aliquid potest, secundo libro expousimus; nec ulla dubitatio est, quin animo solo adipisci possessori nemo possit.

§ 5. A man is regarded as a possessor, not only when he is himself in possession, but also when any other, who is not under his power, holds possession in his name; as for instance, a farmer, or a tenant. Any person may also possess by means of these, to whom he hath committed the thing in litigation, either as a deposit or a loan; and this is what is meant by saying, that a possession may be retained by any one, by means of another, who possesse in his name. It is moreover held, that a possession may be retained, by the mere intention only; for, alibo a man is neither in possession himself, nor any other for him, but has quits the possession of certain lands with an intent to return to them again, be shall nevertheless be deemed to continue in possession. We have already explained, in our second institution, by what persons any man may acquire possession; and, alibo it may be retained solo animo, that is, by an intention only, yet it is indubitable, that a mere intention is not sufficient for the acquisition of possession.

De interdiction recuperanda, et affiniibus remediis.

§ VI. Recuperandae possessiornis causa solet interdicti, si quis ex possessione fundi vel aedium vi dejectus fuerit; nam ei proponentur interdictum
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dicitum Unde vi, per quod is, qui dejectis, cogitaret ei restitutionem posse efficerem, licet is ab eo, qui vi dejectis, vi, clam, vel precario, possidet. Sed ex constitutionibus sacratis, (ut supra diximus,) si quis rem per vim occupaverit, si quidem in bonis ejus est, dominio ejus privatur; si aliena, post ejus restitutionem, etiam affirmationem rei dare vim passo compellitur. Qui autem aliquem de possessione per vim dejecterit, tenetur lege Julia de vi privata, aut de vi publica. Sed de vi privata, si una armis vim fecerit; fin autem armis eum de possessione vi expulerit, de vi publica tenetur. Armorum autem appellatione non solum scuta et gladios et galeas, sed et fustes et lapides, significari intelligimus.

§ 6. The interdict for the recovery of possession is generally made use of, when any person hath been forcibly ousted from the possession of his house or estate; for the party ousted is then intitled to the interdict Unde vi, by which the intruder is compelled to restore him to possession, albo et, who bad been thus forcibly ousted, was himself in possession by clandestine means, by force, or precariously. But, as we have before observed, it is provided, by the imperial constitutions, that, whosoever any man seizeth a thing by force, if it be his own, he shall lose his property in it; and, if it belongs to another, he shall be compelled not only to make restitution, but also to pay the full value to the party, who suffered the force. But whoSOEVER ousts another of possession by force, is likewise subject to the law Julia, de vi privata, or de vi publica: — if the seizing or intrusing was effected without weapons, then the offender is only liable to the law de vi privata; but, if it was effected by an armed force, he is then subject to the law de vi publica. We comprehend not only shields, swords, and helms under the term arms, but also clubs and stones.


Divisio tertia.

§ VII. Tertia divisio interdictorum est, quod aut simplicia sunt, aut duplicia. Simplicia sunt, veluti in quibus alter acto, alter reus est; qualia sunt omnia restitutoria, aut exhibitoria: nam acto is est, qui desiderat aut exhiberis aut restituis; reus autem est, a quo desideratur, ut restituat, aut exhibeat. Prohibitorium autem interdictorum alia simplicia sunt, alia duplicia. Simplicia sunt, veluti cum praetor prohibet in loco sacro, vel in flumine publico, ripa ejus, aliquid fieri: nam acto est, qui desiderat, ne quid fiat; reus est, qui aliquid faceare conatur. Duplicia sunt, veluti Uti possidetis interdictum, et Utrubi. Ideo autem duplicia vocantur, quia par uruiusque litigatoris in his condition is est; nec quisquam praecipue reus vel acto intelligitur, sed unius exemplique tam rei, quam actoris, partes suflinet.

§ 7. The third division of interdicts is into simple and double interdicts; the simple are those, in which there is both a plaintiff and a defendant; and of this sort are all restoratory and exhibitory interdicts: for the plaintiff, or demandant, is he, who requires something to be exhibited or restored; and the defendant is he, from whom the exhibition or restitution is required. But of the prohibitory interdicts some are simple, some double;
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De ordine et vetere exitu.

§ VIII. De ordine et vetere exitu interdictorum supravacuum est hodie dicere; nam quoties extra ordinem jus dicitur, (qualia sunt hodie omnia judicia,) non est nececssa reddi interdictum: sed perinde judicatur fine interdictis, ac si utilis action ex causa interdicti reddita fuisset.

§ VIII. It would be superfluous at this day to speak of the order, and antient effect of interdicts; for, when judgments are extraordinary, (and at present all judgments are so,) an interdict is rendered unnecessary; and judgments are therefore now delivered without interdicts, in the same manner, as if a beneficial action was given in consequence of an interdict.

Titulus Decimus-sextus.

De poena temere ligitantium.

De poenis in genere.

UnC admonendi fumus, magnam curam egisse eos, qui jurassinebant, ne facile homines ad litigandum procederent; quod cest nobis studio est. Idque eo maxime fieri potest, quod temeritas tam agentium, quam eorum, cum quibus agitur, modo pecuniaria poena, modo jurisjurandi religionem, modo infamiae metu coercetur.

Our legislators and magistrates have ever been careful to binder mankind from entering into rash and litigious contentions; and we also are studious to effect the same purpose. And, that such suits may be the better prevented, the rashness both of plaintiffs and defendants both been properly restrained, by pecuniary punishments, the coertion of an oath, and the fear of infamy.

De jurejurando et poena pecuniaria.

§ I. Ecce enim jurejurandum omnibus, qui conveniuntur, ex constitutione nostra defertur; nam reus non alter suis allegationibus utitur, nisi prius juraverit, quod, putans se bona instantia uti, ad contradicendum pervenit. At, adversus insipientes, ex quibusdam causis dupli actio constituitur; veluti si damni injuriae, aut legatorum locis venerabilibus relictorum, nomine agatur. Statim autem ab initio pluris quam simpli eft
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Est actio; veluti furti manifesti, quadrupli; nec manifesti, dupli: nam ex his, et aliis quibusdam causis, sive quis neget, sive fateatur, pluris quam simili est actio. Item actoris quoque calumnia coercetur; nam etiam actor pro calumnia jurare cognitum est nostra constitutione, quod non calumniandi animo litem movisset, sed exstitam, se bonam causam habere. Utriusque etiam partis advocati jusjurandum subeunt, quod alia nostra constitutione comprehensum est. Hec autem omnia pro veteri calumniae actione introducuntur, quae in desuetudinem abit; quia in partem decimam litis actores multabat, quod nisquam factum esse invenimus: sed pro his introducuntur et praetatum jusjurandum, et ut improbus ligitor et damnum et impensas litis inferre adversario suo cogatur.

§ 1. By virtue of one of our constitutions, an oath must be administered to every man, against whom an action is brought, for a defendant is not permitted to plead, till he hath first sworn, that he proceeds as a contradicor, upon a firm belief, that his cause is good. But actions lie, in particular cases, for double and triple value against thefe, who have given a negative ius, as when a suit is commenced on account of injurious damage, or for a legacy left to a sacred place, as a church, hospital, &c. There are also actions, upon which more than the simple value is recoverable at the time of their commencement; as upon an action of theft manifest, which is for fourfold the value; and upon an action of theft not manifest, which lies for double the value, because in these, as well as in other cases, the action is at first given for more than the simple value, whether the defendant denies or confesses the charge brought against him. But the calumny of the plaintiff is also under restraint; for he is compelled by our constitution to swear, that he did not commence the suit with an intention to calumniate; but upon the solemnity of an oath, that he had a good cause: and, what is more, the advocates on both sides are likewise compellable to take a similar oath, the substance of which is set forth in another of our constitutions. This practice hath been introduced in the place of the ancient action of calumny, which compelled the plaintiff to pay the tenth part of his demand as a punishment; but this action is now dispensed with; and, instead of it, we have introduced the before-mentioned oath, and have ordained, that every rash litigant, who baits failed in his proof, shall be compelled to pay his adversary the damages and costs of suit.

Ex constitutione.] The oath of calumny was in use long before the reign of Justinian, as appears from many passages in the digests; ff. 10. t. 2. l. 44. ff. 12. t. 2. l. 16. 34. ff. 39. t. 2. l. 13. § 3. Qui damni infert coveri sibi postulat, prius de calumnia jurare debet. And in section 4. of the same book are these words:—

Si alieno nomine coveri mihi damni infert publicum jurare debemus, non calumniæ causa id eum, cuius nomine caunum postulato, fuisset postulaturum. Ulpian.

But the oath seems afterwards to have fallen into disuse, and to have been only revived by the constitution referred to; part of which is conceived in the following terms. Actor quidem juret, non calumniandi animo litem se movisse sed exstitam, bonam causam habere.

Reus autem non aliter suum allegationibus sitatur, nisi prius et ius juris posuerit:—quod, putans se bona instantia uti, ad reluctandum pervenerit. Cod. 2. t. 59. l. 2.

The canon law permits even a proctor to swear in animam domini jure, vid. decret. Greg. ix. lib. 2. t. 7. And this was formerly the practice in all the ecclesiastical courts in England. vid. ord. judiciorum. tit. 99. and 110. —canon 132.—But the oath of calumny is now dispensed with only in England, but also in those countries, where the canon law is in full force, and where the civil law is the law of the land. vid. Layprudens de Cade conferetur avec les ordinanciæ.
De infamia.

§ II. Ex quibusdam judiciis damnati ignominiosi sunt; veluti furti, vi bonorum raptorum, injuriarum, de dolo; item tutela, mandati, depoti, directis, non contrarii actionibus: item pro socio, quæ ab utraque parte directa est; et ob id quilibet ex sociis, eo judicio damnatus, ignominia notatur. Sed furti quidem, aut vi bonorum raptorum, aut injuriarum, aut de dolo, non solum damnati notantur ignominia, sed et paæ; et recte: plurimum enim intereæ, utrum ex delito aliquis, an ex contraæ, debitor fit.

§ 2. In some cases the parties condemned become infamous, as in actions of theft, rape, injury, or fraud. The parties condemned are likewise rendered infamous, in an action of tutelage, mandate, or deposit, if it is a direct, and not a contrary, action. An action of partnership has also the same effect; for it is direct in regard to all the partners; and therefore any one of them, who is condemned in such action, is branded with infamy. But not only those, who have been condemned in an action of theft, rape, injury, or fraud, are rendered infamous; but those also, who have bargained to prevent a criminal prosecution; and this is a right practice: for there is a wide difference between a debtor, on account of a crime, and a debtor upon contract.

Ignominiosi sunt; traiis judiciis de dolo aut perfidia non agitur,

Non contrarii actionibus. Nam in con-

De in jus vocando.

§ III. Omnium autem actionum instituendarum principium ab ea parte edicti proficiscitur, qua praetor edicit de in jus vocando. Utique enim in primis adversarius in jus vocandus est: id est, ad eum vocandus, qui jus dicturus sit. Qua parte praetor parentibus et patronis, item parentibus liberisque patronorum et patronarum, hunc præstat honorem, ut non aliter liceat liberis libertisque eos in jus vocare, quam si id ab ipso praetore postulaverint et impetraverint. Et, si quis aliter vocaverit, in eum pœnem solidorum quinquaginta constituit.

§ 3. All actions take their commencement from that part of the praetor’s edict, in which he treats de in jus vocando; that is, of calling persons into judgment: for the first step to be taken, in all matters of controversy, is to cite or call the adverse party to appear before the judge, who is to determine the cause. And, in the same part of the edict, the praetor hath treated parents and patrons, and even the children of patrons and patronsesses, with so great a respect, that he does not suffer them to be called into judgment by their children or their freedmen; until application hath been first made to him, and leave obtained; and, if any man presumes to cite a parent, a
patron, or the children of a patron, without such previous permission, he is subject to a penalty of fifty solidi.

De in jus vocando.] vid. f. 2. t. 4. Cod. 2. t. 2.

**TITULUS DECIMUS-SEPTIMUS.**

**De officio judicis.**

*De officio judicis in genere.*

Supereft, ut de officio judicis dispiciamus. Et quidem in primis illud observere debet judex, ne alter judicet, quam legibus, aut constitutitionibus, aut moribus, proditum est.

It now remains, that we should inquire into the office and duty of a judge. And it is certain, that it ought to be his principal care never to determine otherwise, than the laws, the constitutions, or the customs and usages direct.

*De judicio noxali.*

§ I. Ideoque, si noxali judicio aditus est, observere debet, ut, si condemmandus videtur dominus, ita debeat condemnare: Publius Mæcius: Lucio Titio in decem aureos condemna; aut noxam dedere.

§ 1. And therefore, if a suit is commenced by a noxal action, the judge ought always to observe the following form of condemnation, if the defendant deserves to be condemned: e. g. I condemn Publius Mæcius to pay Lucius Titius ten aurei, or to deliver up the slave, who did the damage.

*De actionibus realibus.*

§ II. Et, si in rem actum fit coram judice, five contra petitorum judicaverit, absolvere debet possessorum; five contra possessorum, jubere ei debet, ut rem ipsam restituat cum fructibus. Sed, si possessor neget, in præfenti se restituisse posse, et fine frustratone videbitur tempus restituendae causa petere, indulgendum est ei; ut tamen de litis aëtiatatione caveat cum fidejussore, si intra tempus, quod ei datum est, non restituerit. Et, si hereditas petita fit, eadem circa fructus interveniunt, que diximus intervenire de singularum rerum petitione. Illorum autem fructuum, quo culpa sua possessor non perceperit, five illorum, quo perceperit, in utraque actione eadem ratio pene habetur, si prædo fuerit. Si vero bona fidei possessor fuerit, non habetur ratio neque consumptorum, neque non perceptorum. Post inchoatam autem petitionem.
petitionem etiam illorum fructuum ratio habetur, qui culpa possessoris percepti non sunt, vel percepti consumpti sunt.

§ 2. When a cause, commenced upon a real action, is brought before a judge for his determination, and he thinks proper to pronounce against the demandant, the possessor ought then to be acquitted; but, if the judge thinks it just to condemn the possessor, the party condemned must be admonished to restore the very thing, which was in dispute, together with all it's produce. But, if the possessor alleges, that he is unable to make an immediate restitution, and petitions for a longer time, without any seeming intention to frustrate the sentence, he is to be indulged; provided always, that he gives caution by a sufficient bondman, for the full payment of the condemnation and costs of suit, if he should fail to make restitution within the time appointed. And, if an inheritance is sued for, a judge ought to determine just in the same manner in regard to the profits, as he would in a suit for some particular thing only; for, if the defendant appears to have been a possessor in mala fide, then almost the same reasoning prevails in both actions in regard to the profits, whether they were taken by the possessor, or, ibi' negligence, not taken by him: but, if the defendant was a possessor bona fide, then no account is expected, either of fruits consumed, or of fruits not gathered, before the contestation of suit; yet note, that, from the time of contestation, all fruits must be accounted for, whether they were gathered and used, or left ungathered, ibi' the negligence of the possessor.

De actione ad exhibendum.

§ III. Si ad exhibendum actum fuerit, non sufficit, si exhibeat rem is, cum quo actum est: sed opus est, ut etiam rei caufam debeat exhibere, id est, ut eam caufam habeat actur, quam habiturus esset, si, cum primum ad exhibendum egisset, exhibita res suisset: ideoque, si inter moras exhibendi usucapta fit res a possessor, nihilominus condemnabitur. Praeterea fructuum mediil temporis, id est, ejus, quod post acceptum ad exhibendum judicium, ante rem judicatum, intercesserit, rationem habere debet iudex. Quod si neget reus, cum quo ad exhibendum actum est, in praesenti se exhibere posse, et tempus exhibendi causa petat, idque fine fructuatio posita videatur, dari ei debet, ut tamen caveat, se restitutum. Quod si neque statim jusficii rem exhibeat, neque poeta se exhibitorum caveat, condemnandus sit in id, quod acturis intererat, si ab initio res exhibita esset.

§ 3. If a man proceeds by an action ad exhibendum, it is not sufficient, that the defendant should exhibit the thing in question, but he must also be answerable for all profits and emoluments accruing from it; that the plaintiff may be in the same state, as if his property had been referred to him at the time, when he first brought his action: and therefore, if the possessor, during his delay to surrender the thing in dispute, shall gain a prescriptive title to it, yet such possessor shall nevertheless be condemned to restitution; for he shall not be allowed to avail himself of his own delay. And farther, it is the duty of the judge to take an account of the profits of the middle time; that is, of the time between contestation and sentence. But, if the defendant declares, that he is not able instantly to produce the thing adjudged, and prays a far-
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there time, without any appearance of affecting a delay, a term ought to be assigned him, upon his giving caution to make restitution. But, if he neither obeys the commands of the magistrate in instantly producing the thing adjudged, nor in giving a sufficient caution for the production of it at a future day, he must then be condemned to pay the full damages, which the demandant hath sustained by not having the thing delivered to him at the commencement of the suit.

Familiaræ ericitundæ.

§ IV. Si familiaræ ericitundæ judicio actum sit, singulas res singulis hæreditibus adjudicare debet; et, si in alterius persona praegravare videtur adjudicatio, debet hunc invicem hæreditati certa pecunia (sicuti jam dictum est) condemnare. Eo quoque nomine cohaeredi quique suo condemnandus est, quod fulo fructus hæreditarii fundi percepserit, aut rem hæreditarium corrupserit, aut consumpsit. Quæ quidem similia inter plures quoque quam duos cohaeredes subsequeuntur.

§ 4. When a suit is commenced by the action familiaræ ericitundæ, for the partition of an inheritance, it is the duty of the judge to decree to each heir his respective portion; and, if the partition, when made, is more advantageous to the one than to the other, then ought the judge, as we have before observed, to oblige him, who has the largest part, to make a full recompense in money to his coheir: it therefore follows, that every coheir, who hath taken the profits of an inheritance to his sole use, and consumed them, is liable to be compelled to make a restitution. And this is the law not only when there are two heirs, but also when there are many.

Si familiaræ ericitundæ.] That, which the Romans called judicium familiaræ ericitundæ, is termed in the law of England the partition of an inheritance; and this is made either by consent of co-heirs, or by the authority of the law. A partition by consent requires but little explanation; it may be made by reference to friends, by lot, or by any other way, which the parties can agree upon. But partition by law is, when one, or more, of the parceners would have partition, and the rest will not agree to it; for then he, or they, who desire, that the inheritance should be divided, must bring the writ de partitione facienda, by virtue of which the officer, who refuse to agree, may be compelled to see their lands or inheritance portioned out by twelve jurors, and assigned to each co-heir by the sheriff. [vid. Co. Lit. lib. 3. cap. 1. — Terms of the law, v. partition. Briant lib. 3. cap. 35. 36. de acquirendo rerum dominio.]

Note, that joint tenents, and tenents in common, could not be obliged at common law to suffer partition, but they are now compellable by act of parliament, see 31 H. 8. cap. 1. and 32 H. 8. cap. 32. Co. Lit. 109. 187. 193. b.

Communi dividundo.

§ V. Eadem interveniunt, et si communi dividundo de pluribus rebus actum sit. Quod si de una re, veluti de fundo; siquidem sique fundus commode regionibus divisionem recipiat, partes ejus singulis adjudicare debet: et, si unius pars praegravare videtur, is invicem certa pecunia alteri condemnandus est. Quod si commode dividi non posset, vel si homo forte aut mulus erit, de quo actum sit, tunc totus uni adjudicandus est, et is invicem alteri certa pecunia condemnandus est.

§ 5. The same law is also observed, when a suit is brought upon the action communi dividundo, for one particular thing only, it being but a part or parcel of an inheritance, as for example, a field, or any piece of ground, which, if it can be conveniently
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veniently divided, ought to be adjudged to each claimant in equal portions; and, if the share of one is larger than the share of another, the party, possessing such large portion, must be condemned to make a recompense in money. But, if the thing sued for is of such a nature, that it cannot be divided, as a slave, or an horse for example, it must be given entirely to one of the coparceners, who must be ordered to make a satisfaction in money to the other.

Finium regundorum.

§ VI. Si finium regundorum actum fuit, dispicere debet judex, an necessaria sit adjudicatio; quae pane uno caufa necessaria est, si evidentioribus finibus distinguis agros commodius sit, quam olim fuissent distinct; nam tunc necessitas est, ex alterius agro partem aliquam alterius agri dominum adjudicari; quo caufa conveniens est, ut is alteri certa pecunia debetur condemnavi. Eo quoque nomine condemnandus est qui quod hoc judicio, quod forte circa fines aliquid malitiae committerat, vel verbi gratia, quia lapides finales furatus est, vel arbores finales excidit. Contumacia quoque nomine quidque eo judicio condemnatur; veluti si quis jubente judicis metiri agros paffis non fuit.

§ 6. When the action finium regundorum is brought for the determination of boundaries, the judge ought first to examine, whether it is absolutely requisite to proceed to an adjudication: but it is, in one case, undoubtedly necessary; and this happens, whenever it becomes expedient, that any grounds should be divided by more conspicuous boundaries than they formerly were; for necessity then makes it requisite, that a part of one man's ground should be adjudged to another, in which case it is incumbent upon a judge to condemn him, whose estate is enlarged, to pay an equivalent to the other, whose estate is diminished. It is also by virtue of this action, that any one may be prosecuted, who hath committed any fraud in relation to boundaries, by either removing stones, or cutting down trees, which supplied the place of landmarks. The same action will also subject any man to condemnation on account of contumacy, if he refuse to suffer his lands to be measured at the command of a judge.

Si finium regundorum. The writs de perambulatione facienda, and de rationabilibus diviso, are of the same use in the law of England, as the judicium finium regundorum in the Roman law.

The writ de perambulatione lies, when two lordships are near each other, and some incroachment hath been made; for then, by assent of both lords, the sheriff shall take with him the parties and their neighbours, and shall make perambulation, and fix the bounds, as they were before. But, if one lord incroaches upon another, and will not agree to a perambulation, the party aggrieved shall have the writ rationabilibus divisi against the other. quid. Termes de la ley, and Fitzherbert's nat. brev. p. 303, 309.

De adjudicacione.

§ VII. Quod autem ifitis judiciis alieni adjudicatum fuit, id statim ejus sit, cui adjudicatum est.

§ 7. And note, that whatever is adjudged by virtue of a sentence proceeding from any of these actions, the same instantly becomes the property of him, to whom it was so adjudged.
De differentia a privatis.

PUBLICA judicia neque per actiones ordiantur; neque omnino quicquam simile habent cum ceteris judiciis, de quibus locuti fumus: magnaque diversitas eorum est et in instituendo et in exercendo.

Public judgments are not introduced by actions; nor are they in any thing similar to the other judgments, of which we have been treating. They also differ greatly from one another in the manner of being instituted and prosecuted.

Etymologia.

§ I. Publica autem dicta sunt, quod cuivis ex populo executio eorum plerumque datur.

§ I. These judgments are denominated public, or popular, because, in general, they may be sued to execution by any of the people.

Divisio.

§ II. Publicorum judiciorum quaedam capitalia sunt, quaedam non capitalia. Capitalia dicimus, quae ultimo supplicio afficiunt homines, vel etiam aquae et ignis interdictione, vel deportatione, vel metallo. Cetera, si quam infamiam arrogant cum damno pecuniario, haec publica quidem sunt, sed non capitalia.

§ 2. Of these judgments some are capital, and others not capital. Those, we term capital, by which a criminal is prohibited from fire and water, or condemned to death, to deportation, or to the mines. The other judgments, by which men are fined and rendered infamous, are public indeed, but yet not capital.

Exempla. De lese majestate.


§ 3. The following laws denounce public judgments. The law Julia majestatis extends its force against those, who have been hardy enough to undertake any enterprise against the emperor or the republic. The penalty of this law is the loss of life, and the very memory of the offender becomes infamous after his death.
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Lex Julia majestatis; vid. f. 48. t. 4. and Calvin's lexicon juridicum.

In England the stated judgment for high treason, in all cases except counterfeiting the coin, is, that the offender shall be drawn to the place of execution, and there hanged by the neck and cut down alive; that his entrails shall be taken out and burned, his head cut off, his body quartered, and his head and quarters put up, where the king shall direct. — The judgment in the case of a woman is, "that she shall be burned and burned." In this judgment is implied the forfeiture of all the offender's manors, lands, tenements, and hereditaments: his wife loses her dowry: his children become base and ignoble: he loses his posterity: for his blood is stained and corrupted. All his goods and chattels are likewise forfeited. 3 Ca. inst. 200, 211. Straban's Domus supp. Hale's pl. of the crown, 268.

De adulteriosis.

§ IV. Item lex Julia de adulteris coercendis, quæ non solum temeratores alienarum nuptiarum gladio punit, sed et eos, qui cum mafulis nefandam libidinem exercere audent. Sed eadem lege etiam stupeficationem punitur, cum quis fine vi vel virgines vel viduas honeste viventem stupravit. Pænam autem eadem lex irrogat stupratoribus; si honesti sunt, publicationem partis dimidiæ bonorum; si humiles, corporis coercionem cum relegatione.

§ 4. The law Julia, which was made for the suppression of adulteries, not only punishes those men with death, who violate the marriage bed of others, but also those, who commit acts of detestable lewdness with persons of their own sex. The same law also inflicts a punishment upon all, who are guilty of the crime called stuprum; which is that of debauching a virgin, or a widow of honest fame, without using force. The punishment of this crime in persons of condition is the confiscation of a moiety of their possessions; but offenders of low degree undergo a corporal chastisement with relegation.

Lex Julia vid. f. 48. t. 5. ad legem Juliam de adulteris coercendis.

Gladio punit.] In England, and most other countries at this day, adulterers are punished by life.

Cum maefulis nefandam libidinem.] The crime here meant is buggery or sodomy; under which words all unnatural carnal copulations are to be understood. The ancient English lawyers all agree, that it ought to be punished with death, utrimque supplicio; though they differ, as to the manner of inflicting it. Briston says, that Solomon's and miscreants shall be burned: — Fleta writes, that they shall be buried alive; pecorantibus et fodornis in terra nivos confundentur. — The author of the mirror also delivers himself much to the same purpose; and adds, that Solom. effe crime de majestatis ursi le roy celebre. At this day by 25 Hen. 8. cap. 6; and 5 Eliz. 17. the commiters of this crime, whether male or female, are no otherwise punishable, than as common felons, who are denied the benefit of the clergy. 3 Ca. inst. cap. 10. Hawke's pl. of the crown, lib. 1. cap. 4. But it was doubted by some of the judges in the 4th year of Geo. 1. (tho' with little reason according to Fortescue) whether a man, indicted for buggery with a woman, could legally be convicted upon the above mentioned statute of 25 H. 8. See the King v. Wigram. Fortescue's Reps. 91.

De ficariis.

§ V. Item lex Cornelia de ficariis, quæ homicidas ultore ferro persecutur, vel eos, qui hominis occidendi causa cum tela ambulant. Telum autem, ut Caius nofser ex interpretatione legum duodecim tabularum scriptum reliquit, vulgo quidem id appellatur, quod arcu mittitur; sed et nunc omne significat, quod manu cujusque jacitur. Sequitur ergo, ut lignum, et lapis, et ferrum, hoc nomine contineuntur; dictum ab eo, quod...
quod in longinquum mittitur, a Graeca voce ἑλέος figuratum. Et hanc significationem invenire possimus et in Graeco nomine; nam, quod nos telum appellamus, illi βαλλεσθαι appellant απὸ τῆς βαλλεσθαι. Admonet nos Xenophon; nam ita scribit: Καὶ τα βελη ὀμο ὑπερεῖν, λογικ, τοιεμασα, σφενδοναι, πτεχοι δὲ καὶ λεβοι. Sicarii autem appellantur a sica, quod significat ferreum cultum. Eadem lege et venefici capite dannuntur, qui artibus odiosis, tam venenis, quam scuturris magicus, homines occiderint; vel mala medicamenta publice vendiderint.

§ 5. The law Cornelia de sicariis puniues tose, who commit murder, with death, and also those, who carry weapons, called tela, with an intent to kill. The term telum, according to Caius’s interpretation, commonly signifies an arrow made to be shot from a bow, but it is now used to denote any missile weapon, or whatever is thrown from the hand: it therefore follows, that a club, a stone, or a piece of iron, may be comprehended under that appellation. The word telum is evidently derived from the Greek adverb τηλῶν, procul, because thrown from a distance. And we may trace the same analogy in the Greek word βίδας; for what we call telum, the Greeks term βίδος, from βαλλεσθαι to throw; and of this we are informed by Xenophon, who writes thus: —Darts also were carried, spears, arrows, fings, and a multitude of stones. Assasins and murderers are called sicarii from sica, which signifies a short crooked sword or ponyard. The same law also inflicts a capital punishment upon those, who practice odious arts, or sell pernicious medicaments, occasioning the death of mankind, as well by poison, as by magical incantations.

Lex Cornelia de sicariis.] vid. ff. 48. 18. ad legem Cornelian de sicariis et veneficiis.

Venefici capite dannuntur.] In England all persons suspected of conjuration, witchcraft, or incantations, were antiently cited into the spiritual courts, where, if they were found guilty, sentence was pronounced; upon which the aid of the secular power was demanded by the ecclesiastical judge, and the supposed delinquents were burned, as heretics, by virtue of the writ de barreto combarre; which was taken away by the 29th of Charles the 2d, cap. 9. Vide. 3 Co. inf. 44. 45.

Thus the ecclesiastical judges had the interjurisdiction in respect to forcers and incantments, which were all ranked under the general term heresies, till the statute of the 33 H. 8. which was the first statute, by which any of these offenses were made felony; but this act was repealed by the 1st of Edward VI. cap. 12.

Conjunction and the invocation of wicked spirits were afterwards made felony by 5 Eliz. cap. 16. And again, by a statute in the first year of James the first, by which the 5th of Eliz. is repealed.

The 1st of Jac. 1. cap. 12. is to the following purport.

"That the act of 5 Eliz. against conjunctions, incantments, and witchcrafts, be utterly repealed. — That if any person or persons shall use, practice, or exercise any invocation or conjuration of any evil and wicked spirit; or shall confute, covenant with, entertain, employ, feed, or reward any evil and wicked spirit, or for any intent or purpose; — or take up any dead man, woman or child, out of his, her, or their grave, or any other place, where the dead body reflecteth, or the skin, bone, or any other part of any dead person, to be employed in any manner of witchcraft, incantation, charm or forcery, whereby any person shall be killed, destroyed, wounded, consumed, piracy or lamed in his or her body, or any part thereof; then every such offender, or offenders, their aiders, abettors, and confellors, being of any of the said offenses duly and lawfully convicted, shall suffer pains of death, as a felon or felons, and shall lose the benefit of clergy and sanctuary.

"And farther, to the intent that all manner of practice, use or exercise of witchcraft, incantation, charm, or forcery, should be from henceforth utterly abolished, be it enacted, that, if any person, or persons, shall from and after the feast of St. Michael next coming, take upon them or them by witchcraft, incantation, charm, or forcery, to tell or declare in what place any treasure might be found, or where goods, or things lost or stolen, should be found, or to the intent to provoke any person to unlawfully love;"
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"love; or whereby any cattle or goods of
"any person, shall be destroyed, wasted or
"impaired; or to hurt or destroy any per-
"son in his or her body, altho' the same
"be not effected; that then all persons, fo
"offending, and being convicted, shall suffer
"a year's imprisonment, and stand in the pil-
"lory once every quarter for six hours, and
"there openly confess his, or her error, and
"offense." The second offense is felony. 1 Jac. 1.

cap. 12.

Lord Coke hath written a learned comment
upon this statute, in which he declares, that it
would be a very great defect in government to
suffer so great an abomination, as conjuration,
witchcraft, and forcery, to pass with impunity.
3 Bl. 44.

But the tendency of the statute of the 1t of
James the 1st may bef toll appear from the cheats,
perjuries, and various other mischiefs, which it
produced, to the ruin of many innocent persons;
all which are but too well known to require any
particular mention. vid. Master’s Hist. of New
England; and Salmon’s Universal Traveller.
vol. II. p. 695. This act nevertheless continued
to be a scandal and reproach to the good sense
of the nation, till the 9th year of George the
2d, when it was enacted by parliament——
"That the statute, made in the 2t year of
"king James the 2t, intituled, An act against
"conjuration, witchcraft, and dealing with evil
"and wicked spirits, shall be repealed and utter-
"ly void, except so much as repeals the statute
"of the 2t of Elizabeth, intituled an act against
"conjuration, &c. &c. — that an act passed in
"Scotland, in the ninth parliament of Queen
"Mary, intituled, Anentis witchcrafts, shall be
"repealed — and that from the 2t of June
"no prosecution, suit, or proceeding, shall be
"carried on against any person for witchcraft,
"forcery, enchantment, or conjuration, or for
"charging another with any such offense, as
"any court whatsoever in Great Britain—— but
"that any person, pretending to exercise witch-
craft, tell fortunes, or discover stolen goods,
"shall suffer imprisonment for one whole year,
"stand in the pillory once every quarter for an
"hour; and, if the court shall think proper, be
"obliged to give sureties to behave well for the
"future." 9 Geo. 2:

De parricidii.

§ VI. Aliud deinde lex asperrimum criminem nova pœna persequitur,
qua Pompeia de parricidii vocatur; qua cavetur, ut, si quis parentis
aut filii, aut omnino affectionis suis, quæ nuncupatione parentum con-
tinctur, fata praeparaverit, (ipse clam, pœna), id aequum, id auferit, nec
non esse, cujus dolo malo id factum est, vel conficius criminis exsitit, licet
extraneus sit, pœna parricidii puniatur: et neque gladio, neque ignibus,
neque ulli solemnni pœna subjiciatur, sed inutibus culpo cum cane, et
gallo gallinaceo, et viperæ, et ſimia, et inter eas ferales anguiſtas com-
prehensius, (secundum quod regionis qualitas tulerit,) vel in vicinum
mare, vel in annem proiectatur: ut omnium elementorum usu vivus
carere incipiat, et ei coelum superfluit, et terra mortuo, auferatur. Si
quis autem alias cognitione vel affinitate personas conjunctas necaverit,
pœnam legis Corniæ de ficarius fufinabit.

§ 6. The law Pompeia de parricidii inflictis a new punishment upon those, who
commit parricide, which is the most execrable of all crimes; and by this law it is
ordained, that whoever, either publicly or privately, bastens the death of a parent or
a child, or of any person comprised under the tie, or denomination, of a parent, shall
be punished as a committer of parricide; and that any one, who hath advised, or
been privy to the death of any of these persons, is also guilty of parricide, altho' be is
a stranger, and not related to their family. A criminal, in case of parricide, is
neither put to death by the sword, by fire, nor by any other ordinary punishment; for
the law directs, that he shall be sewed up in a kind of sack, with a dog, a cock, a
viper, and an ape, and, being put up in this horrid inclosure, shall be thrown either
into the sea, or an adjacent river, according to the situation of the place, where the
punish-
punishment is inflicted: thus, whilst he is yet alive, he is deprived of the very elements; so that his living body is denied the benefits of the air, and his dead body the use of the earth. But, if a man is guilty of the murder of any other person, related to him, either by cognation or affinity, he is only subject to the punishment inflicted by the law Cornelia de ficariis.

Pompeia de parricidii.] vid. ff. 48. t. 9. distinguished, as to the punishment inflicted Cod. 9. t. 17. De Icage Pompeia de parricidii. upon criminals.

In England parricide and homicide are not

De falsis.

§ VII. Item lex Cornelia de falsis, quæ etiam testamentaria vocatur, pœnam irrogat ei, qui testamentum vel aliud instrumentum falsum scripserit, signaverit, recitaverit, subjecerit, vel signum adulterinum fecerit, sculpterit, exprerferit, sciens, dolo malo. Ejusque legis pœna in servos ultimum supplicium est; quod etiam in lege Cornelia de ficariis et veneficiis servatur: in liberis vero deportatio.

§ 7. The law Cornelia de falsis, which is also called testamentaria, punishes any man, who knowingly, and with a fraudulent intent, hath written, signed, delineated, or produced a false will, or any other instrument; it also punishes every one, who hath made, ingraved, or in any manner counterfeited the seal of another. The punishment inflicted by the law upon slaves in these cases is death; but the punishment of free persons is deportation.

Lex Cornelia de falsis.] vid. ff. 48. t. 10. § Eliz. cap. 14. 8 Geo. 1. cap 22. 12 Geo. 1. cap. 32. 2 Geo. 2 cap. 25.

De vi.

§ VIII. Item lex Julia de vi publica seu privata adyerfus eos exoritur, qui vim vel armatam, vel fine armis, commiserint; sed, siquidem armata vis arguatur, deportatio ei ex lege Julia de vi publica irrogatur; si vero sine armis, in tertiam partem bonorum suorum publicatio imponitur. Sin autem per vim raptus virginis, vel viduae, vel sanctorum, vel alerius, fuerit perpetratus, tunc et raptores, et ii, qui opem huius flagiti dederunt, capite puniuntur, secundum nostræ constitutionem, ex qua hoc apertius possibfle est fier.

§ 8. The law Julia, concerning public and private force, takes place against all, who use force, whether they are armed or unarmed; but, if proof is made of an armed force, the punishment is deportation by that law; and, if the force was not accompanied with arms, the penalty to be inflicted is the confiscation of one third part of the offender's goods: nevertbeless, if a rape is committed upon a virgin, a widow, a nun, or upon any other person, both the ravishers and their accomplices are all equally subject to a capital punishment, according to the decision of our constitution, in which the student may read more at large of this matter.

De peculatus.
§ IX. Item lex Julia peculatus eos punit, qui publicam pecuniam, vel rem sacratam, vel religiosam, furati fuerint. Sed, siquidem ipse judicis tempore administrativorum publicarum pecuniarum subtraxerint, capitali animadversione punitur; et non solum hi, sed etiam qui ministerium eis ad hoc exhibuerint, vel qui subtraxerat, ne subsecuerant. Alii vero, qui in hanc legem inciderint, pecuniae deportationis subjunguntur.

§ 9. The law Julia de peculatu punishes those, who have been guilty of theft, in regard to public money, or any thing, which is sacred; but, if judges themselves, during the time of their acting as such, commit a theft of this kind, their punishment is capital; and the punishment of all others, who assist in such a theft, or knowingly receive the money stolen, is also capital. But all other persons, who offend against this law, are only subject to deportation.

Lex Julia peculatus.] By the crime peculatus [so called a pecore, in which antiquity all riches consilte] is meant the stealing, or embezzling of money, which belongs either to the church, or to the public in general. vidas. §48. t. 13.

De plagiaristis.
§ X. Est et inter publica judicia lex Fabia de plagiaris, que interdum capit et oposam ex sacrarum constitutionibus irrogat, interdum levitorem.

§ 10. The law Fabia against plagiarists is also numbered among public judgments; but, in consequence of the imperial constitutions, the offenders against this law are sometimes punished with death, and sometimes by a milder punishment.

Lex Fabia de plagiaris.] vidas. §48. t. 15.
Cad. 9. t. 20.
A plagiarism in this place denotes a man-stealer, and is so called from plagium, which signifies man-stealing.
The punishment of a plagiarist is death both by the divine law, and the canon law. Exod. xxi. 16. Deut. xxiv. 1. Decret. G. ix. lib. 5. t. 18. de furitis.

But, in England, the stealing of man, woman, or child, called in the law kidnapping] is punished by fine, pillory, etc. Raym. 474.

De ambitu, repetundis, annonna, resiudis.
§ XI. Sunt praeterea publica judicia; lex Julia de ambitu, lex Julia repeatundarum, et lex Julia de annona, et lex Julia de residiuis, quae de certis capitis loquentur, et animal quidem amissionem non irrogant; aliis autem penes eos subjiciunt, qui praecipera eam neglexerint.

§ 11. There are also other public judgments; such are the Julian laws de ambitu, repetundarum, de annona, de residuis; which do not punish with death, but inflict other punishments upon those, who offend.

The crime, which the Romans called ambitus, is committed by procuring any public office with money, or other gifts; and it seems to be the same offense in regard to temporal offices, as simony is in regard to spiritual preferment. Decret. Greg. ix. lib. 5. t. 13.
But ambitus, or the buying and selling of offices, ceased to be criminal, and became common among the Romans soon after the demolition of the republic; and this practice continued, till Justinian, becoming sensible of its evil tendency, enforced the ancient laws in order to restrain it. Nov. 8. cap. 1. 7.

In France judicial offices are publicly set to sale, and generally fall to the highest bidder; and
and perhaps, as Vinny observes, there may be
less reason to prohibit this species of commerce
in a monarchy than in a democracy.

But in England the statute of the 5th and 6th
of Edw. vi. restrains "all persons, under pain
"of forfeiture and disability for the future,
"from buying certain offices, which concern
"the king’s revenue, and the execution of
"justice. And under these offices not only
that of the chancellor of a diocese is compre-
hended, but also that of a commissary and reg-
ister; for it was resolved in the case of doctor
Trevor, the chancellor of a diocese in Wales,
that both the offices of chancellor, and register,
are within the statute, because they concern
the administration of justice. 3 Co. infra. 148.
12 Co. rep. 78. 79. 3 Lev. 289. Woodward
w. Fox.

Lex Julia repetundarum.] This law forbids
all persons in public offices to take money or
premises, either for administering justice, or
committing injustice. Læg. Guardia repetundarum
pecuniariorum tenetur, qui, cum aliqua potestatem
haberet, pecuniam ab judicandum decernundam suæ
accepit. S. 48. t. 11.

Fortescue, on the laws of England, declares
bribery to be a great milprietum, which is
"committed, when any man in a judicial place
"takes any fee or pension, robe or livery, gift,
"reward or brocage of any person, who hath
"to do before him any way, for doing his
"office, or by color of his office, but of the
"king only, unless it be of meat and drink,
"and that of small value. cap. 51." 3 Co.
infra. 145.

De annona.] The crime fraudulantia annona is
that of abusing the markets, by raising the
price of provisions, forefailing, monopolizing,
&c.

This offense is punishable in England by
imprisonment and forfeiture of the goods or
merchandise foreclosed. See 25 Ed. 3. cap. 3.
2 Ric. 2. cap. 2. 27 Ed. 3. cap. 11. 5 Edw.

De refusis.] Crimen refusii is committed by
retaining the public money, or converting it to
other uses than those, to which it was appro-
priated. Læg. Julia de refusis tenetur, qui publicam
pecuniam delegat in usum aliquam reitumus
nauer in sum consumpti. S. 48. t. 13.

Conclusio.

§ XII. Sed de publicis judicis hæc exposuimus, ut vobis possibile sit
summo digito, et quasi per indicem, ea tetigisse; alioqui diligentior
eorum scientia vobis, ex latioribus digestorum seu pandectarum libris,
Deo propitio adventura eft.

§ 12. But it is now time to conclude our institutions; and we declare it to be our
intent, that this brief exposition of public judgments should serve only, as an index,
to give a general idea of that knowledge, which, thro’ the blessing of God, may be-
most fully and particularly obtained, by perusing the digests with a diligent attention.

FINIS
LIBRI QUARTI ET ULTIME
INSTITUTIONUM.
N O V. CXVIII.

K E F. A.       C A R. I.

De descendentium successione.

Si quis igitur descendentium fuerit ei, qui interstatus mortuus, cujuslibet naturæ aut gradus, sive ex masculorum genere sive ex feminarum descendens, et sive sua potestatis, sive sub potestate sit, omnibus ascendentibus et ex latere cognatis praeponatur. Licet enim defunctus sub alterius potestate fuerit, tamen ejus liberos, cujuslibet sexus sint aut gradus, etiam ipsi parentibus praeponiti præcipimus, quorum sub potestate fuerit, qui defunctus est, in his vis etiam licet rebus, quæ secundum nostras alias leges, patribus non acquiruntur; nam in usu hærum rerum, qui debet acquiriri aut servari, nostras de his omnibus leges parentibus custodiimus: sic tamen, ut, si quem horum descendentium filios relinquuentem mori contigerit, il-
lius filios aut filias, aut alios de-
scendentes, in propriori parentis
locum succedant, sine sub po-
testate defuncti, sine sua potes-
tatis inveniantur; tantam de haere-
ditate morientis accipientes par-
tem, quantunque sint, quantum
corum parentis, si viveret,
habuisset; quam sucessionem
in stirpes vocavit antiquitas: in
hoc enim ordine gradum quæri
nolumus; sed, cum filiis et fili-
bus, ex præmortalio filio aut fi-
lia nepotes vocari vincimus; nul-
la introducenda differentia, fide
masculi sive feminae sint, et se-
ex masculorum seu seminum pro-
le descendant, sine sua potestas-
tatis, sine sub potestate sint con-
stituti. Et haec quidem de suc-
cessionibus descendedentibus dif-
posuimus.

CHAPTER I.

Of the succession of descendents.

If a man dies intestate, leaving a descendent of either sex or any degree,
such descendent, whether he derives his descent from the male or female line, or
whether he is under power or not, is to be preferred to all ascendants and colla-
terals. And, altho' the deceased was himself under paternal power, yet we
ordain, that his children of either sex or any degree shall be preferred in succe-
sion to the parents, under whose power the intestate died, in regard to those
things, which children do not acquire for their parents, according to our other
laws; for we would maintain the laws in respect to the usufruct, which is allowed
to parents: so that, if any of the descendents of the deceased should die, leaving
sons or daughters or other descendents, they shall succeed in the place of their
own father, whether they are under his power or sui juris, and shall be in-
tituled to the same share of the intestate's estate, which their father would have had,
if he had lived; and this kind of succession has been termed by the antient lawyers a succession in stirpes; for in the succession of descendent we allow no priority of degree, but admit the grandchildren of any person by a deceased son or daughter to be called to inherit that person together with his sons or daughters, without making any distinction between males and females, or the descendent of males and females; or between those, who are under power, and those who are not. These are the rules, which we have established, concerning the succession of descenden.

E tis toinov. Si quis igitur. The three first chapters of this novel constitution deserve the attentive consideration of the reader, not only because they contain the latest policy of the civil law in regard to the disposition of the estates of intestates; but because they are the foundation of our statute law in this respect. vid. Holt’s cafes, p. 259. Pere Williams’s rep. p. 27. Prec. in chinn. p. 593. Sir Thom. Raymond’s rep. p. 456. And they are still almost of continual use, by being the general guide of the courts in England, which hold cognizance of distributions, in all those cafes, concerning which our own laws have either been silent, or not sufficiently expressed.

Eis toin ov aves avianos. In proprioni parentis locum succedant. Nothing is more clear in the civil law, than that grandchildren, even when alone, (altho’ they descend from various stocks and are unequal in their numbers,) would take the estate of their deceased grandfather per stirpes, and not per capita. Suppose therefore, that Titius should die, leaving grandchildren by three different sons, already dead; to wit, three by one son, six by another, and twelve by another; each of these classes of grandchildren would take a third of the estate without any regard to the inequality of the numbers in each class. But, as to this point in England, the law-reports mention no judicial determination; yet it seems probable, that the courts, in which distributions are cognizable, would order the division of an estate in such a case to be made per capita; and this, partly from a motive of equity, and partly from a consideration of the intent of the statute, relating to the estates of intestates; for the statute directs an equal and just distribution; and, when the act mentions representation, it must be understood to refer to it, in those cases only, where representation is necessary to prevent exclusion, but not to refer to it in those cases, where all the claimants are in equal degree, and therefore can take suo quique jure, each in his own right. vid. 23, 24, Car.2. cap.10. Lib. 3. Inst. pag. 4.

K E Φ. B.

Peri twv aionov diádochhs.

Ει τοινων τελευθήσας καλινγετας μεν μη καλαλιτοι κληρονομοις, παλινς δε ς μηνας ι αλλοι γονεις αυτω επιζήσαις, παλινς των εκ πλαγιας συγγενων των αγοριμαται Θεστήζωμεν, εξηρμενων μονων αδελφων εξ εκελευ γονεως συναπομενων τω τελευθήσας, ως δια των εξης δηλωθησελαι. Ει δε σολλον των αινιγε

Κ A Ρ. II.

De ascendentium successione.

Si igitur defunctus descendentis quidem non relinquat hæredes, pater autem aut mater aut alii parentes ei superfint, omnibus ex latere cognatis hos proponi fancimus, exceptis solis fratribus ex utroque parente conjunctis defuncto, sicut per subsequentia declarabitur. Si autem plurimi ascendentium vi-
vunt. hos praeponijubemus, qui proximi gradu reperiantur, masculos et feminas, sive paterni, sive materni sint. Si autem eundem habeant gradum, ex aequo inter eos hæreditas dividatur, ut medietatem quidem accipient omnes a patre ascendentes, quanticunque fuerint; medietatem vero reliquam a matre ascendentes, quantocunque eos inveniri contigerit. Si vero cum ascendentibus inventantur fratres aut sorores ex utrilique parentibus conjuncti defuncto, cum proximis gradu ascendentibus vocabuntur, si et patre aut mater fuerint; dividenda inter eos quippe hæreditate secundum personarum numerum, uti et ascendentium et fratrum singuli æqualem habeant portionem; nullum usum ex filiorum aut filiarum portione in hoc cafu valente patre sibi penitus vindicare, quoniam, pro hac usus portione, hæreditatis jus et secundum proprietatem per praesentem dedimus legem; differentia nulla servanda inter personas istas, sive feminas sive masculi fuerint, qui ad hæreditatem vocantur; et sive per masculi...
Of the succession of ascendants.

But, when the deceased leaves no descendents, if a father, or mother, or any other parents, grand-fathers, great-grand-fathers, &c. survive him, we decree, that they shall be preferred to all collateral relations, except brothers of the whole blood to the deceased, as shall hereafter be more particularly declared. But, if many ascendants are living, we prefer those, who are in the nearest degree, whether they are male or female, paternal or maternal; and, when several ascendants concur in the same degree, the inheritance of the deceased must be so divided, that the ascendants on the part of the father may receive one half, and the ascendants on the part of the mother the other half, without regard to the number of persons on either side. But, if the deceased leaves brothers and sisters of the whole blood together with ascendants, these collaterals of the deceased shall be called with the nearest ascendants, although such ascendants are a father or mother; and the inheritance must be so divided according to the number of persons, that each of the ascendants, and each of the brothers, may have an equal portion; nor shall the father in this case take to himself any usufruct of the portions belonging to his sons and daughters, because by this law we have given him the absolute property of one portion; and we suffer no distinction to be made between those persons, who are called to an inheritance, whether they are males or females, or related by males or females, or whether he, to whom they succeed, was, or was not, under power, at the time of his decease.

Εἶ καὶ μήτηρ ἡ μητέρα εἶπαν. Si et pater aut mater fuerint.] By the law of England, when a person dies intestate, leaving a father, the father is solely intitled to the whole personal estate of the intestate, exclusive of all others; and anxiety, [L. e. in the reign of Henry the first, vid. 11. Hen. primi, Williams editor, p. 266.] a surviving father, or mother, could have taken even the real estate of their deceased child. But this law of succession was altered soon afterwards; for we find by Glanville, that, in the time of Henry the second, a father or mother could not have taken the real estate of their deceased children, the inheritance being then carried over to the collateral line. vid. Glanville, lib. 7. cap. 1, 2, &c. 1 Peter Williams 50. And it has ever since been held as an inviolable maxim, that an inheritance cannot ascend. Co. Litt. 11. a. But this alteration in the law, made since the reign of Henry the first, did not extend to personal estate, so that, before the statute of the first of James the second, if a child had died intestate without a wife, child, or father, the mother would have been intitled to the whole personal estate, exclusive of the brothers and sisters of the intestate; but it is enacted by that statute, "that, if, after the death of a father, "any of his children shall die intestate, without "wife or children, in the time of the mother, "every brother and sister, and their re"latives, shall have an equal share with "her." 1 Jac. 2. cap. 17. § 6.

But, should it here be asked, whether the brother of an intestate would exclude the grandfather by the civil law? the novel appears at first sight to answer it very fully in the negative by enacting, "that, if the deceased leaves brothers and sisters together with ascendants in the right line, thel s "collaterals shall be called with the nearest ascen- "dants, &c." And indeed the generality of writers; namely, Gudin, Forster, Ferrières, Du-

mat, and others, all understand this passage, as

D d

admitting
admitting ascendants and brothers to take jointly; yet a contrary interpretation hath been given by some civilians, of whom \textit{Vest} is the principal, whose arguments in support of it are therefore here copied at large.

"Iliud non fatis expeditum est, an etiam cum
avov aut proavo, ubi alius proximus ascenden
e non est, fratres Germani ejus, qui defunctus
est, concurrendo debeant, an magis avo pro-
vovi praeserendi est, eoque excludant? Con-
cursum enim ascendetium naturalem gradu
remitorem, quos nullus intermedius existiens
ecludit, cum fratres Germanis defuncti tu-
entur plerique, moti eo, quod cum \textit{proxime}
ascendibilis fratres venient. vid. novil. 118.

\textit{Proximus autem est, quem nemo antecedet.}

"Sed Juris rationibus convenienti a fratribus ejus
avom proavumve defuncti a fratribus ejus
Germanis in sucessione excludi; quia Impe-
rator in deicta novill. 118. emphatico dixit,
fratres et forores cum proximi gradus ascenden-
tibus vocari; quibus mentio proximorum gradu
inutilis plane ac superflua effet, si non per
gradus proximos denotarentur illi, qui in primo
lineas ascendentes gradu sunt; cum juris certi
acque indubitati sit, nonquam in ascendente
lineas locum esse juris representationis, per quod
remitore subinimatur in locum proximioris de-
functi; acque adeo sufficiet, si generaliter
expressionem effet, fratres cum ascendibilis voca-
cari. Ne dicam hoc ipso, quo in linea ascen-
dente representaion perfusae proximioris ad
mifia non est, siere non posse, ut avo vel pro-
avus defuncti, qui a patre vel mater defuneci
certo certius excluditur, concurrenter cum fra-
bribus, qui cum patre matreque defuncti con-
current. Quibus accedit, quod sententia, de
avo defuncti cum Germanis eis fratribus con-
currente, ad aburda dicit. Si enim verum
est, quod cum cauf quo fratres et forores cum
proximitas gradus ascendibilis ita concurrant,
ut hereditas et alius secundum perfonarum
numerum dividenta est, ac ascendentium et
fratrum singuli aequalem habentem portionem
secundum d. novil. 118. eveniret necessefu, ut
remotiores ascendentem ob defecum proximio-
rum cum fratribus defuncti concurrenter plus
fratribus nocituri essent, quam proximiores;
dum, positis duobus fratris Germanis de-
functi, pater et mater concurrens duas tantum
partes aequales auferendo efficerent, ut fratres
singuli quartam heredatis fratrem partem
capiant; quatuor autem aui ab aequo existentes,
vires totidem partes occupando, non nisi fex-
tum singulis defuncti fratris relieturi effet;
seu tantum partem decommun duo fratres singu-
li effent habitui, si cum provis acque pro-
avibus (quales ece efe pollutione) deberent con-
currente. Quam autem a ratione id alienum
fit, ut magis aliis concurret uo noceant remo-
tores, quam qui ejusdem linea proximiores
funt, nemo, ut opinor, non sponte fatis agrin-
fei. Denique tantum concurret effe fratrum
cum patre et mater, non vero cum aliis ascen-
dentibus remitoriis, ubi pater materque de-
feiti, aperte probant verba novill. 118. dum
illic diftert caumen, si cum ascendibilus in-
veniuntur fratres aut forores ex utique pa-
rentibus conjuncti defuneci, eos cum proximis
gradu ascendibilis vocari, si aut pater aut mater
fuerint; unde securius, eos non omni causa, nec
promiscue cum omnibus ascendibilibus, venire;

sed si pater aut mater fucerit: ideoque mox igi-
tur subjicitur, in hoc caufa patrem nullo aem,
ex filiorum aut filiarum portione, poife sibi penitus
vindicare, nulla auvi faeta mentione; cum ta-
tem id avo aequo interdicendum suisset, si et
avus cum defuncti nepotis fratris succedere
potuisse, dum fratres succedentes aequa potu-
sissent in avo quam in patris potestate esse. Ut
proinde nihil in contrarium efficiat, quod, in
jure, proximus dicatur, quem nemo antecedet;
cum id tum demum admittere debeat, quando
nulla inde absurditas profuit; prout in hoc
cau futurum, supra monistrum eff. vid.
\textit{Joannis Vest.} com. ad Pandectas, tom. 2.
lib. 38. t. 11. § 13.

But this question seems now to be settled in
\textit{England} in consequence of three determinations;
the first of which was given in the Exchequer in
the case of \textit{Poole} verf. \textit{Wilsom} on the 9th of July
1708: — the second in the case of \textit{Norbury}
verf. \textit{Vicars}, before Mr. \textit{Fortescue}, Master of the
Rolls in November 1749: — and the third was
delivered on the 14th of Jan. 1754, in the case of
\textit{Evelin} verf. \textit{Evelin}, by the Lord Chancellor,
who decreed in favor of the brother in exclu-
sion of the grandfather, having founded his op-
inion partly in deference to the former determina-
tions; partly in consideration of the \textit{present}
common law computation of degrees, relative to real
estates; and partly upon the benefit, which must
 accrue to the Public by preferring a younger
man to an older, the brother of a deceased per-
son to the grandfather, \textit{proprius semper asserentis}.

And it was also declared to be the opinion of
the court, that, if the point in question had been
\textit{res integra}, and solely determinable by the \textit{Roman}
law, the decree would still have been the
same; which declaration, from so high an author-
ity, must have great weight in ascertaining the
meaning of the \textit{Novel}, and must incline civilians
in general to think more favorably for the future of
\textit{Vest's} arguments, which were particularly quoted
and much relied upon by the court.
De successione ex latere venientiium.

Sigurter defunctus neque descendentes nequaeascendentes reliquerit, primos ad hereditatem vocamus fratres et forores ex eodem patre et ex eadem matre natos, quos etiam cum patribus ad hereditatem vocavimus. His autem non existentibus, in secundo ordine illos fratres ad hereditatem vocamus, qui ex uno parente conjuncti sunt defuncto, five per patrem-folum, five per matrem. Si autem defuncto fratres fuerint, et alterius fratis aut foronis pre mortuorum filii, vocabuntur ad hereditatem isti cum de patre et matre this, masculis et feminis; et, quanticunque fuerint, tantam ex hereditate percipiant portionem, quantam eorum parens futurus esset accipere, si superstes esset. Unde consequens est, ut, si forte praemortuus frater, cujus filii vivunt, per utrumque parentem nunc defunctae persone.
ωμη συνηπτετο, οι δε περιοντες ἀδελφοι δια τα ωτατες μονη τυχον, η της μητρος, αυτω συνηπτοντο, προτιμηθοσιν οι των παιδων των ιων θεων, ει και τριτω εισι βαθμω, ειτε προς πατρος ειτε πεταμητρος ειησαν οι θεωι, και ειτε αρενες ειτε θηλειαι, ὅπερ ὁ αυτως γονεως προετιματο, ει περιγην. Και εκ των ονατυων, ει δε μεν περιων ἀδελφος εξ εκαλεθ γονεως συναιτει τω τελευτησαι, ὁ δε προετιμηθας δε ένος γονεως συνηπτετο, τως των παιδως εκ της κληρονομιας αποκλειομεν, ωσπερ και αυτως, ει περιγην, εξεκλειειτο. Το δε τοιοου προοιμιου εν ταις ετος της ταξει της συγενειας μονω παρεχουμεν τοις των ἀδελφων, αρρενων η θηλειων, υιως η υπαλλασσιν, ια εις τα των ιων γονεων δια και υπεσελθεσιν. ιδει δε άλλω καντελως προσωπω, εκ ταυτης της ταξεος ερχομεν, ταλο το δικαιον συνυχωρυμεν. Άλλα και αυτως τοις των ἀδελφων ταιοι τοις ταιγης της ενεργειας παρεχουμεν, ότε μελα των ιων κρινονται θεωι, αρρενων τε και θηλειων, ειτε προς πατρος ειτε προς μητρος ειεν. Ει δε μελα των ἀδελφων τω τελευτησαις και άνινθες, ως ηδη προειπομεν, προς την κληρονομιαν.
[9]

romaniam calvulai,  videi tropo
pros tnu ex adiabehi diadochi
us in adelpho o fratera saido
kaligoi, suxhorahmen. videi eix
ekalfer gonneis o auton palis o
mehor sunoide to tcheleiswai.

Otole toin tois tis adelphwiai tis
adelphis, paisi toio proponion
dedwakam, ina tnu tois gonneis
upeisoiokes totoi, monoi trih
olles babamu, melo tnu ex de-
tero babamu pros tnu xleronimw
kalwai. ekwino proddhlon estin,
odi tnu theiin tnu tcheleiswai to to
redew eni kai theiin, eite pros
tapoios nite pros melhor inshai,
proismwai, eikai ekwino tri-
teron omoicos sunyeneis babamu
exawen.

Ei de mple adelphes, mple pai-
das adelphou, vis eirhakam, o te-
leiswai kalalewai, pawlas tis
efexis ex plaxin sunyeneis pros
tnu xleronimw kalwam, kalo
nu einos ekatbabamu protrimosin,
inai ois egyleeroi tis babamu avtou
tnu loswn proismwai: eis de pol-
loioi atis babamu euywewsi, ka-
ta to tnu prosotwn aridem me-
takou auton xklersonima diarpe-
theswai, oter in capitai ois hem-
terai legwsi nomoi.

tatem vocantur, nullo modo
ad successionem ab intestato
fratris aut fororis filios vocari
permitimus; neque si ex utro-
que parente eorum pater aut
mater defuncto Jungebatur.
Quandoquidem igitur fratris et
foritis filis tale privilegium de-
dimus, ut, in propriorum pa-
rentum successentem locum, fo-
li in tertio constituiti gradu,
cum iis, qui in secundo gradu
funt, ad hereditatem vocentur;
illud palam est, quia thiis de-
functi masculis et feminis, sive
a patre sive a matre, praepo-
nuntur, si etiam illi tertium
cognitionis similiter obtineant
gradum. Si vero neque fratres,
neque filios fratrum, fictum di-
imus, defunctus reliquerit, om-
nes deinceps a latere cognatos
ad hereditatem vocamus, se-
cundum unius cujusque gradus
praeogatiavum, ut vicinires
gradu ipsi reliquis præponan-
tur. Si autem plurimi ejuf-
dem gradus inveniantur, se-
cundum perfonarum numerum
inter eos hereditas divi-
datur; quod in capite nostræ
leges appellant.
CHAPTER III.

Of the succession of collaterals.

If a man leaves neither descendents nor ascendents at the time of his death, we first call his brothers and sisters of the whole blood, whom we have also called to inherit with the fathers of deceased persons.

But, when there are no brothers of the whole blood with the deceased, we call those, who are either by the same father only, or by the same mother. And, if the deceased leaves brothers and also nephews by a deceased brother or sister, these nephews shall be called to succeed with their uncles and aunts of the whole blood to the deceased; but, however numerous these nephews are, they shall be intitled only to that share, which their parent would have taken, if alive. From whence it follows, that, if a man dies and is survived by the children of a deceased brother of the whole blood, and also by brothers of the half blood, then his nephews, [that is, the children of his brother, by the whole blood,] are to be preferred to their uncles and aunts; for, altho' such nephews are themselves in the 3d degree, yet they are preferred, as their parent would have been, if living. And on the contrary, if a man dies, and is survived by a brother of the whole blood, and by children of a brother of the half blood deceased, these nephews are excluded, as their father would have been, if he had lived. But among collaterals we allow the Privilege of representation to the sons and daughters of brothers and sisters, and no farther; and we grant it only to brothers and sisters children, when they concur with their uncles or aunts, paternal or maternal: for, when ascendants are called to inherit, we by no means permit the children of a deceased brother or sister to share in the succession; altho' the father or mother was of the whole blood with the deceased brother. But we have so far allowed the right of representation to brothers and sisters children, that, being only in the 3d degree, they are called to inherit with those, who are in the second; and this is evident, because brothers and sisters children are preferred to the uncle and aunts of the deceased, paternal as well as maternal; altho' they are all in the 3d degree of cognation.

But, if a deceased person leaves neither brothers nor brothers children, we then call all the other collaterals according to the prerogative of their respective degrees, preferring the nearer to the more remote; and, if many are found in the same degree, the inheritance must be divided according to the number of persons; and our laws distinguish this manner of dividing an inheritance by calling it a division in capite.

Περὶ δὲ ἀναδιάδοχου κλασματικαῖα. Πρῶτος ἄδειπνοι λαθαιρέων. Primos ad hereditatem vocamus. We must here observe in relation to the distinction between the whole blood and the half blood, that in England the rules of law are different, according to the nature of the estate, which is to be taken; for, in case of lands the whole blood is always preferred, and the half blood is no blood inheritable by descent. 1 Co. 14. But, in respect to personal estate, the law has not always been fixed and certain; inasmuch as the statute of the 23d of Car. II. (for the better settlement of the estates of intestate)takes no notice of this distinction between the whole blood and the half blood, but directs, that distribution shall be made among all those, who are in equal degree of kindred to the intestate. But, it being certain, that brothers and sisters of the half blood are in the same degree with bro-
thers and sisters of the whole blood, it hath been the general opinion, that brothers and sisters of the half blood were intituled, by virtue of the statute, to an equal share of the intestate's estate, with the brothers and sisters of the whole blood, altho' there are several precedents of judgments given, since the statute, allowing the half blood to have but an half share. But the law in this respect has been fully settled ever since the decree of the house of Lords in the case of Watts and others verf. Crooke, upon an appeal from a decree in chancery, which had been given in favor of the half blood, and was affirmed by the house. vid. Shower's Cases in Par. 108. and Straban's Domat. 683.


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