A SUMMARY
OF THE
ROMAN CIVIL LAW,
ILLUSTRATED BY
COMMENTARIES ON AND PARALLELS
FROM THE
Mosaic, Canon, Mohammedan, English, and Foreign Law.

WITH AN APPENDIX, MAP, AND GENERAL INDEX.

BY

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Χρώμεθα γὰρ πολυτελές ὁδὸν ζηλούσῃ τοῖς τῶν πλατεῖστην νόμους, παράδοξα δὲ αὐτοὶ μᾶλλον όντες τοῖσιν, ἡ μμοθρεμένοι ἀπόστοις. ΘΟΤΗ. ΜΗΤ. Ε. κτή. ΑΠ.

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MDCCCLII.
PREFACE TO SECOND VOLUME.

Although, in commencing this work, the Author was in a great degree prepared for many of the difficulties he has encountered, the progress of his undertaking has, nevertheless, developed others which he had not anticipated; and which must plead his excuse for the protracted appearance of this his first instalment of the Second Volume. The most formidable of these impediments have been the difficulties of arrangement, and l'embarras des richesses with regard to his authorities; and thus, in order to prevent his work from swelling to too great a bulk, he has often, though with great regret, cancelled much matter which he had originally intended to embody. The result has been that, in his desire to embrace that which more nearly concerned the Roman law, he has often been driven to strike out parallels and passages referring to the law of later ages, which could best be spared without interfering with the one great aim of his labors; namely, the illustration of the law of that empire, which formed a bond so perfect as to sustain that great body politic from a period 753 years before the Christian era to A.D. 1204, when the final blow was struck at the empire by the Latins, until which period, as an eminent modern writer on Byzantine history, George Finlay, truly observes, it had not forfeited its claim to identity with that founded by Romulus nearly two thousand years before, or had become a new, and, to speak correctly, a Greek kingdom. The victorious arms of senatorial Rome, the triumphs of the Cæsars, the intelligence and wealth of the Eastern Empire, failed to preserve its integrity from the repeated attacks of barbarous nations; but the security of property, guaranteed by a certain and known
law, was rendered, by the precedent of ages, too sacred to admit of serious change. At the same time, it is possible that the innovation of imperial ordinances may be considered as one of the elements of its decay, infringing as they did the principle on which the older Roman law was based; namely, the decisions of the courts founded on justice under the guardianship of an enlightened juridical logic.

In conclusion, the Author begs respectfully to express his grateful acknowledgment of the distinguished notice bestowed upon his labors by crowned heads of foreign states, and by the only surviving constitutional types of ancient Rome, whom he formerly had the honor to serve, whose senates contain so many men capable of appreciating the object he has in view. He has also to record his sense of the encouragement extended by the legal profession here and abroad to his undertaking, which he hopes to prosecute with less delay than circumstances rendered unavoidable in the earlier portions of his work.

Temple, 13th April 1851.
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A SUMMARY
OF THE
ROMAN CIVIL LAW.

BOOK II.
TITLE VII.

The Rights of Things—Res—Res Divini et Humani Juris—Res extra Patrimonium and
in Patrimonio—Res Singularum—Res extra Patrimonium—Res Communes—Publicae
—Universitatis—Sacrae—Religiosa—Sanctae—Res in Patrimonio—Res Corporales—
Mobiles—Fungibiles—Mancipi—Nec Mancipi— Chattels—Res Immobiles—Res Incor-
porales—Servitutes—Maxims of Services—Servitutes Reales—Rusticae— Urbane—Affir-
mativae—Negativae—Personales—Usufructus—Usus—Habitatio—Opera Servorum.

§ 921.
The first book of Justinian's Institutes treats of Persons which have been disposed of here in the previous volume; the second commences by defining the nature of things which, in their most general sense, will form the subject of the present title. Res, in the Roman sense of the word, had three significations: in its first and most general sense, it is used in contradistinction to persona; "Rei appellatione," says Ulpian, "et causa et jura continentur;"—in another and more restricted sense it signifies those objects of rights which are neither persona, actiones, nor facta—Non solum res in stipulatione deducunt possunt sed etiam facta: here res and facta are placed in antithesis.

§ 922.
The classical Caius divides things into those divini et humani juris—the former being such as, from the nature of their destination, are not available in general commerce, as the latter are; but there are also other things which, although not divini juris, can nevertheless not be the exclusive property of individuals, many persons having a joint right in their enjoyment to a greater or less extent: such are termed res extra patrimonium, as contrasted from res in patrimonio, which are capable of individual possession and enjoyment, and are otherwise designated as res singularum.
Of the first description are *res communes*, *res publicae*, *res universitatis*, *res nullius*, and *res divini juris*, in the most comprehensive meaning of the word, and consisting of *res sacrae*, *res religiosae*, and *res sanctae*.* Res in patrimonio* are divided into *res corporales*, or such as are capable of corporeal possession, which might be *mobiles*, *immobiles*, or *incorparables*, which were incapable of such corporeal enjoyment. The whole may be exhibited in the following tabular form:

<table>
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<th>Res sacrae, religiosae, sanctae;</th>
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<td>§ 923. Of things not in property the first are <em>res communes</em>, in a certain qualified sense termed <em>res nullius</em>, by which expression must be understood things the property of no one in particular, of which the Roman Law acknowledges four sorts,—the air, running water, the sea and its coasts, and wild animals as long as they are in a state of freedom. The air is necessary to human life, and every one may use so much of it as is requisite, nor is it capable of appropriation; and the same is the case with running water: the sea is the highway of mankind, and no one can, without a violation of natural law, be prohibited from using it in the way of navigation or for other purposes. The modern exceptions from this rule, if such they can be called, introduced by the law of nations, arise in the case of the <em>mare clausum</em>, on which Selden has an admirable treatise; for it is held and admitted, that where the territory of a nation entirely surrounds a sea, as was formerly the case with the Caspian when in the middle of the Persian territory and the Black and White Seas (Euxine and Marmora) when both these, as the latter still is, were surrounded by the dominions of the Ottoman Padishah, that the latter had, in consequence, the right of closing the Straits of the Dardanelles and of the Bosphorus against all foreign vessels. These seas are then only to be considered as salt lakes, like the Dead Sea, it not being a matter of dispute that the right over lakes situated in the interior of a country appertains exclusively to its jurisdiction. Hence the Venetians never had any right but that of the strongest to the Adriatic, or the Danes</td>
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1 By the law of England, ejectments will not lie for a piece of water, but must be for so many acres of land covered with water. Black. Com. b. 2, ch. 2.

even formerly to the Baltic, nay, as little as the French have to call the Mediterranean a lac Français.

The claim of modern nations to seas not in this category is clearly against reason, and not founded on the law of nations but on the droit du plus fort, for no one can claim the exclusive enjoyment of anything, a right to enforce which there exists no natural means. Thus for Great Britain to claim an exclusive right to the navigation of the Irish Channel would be unreasonable, for it is no mare clausum; nor even is it competent to Great Britain and France to claim a divided right in the St. George’s Channel, although they may reasonably agree between themselves that the subjects of either party should confine their fishing within midchannel on either side, but this agreement ought not to prejudice the rights of third parties. Modern tacit consent has established the rule of jurisdiction seaward from the coasts of any country as far as cannon shot will reach, such rule being considered necessary for the due protection of territorial rights in cases of hostile aggression, and the rights of the coating trade and revenue laws, and this rule is held to include bays; but it would be monstrous to assert this strict right in time of peace so far as the right of peaceable navigation is concerned, founded as it is on the principle of general utility introduced by the law of nations, and not on that of nature.

The Roman Law considered the coasts of the sea as common, to the extent of fishing, drying nets, and building the huts necessary thereto: sed ejusdem juris est cujus et mare et quae subjacet mari terra vel arena.¹

§ 924.

Res publica were identical with Res communes, until Justinian² drew the distinction between them. These were—flumina, ripæ fluminum, portus, viae publicæ, fundi publici.

With respect to the first, although water may freely be taken from rivers, yet the rights of piscery and navigation belong, according to the Roman Law, to the individuals of the nation through which the river flows, and the use of a high road is in like manner restricted to the nation through which it passes.

The banks of a river are in like manner public property, so far as the right of loading and the unloading of goods is concerned; but where private property is situate on the bank, those rights must be so exercised as to bring no damage to the proprietor.

Riparum quoque usus publicus est jure gentium, sicut ipsius fluminis. Itaque naues ad eas adpellere, funes arboribus ibi natis religare, onus aliquod in his reponere culibet liberum est, sicut per ipsum flumen navigare. Sed proprietas earum ilorum est, quorum praedias hærent; qua causâ arbores quoque in eisdem natæ eorundem sunt.³

¹ I. 2, 3, § 5.
² I. 2, 1, pr.; P. 2, 8, 2; Ger. Noott. Probabil. I. 7, p. 10, et seq.
³ I. 2, 1, § 5.
The coast of the sea is free to all mankind, but, as in the case of rivers, the _imperium publicum_ over it and harbours belongs to the Roman people. In like manner, public roads, for the local system of quasi-public, or turnpike roads was unknown, all the arteries of the empire being sustained at the public expense. _Fundis publicis_ resembled the present Crown lands, and the revenues proceeding from them flowed into the _ararium._

§ 925.

The word _universitas_ has a triple meaning: thus there may be a _universitas rerum, universitas juris_, or _universitas personarum_, the latter of which have already been explained. 

Res universitatis are either strictly _publicae res_ or _patrimonium populi_, and may be _res_ or _patrimonium universitatis_, and the _res universitatis_ are either properly _res universitatis_ or _patrimonium universitatis_.

Public things are properly such as every one may use—such as rivers, their banks, harbours, and highways; but such things as belong to the whole nation, the _use_ of which is, however, not common to every individual, belong in _patrimonio populi, scilicet, reipublicae_, and perhaps the clearest distinction is between _use_ and _usufruct_, for though _ager publicus_ be not actually enjoyed by the nation at large, yet the rents of such, flowing into the public exchequer, become the common national property.

Things, the _use_ of which is free to all and every individual, are termed _res universitatis_, or things of the community at large, not the community in the sense of a private corporation, and Pomponius says _publica, quae non in pecunia sed in publico usu habentur_. In the one case the _profits_ are common to the whole nation, in the other the _thing_ itself.

This _res universitatis_ implies _use_; _patrimonium universitatis_, _usufruct_; and the distinction arises between the _jus ad rem ipsam_ and the _jus ad usum rei_, and a _servus publicus_ would be _patrimonium_, not _res_.

Res _nullius_ is the _use_; _patrimonium universitatis_, _usufruct_; and the distinction arises between the _jus ad rem ipsam_ and the _jus ad usum rei_, and a _servus publicus_ would be _patrimonium_, not _res_.

Res _nullius_, in its second and more ordinary signification, implies those things which were by their nature indeed capable of individual possession, but which remained unappropriated. An _haeditas_, apart the fiction which vested it in certain persons, is in this category.

Wild animals termed _ferae naturae_, wild birds and fishes not enclosed in private parks or waters, or, as it is expressed in the Institutes, _omnia animalia quae caelo et terrâ nascuntur simulatque_
RES EXTRA PATRIMONIUM.

ab aliquo capta fuerint, jure gentium statim illius esse incipient quod enim ante nullius est, id naturali ratione occupanti conceditur: in like manner bees and gems, or other precious things found on the sea-shore, and pari ratione pearls in the sea, since oysters are fish and the sea is common property; but all these things become individual property, and cease to be res nullius, when slaughtered, tamed, or reclaimed, and some are even reckoned among res mancipi when so appropriated.

§ 926.

Lastly, res divini juris belong to the category of things extra patrimonium, and are such as are in some way connected with religious belief. Their division is triple,—those consecrated to divine worship are termed sacra; spots where a dead body has been placed, religiosa; and things protected from violation by heavy penalties are distinguished as sanctae.

Temples, chapels, and altars, consecrated to divine service are res sacrae, and moveables donaria, things belonging to sacrifices, the robes of priests, &c. the consecration whereof has been performed by the pontifex maximus, or by the emperors, who in later times combined this office with the imperial dignity. Some erroneously think that res sacrae are alone those dedicated to the dis superis, but we find temples and the like dedicated to the infernal and demi-gods, as Pluto, Proserpine, or Hercules, are also included. When things are consecrated to the use of the public deities, they are termed publica; but when to that of private or household gods, privata.

Inasmuch, then, as res sacrae belonged to the gods, they were res nullius, and were consequently incapable of valuation, hypothecation, or mortgage, usucapion or adaptation to any profane use.

It now remains to be seen how objects were consecrated, and first it must be premised that those things said to be sacro commendatae are not to be confounded with res sacrae, being things merely placed in the temples for security.

1 I. 2, 1, § 12. 2 Hopfner Ed. Weber, § 261, finds fault with this definition, for he asserts that res sacrae and religiosa were more recommended to the public protection than other things, and were therefore sanctae; and that it is not true that all res sanctae belonged to no one, and were utterly withdrawn from commerce, although Marcian, P. 1, I. 6, § 2, and Justinian, I. 1, 2, § 10, assert them to be so. That they were therefore not divini juris, but only such as were dedicated to certain protecting deities, ex gr. to Mars, Neptune, and Minerva, which alone were nullius in bonis. Justinian, too, says, res sanctae veluti muri et portae quodammodo divini juris usus sunt.

4 Heintr. ad Alphen Diss. de Rei Consecratione. Ludg. Bal. 1791.

6 Leyser Sp. 22, med. 1; Otto, 5 8 ; I. 1, 2.

8Cic. Leg. 2, 9, & 16; Herod. Hist. 1, 14.

Savigny über die sacra privata der Römer Zeitach. für geschichl. Wissenschaft, 2 B. No. & V.

9 The Mosk of Soolemanyeh, in Constantinople, is full of valuable property, of all creeds and confessions, thus deposited.
Consecration was solemnly performed by public authority.

The inauguration of temples.

Distinction between aedes sacrae and templum...

The consecration of Christian churches continued from the Roman practice.

Lustratio areae was performed with certain solemn ceremonies.

Laying the first stone a Roman ceremony.

The dedication performed by the pontifex and a superior magistrate.

The form in which dedication was performed.

It was indispensable that consecration should be performed by the pontifices under public authority,—an auctoritas of the senate or a decree of the sovereign,—and no private person could thus withdraw property from general commerce.

Temples were consecrated by inauguratione, a term derived from the augures taking solemn possession of the space, after having consulted the auspices; and those buildings, in the consecration of which this formality was omitted, were termed aedes sacrae, but not templum.

Christian churches are in like manner consecrated by bishops, a practice undoubtedly preserved from Pagan antiquity; nor is the distinction between templum and aedes sacrae entirely lost in England, the old parish churches having a claim to this higher title, whereas a chapel of ease or other consecrated building could scarcely be so designated if established on speculation, or otherwise by private trust deed, and not under any general or private Act of Parliament.

A place having been selected, it required to be purified; this was called lustratio areae, and was performed by soldiers, whose families were of good omen, bearing branches of the felix arbor, followed by vestals, attended upon by boys and girls, both of whose parents were alive, and who purified the space, lustrabant spatium, with clear river or spring water.

The magistrate then approached, preceded by the pontifex, who performed the sacrifices called suovetauralia, pouring the blood and entrails upon the earth, with prayers to the gods that the edifice might rise under their divine assistance; the building was then begun by laying a large stone termed lapis aspicalis, as the commencement of the foundation.

Hence the ceremony of laying the foundation-stone of public buildings, which is usually done by some person of eminent, personal, or official rank, if not of royal dignity.

The dedicatio, or assignment to a particular deity, was next performed by a superior magistrate, preceded by the pontifex chanting a solemn hymn, with his hands upon the door posts; hence temples were termed fana a fando, quia carmen, or solemnia verba fatur; or, perhaps, from the Greek, φωνα, the words of dedication. Heineccius gives the form of words in which Romulus is said to have dedicated a temple to Jupiter Feretrius.

FEST. V. SACER.

1 Fest. v. Sacer.
2 Guther de Jur. Pont. 3, 12.
3 Cic. pro Dom. 53; Tac. H. 4, 83.
4 Gell. 14.
5 Vid. the ceremony of planting a colony, § 854, h. op.
6 Tac. H. 4, 83; Grut. Inscr. p. 39, 5.
7 Liv. 2, 8; Cic. pro Dom. 47; Val. Max. 5, 10; Brison, de Form. 1, p. 184.
8 Fest. v. Fanum. Varro de LL. 5, 7; Poplic. 104.
9 Ant. Rom. 2, 1, 2; Liv. 1. 20.
Lastly, certain statutes or leges were attached to the foundation regulating its government.

All these formalities being duly observed, sanctity was supposed to inhabit the spot, and it was thenceforth taken out of the category of private property, and although the edifice should be destroyed or fall into ruin by the lapse of time, the place nevertheless remained hallowed.

Res sacra might be desecrated by capture by the enemy; this, however, operated a mere suspension of their sacred nature, for on their afterwards being recovered, the law of postliminium acted upon them, and their former state revived.

Exauguratio, however, operated an utter revocation of their hallowed character, and was performed by a ceremony termed evocatio sacrorum, described by Macrobius, and alluded to in the Pandects.

§ 927.

The Canon Law has retained the res sacrae, being consecrated vessels, &c., for the immediate and actual use in the office of the church, and have added another species not consecrated, but mediately dedicated to the furtherance of holy purposes, under which may be placed property of the church, landed estates, capital, tithes and other dues for the payment of officers or the upholding the edifices of the church, and the discharge of other ecclesiastical obligations. These may be sold when the necessities of the church require such alienation, or when the discharge of debts incurred cannot be otherwise effected. Landed estate or other investment may also be changed when it pays a low rate of interest, and the investment can be advantageously improved. To effect this end, the bishop must institute an examination into the facts, and issue his decree of alienation thereupon.

Acting upon this principle, the monks, to evade the statute of mortmain, were used to consecrate large tracts of country as churchyards, and thus, by attaching them to the church, withdraw them from public commerce.

§ 928.

Res religiosa belonged, like res sacrae, to the pontifical law, and were hence sometimes termed sancta, on account of the pontifical sanctio. A place became religiousus by the simple interment of the dead body, ashes, or bones of any human being. Constructive burial is asserted variously to have, and not to have conferred, this right, and the question consequently arises, whether the ecclesiastical law conferred upon the foundation, after which the place was considered hallowed.

Suspension of consecration.

Exauguration or revocation of consecration.

Consecration retained and extended by the Canon Law, according to which consecrated things were not necessarily withdrawn from general commerce.
tion of a cenotaph, κενοράφιον, would make a place religious or not.

All sepulchres were dedicated diis manibus, commonly represented by the two capitals DM., diis manibus sacrum, DMS., or diis inferis manibus sacrum, DIMS.; but more lengthy inscriptions are to be found. Hæc ædificia propria comparata facta dicataq. sunt monventi sive sepulchrum est et ollarum quæ in his ædificis insunt et consecratæ sunt religionisq. earum causa. The spot on which the body itself was laid was not alone religious, but also a certain extent round it, which was often designated thus, IN. FR. PX. AGR. P. XX (in fronte pedes x in agrum pedes xx), or the sepulchres were even surrounded by walls.6

The hallowedness which attached to the place after a dead body had been deposited there also prevented its removal, at least without permission of the pontifices, in whose jurisdiction graves were, and for this reason it was necessary to obtain the pontifical sanction, in order to repair a sepulchre.4

It was not lawful to bury a body in a public place not appropriated to such purpose; for Cicero tells us, locus publicus non potest privatâ religionè obligari.6 It was in like manner forbidden to lay a dead body in a purus locus belonging to another man, because it was equivalent to robbing him of his property, by withdrawing it from commerce; for every one might of his own authority constitute a place religious by the act of burial, but a purus locus held with another in common required the partner’s consent to the act. In like manner, it was necessary for the proprietor even to obtain the usufructuary’s concurrence.

A law of the Twelve Tables8 forbade intramural interment, or burning, ne ultra urbem sepeliatur ne uretur, and this wise provision was confirmed by Hadrian,9 and again by Diocletian and Maximian.10 This practice, which is traceable to the highest antiquity among the Egyptians, Jews, and Greeks, was probably attributable, in the first instance, to the sanitary measures of the government, rendered the more necessary by the heat of the climate. The attaching the idea of sanctity to burial-places was probably merely a politic means of preventing the disinterment of bodies without due precaution. Of like origin was the duty imposed upon any one who casually met with an exhumed dead body to inter it. Thus the Egyptians had their catacombs set aside for

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1 These were erected in memory of a deceased person, whose body, from some accident, could not be found.
3 Gruter Ins. p. 847, 5.
4 Hor. Serm. 1, 8, 12; Briss. A. R. 3, 15 & 16, p. 36, et seq.
5 P. 11, 7; & 33; Plin. Ep. 10, 73; Grut. Ins. 628, ubi reliquæ, Traiectæ
6 De Leg. 2, 23.
7 I. 2, 3, § 9.
8 Cíc. de Leg. 2, 23; D. Goth. Leg. XII Tab.
9 P. 47, 12, 3.
10 B. 3, 44, 12.
the purpose, the Jews their burial-places, where we find madmen took up their abode, and came out exceeding fierce, so that none might pass by that way. The tombs of the Greek and Trojan heroes were all placed without the city or camp, and the same is the case in all modern nations except England, where the public health is sacrificed to burial-fees.

The doctrine of the Manes was probably derived from Egypt, the nursery of pagan theology. The theories connected with the souls after death were intimately associated with that of its immortality; the soul of a deceased person was supposed, under the designation of Manes, occasionally to wander back to earth, and to haunt the neighbourhood where its mortal temple had been laid; in allusion to which we have, id cinerem aut manes credis curare sepultos. Hence, probably, the modern superstition that ghosts appear in churchyards where the bodies have been buried, or where the person has come to a violent or an unfair end.

The supposed apparition of ghosts is often resorted to by the Greek and Latin poets, and it does not appear to have been material whether the soul was in the Elysian fields, in the realms of Pluto, or in its intermediate state in Hades.

It was considered imperative to obey the commands conveyed by the manes of the deceased; to this latter Ovid alludes in describing Achilles as appearing on his tomb near the Naustathmon of the Greeks before Troy, and demanding the sacrifice of Polyxena:

\[ \text{Hic subitò, quantus, cùm viwìret esse solebat,} \]
\[ \text{Exit humo late ruptà similisque minaci,} \]
\[ \text{Temporis illius vultum referebat Achilles,} \]
\[ \text{Quo ferus injusto petiti Agamemnona ferro:} \]

and afterwards,

\[ \text{Placet Achilles maatata Polyxena manes.} \]

Again, when Polyxena is to be sacrificed, Hecuba offers herself instead of her daughter, but Ulysses says,—

\[ \text{Ov o' ἐνεράια καταθανέων Ἀχιλλέως} \]
\[ \text{φάντασμα' Ἀχαιός, ἀλλὰ τὴν ἀγία τάφο.} \]

It was also usual to sacrifice and invoke the shades of heroes; thus, in Virgil:

\[ \text{Solemnes tum forte dapes et tristia dora,} \]
\[ \text{Ante Urbem in luco folsi Simoëntis ad undam,} \]
\[ \text{Libabat cineri Andromache manesque vocabat,} \]
\[ \text{Hectorum ad tumulum viridi cum cespite inanem,} \]
\[ \text{Et geminas causam lacrymis sacraverat aras.} \]

1 Matt. viii. 28; Mark v. 1; Luke viii. 26.
3 Æn. 4, 34.
4 Met. xii. 441, 448.
5 Eurip. Hec. 389.
6 Æn. 3, 393.
In another place we have anima and manes in connection:—

Ninaque fundebat pateris animamque vocabat,
Anchisa magni manesque Acheronte remissos.¹

The manes were occasionally invoked at a cenotaph:—

Tunc egomet tumulum Rhataeo in liture inanem,
Constitui et magnâ manes ter voce vocavi.

Hence, it would appear that it is erroneous to suppose there were no manes at a cenotaph, and if there were, it must have been a locus religiosus.

These apparitions usually occurred at night or in a dream. Nocturnosque ciet manes.² Thus the witch of Endor invoked the ghost of Samuel at the request of Saul at night.³

It was incumbent on every pious person to bury a dead body when he came in its way, to give the manes rest, and enable them to pass the Styx. Polydorus⁴ appears to a female attendant of his mother Hecuba, and informs her of his treacherous death by Polymestor, who had murdered his ward to possess himself of his wealth, and had thrown the body into the sea, wherefore his manes could not rest, but followed the corpse swept to and fro by the waves. Antigone,⁵ of Sophocles, turns upon the prohibition to bury the dead body of Polynices, and mention of the same subject occurs in the Ajax.⁶ Δωρητον ἄντων ἐκβαλεῖν ταφῆς ἄτερ; in the latter book of the Iliad,⁷ we perceive the importance attached to the inhumation of a dead body.

It is astonishing that, notwithstanding the many evidences to the contrary, the impression should still exist that the immortality and divine nature of the soul, demonstrated by the very expression diis manibus, was not believed by the nations of antiquity. With respect to Egypt, the preservation of the body has been erroneously connected with the preservation of the soul; such was not the case; it was merely thought to be gratifying to the soul that its earthly shell should be treated with befitting respect, and was considered, or the place in which it had been deposited, a point of attraction for the soul when it returned, as it was at liberty to do, to earth. For had the Egyptians even supposed that the soul was annihilated with the dispersion of the last particle of dust, how many souls of the poorer classes (for but few, comparatively, can have been embalmed) and of those killed in battle must have been lost? As, however, the body is never utterly destroyed, but merely converted into other substances, the soul, even if dependent upon the body, could never be utterly lost, for want of a representative or connecting particle; it is, therefore, exceedingly probable that belief

in the immortality of the soul existed in the earliest ages, and has been merely adopted into the doctrines of more modern creeds.

To resume, a person may concede to another the right of laying a body in his own sepulchre, although the sepulchre itself formed no part of his property, or technically *non erat in bonis*, and was consequently not transferable as a part of his estate; if, however, a man alienated that part of his property in which his sepulchre lay, such burial-place passed to him who acquired the estate, as an appurtenance.  

When the members from any cause had been scattered and buried in different places, the place where the head was laid was alone held *religiosus*.  

If a person laid a body in the land of another, he was compellable to care for its removal, or to pay the price of the place so rendered unsaleable, and the spot remained *religiosus*, until the removal of the body or ashes under pontifical sanction.  

The laying a body in another's land obliged to purchase or removal.  

*Pagan superstition* connected with the manes preserved by the Christian emperors.

§ 929. 

The third and last species of this *divini juris* are *Res sanctae*, which Ulpian, in distinguishing from *sacra* and *profana*, tells us:  

*Sancta dicimus qua neque sacra neque profana sunt, sed sanctione quodam confirmata. Ut leges sanctae, sanctione enim quodam sunt subnixae.*

Again, since whatever *res* were inviolable were termed *sanctae*, the word is otherwise derived by some from the ceremony by which they were rendered so, in which *sagmina*; or herbs, were used in the act of dedication to the *diis mediaeumis*; but by far the more reasonable derivation is the preceding one of Ulpian, from the *sanctio pontificalis*.

The walls of a city, the passage outside them termed *pomoerium*, the pallisades of a camp, *vallum*, and the gates, *portae*, were held to be *sanctae*. With respect to the first, reference must be had to the mode in which the place was hallowed on its first selection, no one was permitted to dig a cellar into city walls, or rest beams in them, and the violation of the sanctity of the walls of Rome is historically alleged as the pretext for the death of Remus: the repair of the walls was not even permitted without the express permission of the emperor and provincial president, *muros municipales nec reficere licet sine principis aut praefidis auctoritate*, and this

1 A. Mathaü, A. F. A. N. Com. ad I. 2, 1, § 9, n. 73.  
3 C. 3; 444 4.  
4 P. 1, 8, 9, 3.  
5 Fest. v. Sagmina, P. 43, 6, 5, & 3.  
6 Fest. v. Sanctum.  
7 § 926, h. op.  
8 Ulpian, P. 1, 8, 9, § 4; C. 8, 12, 5.
notwithstanding that any one might undertake public works in general.

The statutes of the emperors, the *album* or proclamation tablets of the magistrates, boundary stones, were *res sanctae* in like manner.

This right of inviolability was also extended to certain persons, hence termed *persona sancta*—the emperor, the tribunes, ambassadors, and parents and patrons with reference to their children and clients.

As it was more advantageous to the priesthood, on the introduction of Christianity, not to abolish these superstitions, they were continued and increased in direct contravention of the new dispensation; for while, on the one hand, the supposition upon which this sanctity was founded was repudiated—namely, the presence of *manes*—the number of *res sacrae religiosa* and sanctae was augmented by the substitution of saints for the former heathen deities, by the interposition of a species of trust by which much property was exempted from the general law of transfer; yet how often have the holy vessels of the church been sold to support bloody and unjust wars, and the tithes applied to the like purpose. Protestants have even preserved, with still less reason, these Pagan superstitions; and churchyards and churches are consecrated, although we are told that "God dwelleth not in temples made with hands."

§ 930.

*Res in patrimonio,* otherwise called *singulares,* are things belonging to one or more persons; if to more than one, in partnership; nevertheless, not to so many as to form a people or a corporation duly constituted, for then they would be *res universitatis.*

*Res singularis* is a corporeal, and, at the same time, a definite thing, as a table, sheet of paper, or that which, though composed of many parts together, makes a connected whole, as a house, piece of machinery, &c.; it may also be an incorporeal thing, as a single right, or single genus.

*Res universalis,* or *universitas rerum* in its wider sense, consists of many different and separate things which together make one under a common name, *totum per adgregationem:* thus an inheritance may consist of moveables and immoveables, corporeal and incorporeal things mixed.

*Universitates* may be again, *stricto sensu,* divided into *universitates juris,* and *universitates hominis.* *s. rerum:* of *universitates juris,* there are but two, the *hareditas* and the *peculium:* the rule in this case is *surrogatum sapit naturam ejus,* in cuius locum *surrogatum est* or *pretium succedit in locum rei et res in locum*

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1 Vid. commination against sinners, "Cursed is he that removeth his neighbour's landmark." Deut. xxvii. 17.

2 Ex. gr., all houses or things, *qua pax causae interiuivit*; hospitals, *xenodochia*; orphan asylums, *orphanotheca*; alms-houses, *proboiotrophae."
pretii, which means that when a thing belonging to a universitas juris is sold, the price is to be looked upon as a part of such universitas juris, and if the possessor of such universitas appropriate part of the value in order to purchase something, such thing is to be looked upon as part of the universitas.

Universitates rerum convey the idea of corporeal things which, although distinct from each other, make together an entirety, as a library, a herd of cattle, or the like.

§ 931.

The distinction between res corporales and res incorporales is, that the former can, the latter cannot, be touched—res corporales sunt, quae tangi possunt; res incorporales quae tangi non possunt: this definition has, however, in modern days been held defective, since magnetic fluid, for instance, cannot corporeally be touched; modern lawyers have therefore substituted the word felt or perceived. It will perhaps be interesting to the reader to refer to Heineccius's masterly treatise on this point, in which he deduces this distinction from the principles of the Stoic philosophy.

Corporeal things are either moveables or immoveables. Res mobiles are of two kinds,—those capable of innate motion, res sese mouentes, as animals or slaves; and those capable of being moved only, res mobiles, as books, furniture, and the like.

Res fungibiles were such things as wasted in the using, as provisions and the like, and were therefore not the objects of specific recovery.

Justinian is supposed to have abolished the distinction between res mancipi and nec mancipi; at all events there is no mention of them in his works: it is, however, important to examine what these were, as occasionally inferential allusion is made to them.

The word itself is contracted from mancipii, and compounded from manus and capio. Res mancipi were transferable by formalities, which Roman citizens alone were capable of performing, the purchaser being denominated mancipes, and the vendor being under the obligation evictionem præstare: res nec mancipi, were such as were not alienated by this solemn mode, and where the risk was at the charge of the purchaser.

The incidents of res mancipi were two,—first, the mode of transfer, which was per æs et libram, that is to say, by Quiritian transfer; nevertheless, it does not appear to have been indispensable that this mode of sale should be adopted, as usus or usucapio would suffice to pass res mancipi.

Some sort of official sale was doubtless necessary to transfer res
mancipi so as to clothe them with all their incidents, and these will be found where the modes of acquiring are treated of.

The chief advantage of passing such things by this form was the security afforded by an official sale, which rendered a stipulation unnecessary, and bound the vendor by a sponsio to eviction, or double the value in case of refusal; it was, in short, a warranty of title, ni quid suum sit se evictionem praestitum. This operation was also termed nexus, because the vendor was bound to certain acts. Res mancipi thus transferred were at once in dominio, and although res nec mancipi could also be passed by the same formalities, yet they were nevertheless only in bonis; hence we see that the form of transfer only had its full effect on certain objects, and we are still without full information as to all res which were in the category of mancipi: it is probable that they were not numerous, but consisted of such objects as in the primæval state of Rome were of the greatest practical value.

Secondly, as regarded the object itself, res mancipi, as far as now can be ascertained, were—

1. Praedia in italicō solo, landed property in Italy, and inferentially in any province on which the jus italicum had been conferred, nor did it matter whether these were prædia rustica or urbana, which might come into this category by accession.

2. The rights jura appertaining to prædia rustica, as actus, vicæ, aquæ ductus, and all other servitudes attaching thereto by accession, but not those attaching to a præedium urbanum, because this was itself an accession, and there could be no accession on an accession.

3. Slaves transferred by the form of mancipation.

4. Quadrupeds used for burden or draught, as oxen, mules, asses, or horses.

5. An inheritance, hæreditas sive familia.

6. A filius familias, for both these latter were capable of transfer by the Quiritian mode only, and were in dominio.

7. Pliny adds pearls, margarites.

And Ulpian says that all other things were nec mancipi, even elephants and camels, which, although beasts of burden, were reckoned bestiarum numero, and this probably because they were originally unknown to the Romans.

Cicero tells us that res mancipi were enumerated in detail in the schedule or protocollo of the property of a Roman citizen, but that the rest was set down in a lump sum.

Moveables in the English law are designated under the generate term of chattels, a word derived from the barbarous Norman Latin

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1 Paul. R. S. 2, 17; 2, 2, et seq. : Cic. ad Fam. 7, 30 ; Varro de LL. 6, 5, p. 58.
2 Ulp. 1, 16.
3 Ulp. 19, 1.
4 Cic. de Orat. 1, 178 ; sq. et de Offic. 3, 67, 3 pro Flacco. 32.
5 H. N. 9, 35.
6 19, 1.
7 Pro Flacco, 32.
word *catalla*, cattle, and everything was included under this term which was not a feod, but, strictly speaking, it was applied to beasts of husbandry.

The origin of the term may be traced to that period when the most valuable part of a man's moveable property consisted in flocks and herds: hence the Latin word *pecunia* used to designate money, from *pecus*; and as in the Roman state, land from the habits of the people was comparatively of little value, *pecunia* was used to convey the idea of a man's property generally;¹ thus we find, in the laws of the Twelve Tables, *uti paterfamilias legasset super pecunia sua ita jus esto*. The nobles in the principalities of Wallachia and Moldavia, the ancient Dæcia, where the foundation of the language is purely Latin, are termed Boyards, from *boves*, riches, having been formerly estimated by the number of a man's cattle, as it was among the patriarchal Jews.

The distinction between personal and real property was introduced with the feodal system, and was unknown to the Romans. In England the principle is diametrically opposite to that of ancient Rome, for while moveable property was there of the greatest value, land was of paramount importance here. This increased under the Norman rule, nor was it uncommon to amerce a man in half or the whole of his chattels; nor was this, which would now be a ruinous fine, at that time a measure of the extremest rigor.

Things personal consist of goods, money, and all other moveables, and of such rights and profits as appertain thereto, which latter, however, come under the head of incorporeal things. Things personal or chattels are said to be in possession, but things real in seisin.

§ 932.

*Res immobiles* things, are such as land, meadows, gardens, and the like—also a house, because not removeable without damage; nevertheless, there are things *immobiles vel naturâ vel juris intellectu*—immoveable by nature or in the eye of the law: thus the law considers trees *fructus pendentes* as immoveable, because so strongly fixed to the immovable that a severance from it would cause damage to their nature, or because they are fixed and necessary to the enjoyment of the reality, as the doors, windows, tiles, roof, &c. of a house. The English law has invented another term for many of these, that of fixtures.

The distinction between moveables and immoveables is very important, as will hereafter appear, inasmuch as limitations affect the former after three years, the latter after ten or twenty; again, the husband is sole master of moveables, but not always of immoveables; and lastly, immoveables are capable of rights, which moveables are not.

¹ P. 50, 16, 222.
The division into moveable and immoveable attaches only to corporeal things, incorporeal objects being, strictly speaking, neither one nor the other.

Things real in England consist of lands, tenements, and hereditaments, which last, however, include everything capable of inheritance, and consequently comprises chattels and incorporeal things.

Tenement is everything subject to tenure, but land includes everything on the surface of the earth, above and below it; consequently mines pass with a grant of land, to which the word seisin is applied, and not possession.

§ 933.

Res incorporales are in other words jura or rights, and inasmuch as corporeal things are those qui tangi possunt, so are incorporeal things those qui tangi non possunt; consequently, as the first are capable of actual possession, so the latter are only capable of improper or quasi possession, and are said to be in bonis, not in mancipio, for no corporeal seisin can be had of them, being merely rights, of which exercise is the proof.

A servitude or service is a real right attaching to the property of another, whereby the owner must suffer something in respect of this property which he otherwise, in right of his ownership therein, would not have been obliged to suffer, or forbear some act which he otherwise would have had the right to have performed in virtue of his character of owner for the benefit of some other person or thing. This is more expiatory than, though not so concise as, the definition of the Pandects,—servitus est jus quo res alterius rei vel personæ servit.  

§ 934.

Servitus is a real right, for when there only exists a jus ad rem, as against another, whereby that person must suffer something to be done to his property, or omit to do something, it is no good service: for instance, the lessor must allow the lessee to occupy the premises leased; here no service accrues to the lessee, because no real but a mere personal right to the house subsists as against the lessor.

Secondly, a servitude is a right attaching on the property of another; as, for example, to pass through another court-yard, or feed beasts on another's pasture; and here the condition of a slave is not included, for, although a slave is a thing, yet he is the personal property of his master.

Thirdly, it is a right in virtue whereof a person must suffer something to be done to his property by another, or forbear to do some act, to suffer or forbear to do which he could not be compelled, compatibly with his natural freedom, were it not for

1 I. 2, 2.  
2 D. 8, 1, 1.
the servitude. One man may allow another to draw water at his well, or promise not to build his house so high as to obscure his windows, in both of which cases a service is created.

Fourthly, this act or forbearance is for the benefit of another; and this is requisite, since a real service cannot be originated for the mere amusement of another.

Fifthly, the right to a service attaches either to a thing as an incident thereto, or to a person as such; hence servitutes are of two kinds, reales sive prædialæ et personales, for if every possessor of the object have a right to the service, the service is clearly real, but if it be granted to an individual for the term of his natural life, it is clearly personal: thus, if Sempronius grant Titius his neighbour the right to draw water from his well, Titius can exercise this right, but not a subsequent owner of Titius's house or his heir, but if the right be granted to Titius's house, then the subsequent owner thereof can exercise the right, which is a real servitude or service.

Such rights as these are for the mutual accommodation of neighbours, and are consequently matters of a private nature, but contracts between private persons will not be valid when they perniciously affect the public good, and here the principle of ita utere tuo ut alterum non laedas is applicable.

§ 935.

There are certain general maxims applicable to services which serve as useful guides in this matter; and, firstly, res propria nemini servit, a service must always attach on the property of another, for the owner has the service not jure servitutis, but jure dominii.

Secondly, servitutum non eâ naturâ est ut aliquid faciat quis, sed ut aliquid patiatur aut non faciat, a good service consists in suffering and forbearing, not in doing, and is of a purely passive nature; consequently, a promise to do a certain thing, such as keeping another's land cultivated, would create no service, but merely a jus ad rem, binding the promissor and his heirs. But if a man promise that all future owners of his estate, not being his heirs, successors singulares, shall plough another's land, neither is a service nor even a jus ad rem created, for servitutem res debet non persona, res autem facere non potest; and Labeo says, "Servitutem non hominem debere sed rem." This rule was probably established with a view to the remedy.

Thirdly, servitutes are indivisible because incorporeal. The consequences of this are manifold; firstly, all the heirs of one who promises a service can be sued for its fulfilment, heredes servitutem promitterit tenentur in solidum, and, vice versa, singuli heredes stipulatoris solidum petunt, each heir can sue for the fulfilment of the entire service; secondly, the whole estate is subject to the service less a special restriction to one part of it,

1 P. 60, 16, 86.  2 P. 2, 14, 38.  3 P. 8, 5, 6, § 2.  4 P. 8, 5, 6, § 2.  5 P. 8, 1, 5.
may be limited as to time;

must have a causam perpetuam.

Fourthly, a servitus may be temporali in diem until, or ex die from, a certain period; and if this condition be infringed, the prætor grants exceptio doli or pacti.

Fifthly, a servitus must have a causam perpetuam, that is to say, must in its nature be such as to be always available without active interference; thus, the right to take water from a spring would be a good, and from a cistern a bad service. Nevertheless, the prætor will bring equity to the relief of one in possession of such faulty service.¹

In Germany and England services may consist in faciendo, a practice which sprung out of the foederal law.

§ 936. Servitutes are either reales, otherwise prædiales, or personales. Servitutes reales are either rusticae or urbane, which latter may be affirmativa or negativa.

Servitutes rusticae are,—iter, actus, via, aquæductus, aquæhaus-tus, pecoris ad aquam adpulsus, glandis legænda, jus pascendi, compascui, calcis coquendi, arena fodiendi, crete eximenda, pedamenta sumendi.

Servitutes urbane are principally as follow:—oneris ferendi, signi immittendi, projiciendi et protegendi, stillicidia et fluminis, non altius tollendi, altius tollendi, fenestraum, luminum, ne luminibus officiatur, prospectus, ne prospectui officiatur, non propisciendi, cloacæ, fumi, latrina.

Servitutes personales are:—usufructus, usus, habitatio, operæ servorum.
SERVITUTES REALES.

§ 937.

Real services attach to landed estates, pradia. The estate enjoying the service is termed praedium dominans, and that suffering it praedium serviens.

Praedia rustica are distinguished from praedia urbana, not by situation, but by the use which they serve; thus a praedium urbanum may be in the country, and is such as is used for the habitation of man, and not connected with agricultural pursuits; the mansion being sometimes termed pratorium, but under praedia rustica are included all such buildings as serve for agricultural purposes, for the habitation of the bailiff, villicus, and his family, sheds and stabling for beasts and horses, and those termed adifrica fructuaria, consisting of barns, granaries, cellars, and all buildings in which produce is stored.

Services in the English law are incorporeal hereditaments, and, as Blackstone informs us, have never been reduced to any regular system of division, and that no complete enumeration of them is to be found in our books. They consist, as we have seen, in the Roman law, in rights in alieno solo, and may be classed under profits, such as the right of fishing and agisting cattle; and easements, which are rather a matter of convenience than profit, such as the right of way, &c. Since Blackstone wrote, Mr. Gale has treated, with great success, on the latter, and is worthy to be consulted on this branch of law, where the analogy with the Roman system will be found so striking as to lead to a conviction that it was derived from that classical source.

§ 938.

Servitus itineris, from eo, is the right of a footpath, on which however, a horse may even be ridden if the place allows of it; its width has not been ascertained, and appears to have varied.

Servitus actus is the right of driving cattle, a beast of burden, or a chariot, but not a cart, which first must, however, not be laden; in which case it was said to be an actus plenus. Its width was four feet over all; being, moreover, in a measure regulated by the locality, in the absence of a defined agreement.

Servitus via is the right to drive a loaded cart or waggon through another's ground, including the haulage of timber and stone; its width was four feet over all.

And here it is to be remarked that the actus comprehends the itineris, and the via both.

In a via sixteen feet at the turnings, otherwise where straight

1 Suet. Calig. 37; P. 50, 16, 198.
2 Columella de re Rust. 1, 6.
3 Varro de LL. 4, 4, p. 7.
4 P. 8, 3, 1, 21; 8, 4, 23.
5 P. 8, 3, 23.
6 P. 8, 3, 9, pr. 7 & 11.
7 Varro de LL. 4, 4, p. 6; Festus v. Actus.
8 P. 8, 3, 13; § 2 & 23, pr.
9 P. 46, 4, 5, pr. 7 & 13; Thib. l.c. § 764.
10 P. 8, 3, 7, pr.
Servitus aquaeductus was the right to convey water by canals, bricked trenches, or pipes, through another's land. Some aqueducts were public, but others for the use of private farms, to which this service particularly applies.

Servitus pecoris adhaustum adpulsus is the right of driving cattle to water at another's spring, pond, or brook.

Servitus glandis legendae was the right of gathering acorns. Servitus pascendi is the right of grazing cattle, in English law termed agistment, on another's pasture.

Servitus aquahaustus, or haurienda, is the right of taking water from the spring, fountain, or pond of another.

A right of way in England may be either attached to a particular house or land, where it is said to be appurtenant, or in Roman law a real service; or annexed to the person of the grantee, where it is said to be in gross, or in Roman law a personal service. And as the law will presume that he who alienates a piece of ground to another intends to give him the power of enjoying it, a right of way will accrue to it as of course, and in like manner a lessee has free entry to carry away emblements after the termination of his tenancy. The Twelve Tables justified a man, who had a right of way over another's land, in passing over any part of such property when the ordinary road was out of repair, which corresponds in general with the law of England.

Of like nature is the right of water-courses, which may generally be defined to be the right a man has to the benefit of the flow of a river or stream; but this right is confined to pastures and lands from which the fruits have been harvested.

If the number of the cattle has been fixed, the lambs dropped subsequently on the land will not be included. Cattle infected with a contagious disease clearly cannot be so agisted. But if the number be left uncertain, it must be determined by the necessity of the dominant estate.

Jus compascendi, the right of joint agistment, is termed in Germany Mithut. In the above case, the owner of the pradium serviens was excluded only where the pradium dominans could lay claim to something certain.

Servitus compascui consisted in the right of many proprietors reciprocally to agist their cattle on each other's land, or where...
many jointly exercise the servitus pascendi in common on the land of another. This, in Germany, is termed Koppelhut and Koppelweide.¹ This right may be granted between two proprietors by request, merely in the form of a personal service, jure familiaritatis.² Thibaut³ thinks that implication will not interfere in the latter case, if the possession be clearly made out.

Servitus calcis coquendi is the right of burning lime on another’s estate.

Servitus arenæ fodiendi is the right to dig sand on another’s land.

Servitus cretæ eximenda is the right of taking a white earth resembling pipe-clay from another’s estate; it is earth which was used for dyeing and coloring their white garments.

Servitus pedamenta sumendi was the right of cutting props and poles in another’s copse.

§ 939.

Under res superficiales were included in the Roman law all such rights as one party may possess in the property of another. The jus superficiarium does not supersede, but only restricts, the right of the dominus directus, or owner of the fee; and hence superficies may be placed under the head of services:⁴ the possessor of such right is termed a dominus utilis, yet his rights are to be distinguished from those of the emphyteutical proprietor, whereof hereafter.

When the dominus directus of an immoveable grants to another a superficies or superficiarium, be it a building or aught else⁵ thereupon so closely attached, or therewith so intimately connected,⁶ that, according to the maxims of Accession, it must pass to the owner of the soil or remain thereupon.⁷ In such case the owner of the soil has a property in the superficies,⁸ and can vindicate it as his property.⁹ On the other hand, the Superficiary possesses many rights which, for the period of his occupation, cause the jus superficiarium closely to resemble that of the actual proprietor, the lord himself.

§ 940.

Servitutes reales, or real services, properly so called, are annexed to the farms from which they are due. We have already seen of what nature rustic services are; and, bearing in mind what constitutes urban services, we will pass to them, premising a few words on the law of buildings in Rome. According to the laws of the Twelve Tables, every house was obliged to have around it a certain space, so that each habitation was isolated: this space

¹ Münter von der Koppelweide (Hagemanns und Günthers Arch. 4, Th.)
³ 1. c. § 754.
⁴ P. 30, 1, 86, § 4.
⁵ P. 8, 3, 13, pr.
⁶ P. 43, 17, 3, § 7.
⁷ Heilff. de Superf. Gies. 1682 (op. V. I. T. 3); Thib. Syst. des P. R. § 772, n. x.
⁸ P. 43, 18, 2; P. 39, 2, 49; P. 50, 16, 49.
⁹ P. 43, 18, 7, § 4.
Many urban services could not exist.

Houses built in stacks having an ambitus.

Constantinopolitan building law.

Servitus oneris ferendi. Services on private buildings.

Servitus signi immittendi. Public not liable thereto.

was termed *ambitus*¹ and extended two feet and a half round the house, for the purposes of repair and safety in case of fire; and so long as this system of isolation existed, many of the urban services which hereafter accrued could not have had an existence, more especially the *servitus oneris ferendi*; but when the number of citizens increased in Rome as well as in other populous cities, it was found practically difficult to uphold the strictness of the old rule, and one *insula* or stack of buildings came to contain two or more dwellings, subdivided, perhaps, or constructed anew in this form, to save the two and a half feet *ambitus*, to which must be attributed the origin of services. Under Nero the old building law was re-introduced; and later, Antoninus and Verus Augusti issued rescripts to the effect that, *in arcâ, qua nulli servitutem debet, possed dominum vel alium ejus voluntate adificare intermisso legitimo spacio à vicinâ insula*.³ From this period houses began to be connected and surrounded by a common wall, and this continued notwithstanding some laws of Constantine the Great and succeeding emperors, who ordained, by particular constitutions, how far distant a private house should be from a granary or a public place.⁴ Lastly, the famous constitution or Building Act of Zeno regulated the matter quaod Constantinople, and it will be well to refer to this law, and Dirksen’s admirable commentary thereon.

§ 941.

It sometimes occurs that a neighbouring house is charged with the service *oneris ferendi*—that is, of supporting on its wall, vault,⁵ or its pillars, some portion of the neighbouring house; but it was not a part of the service that the *columna serviens* should be repaired by its owner upon the principle *paries oneri ferendi, uti nunc est, ita sit*.⁶ This was, then, a matter of special stipulation, *ut refereret, lapide quadrato vel lapide structili*, or by any other work. Gallus Aquilius asserts this compact to be contrary to the nature of services;⁷ and it is true it consists in, *faciendo*, but it is overruled by that of Servius, who admits the validity of like conditions in such services:⁸ during the repairs the proprietor of the *praedium serviens* is, however, not obliged *onus ferre*.⁹ It has already been seen that the end of a beam cannot be placed in the wall of a town on account of its public character,¹⁰ and that consequently such are not liable to services.

§ 942.

*Servitus signi immittendi* was the liability to suffer that a tile, beam, stone, or piece of iron—for under *tignum* all these, and

¹ Varro de LL. 4, 4, p. 6, Festus v. Ambitus.
² Tac. A. 15, 42.
³ P. 8, 2, 14.
⁴ C. Th. 8, 12, 4, & 46; C. 8, 10, 9, & 11; Brit. A. R. S. J. 2, 4; Caj. Obs. 1, 4, 3.
⁵ Strake Rechtl. Bed. 4, B. 158, Bed. 6 P. 8, 2, 33.
⁶ P. 8, 2, 14.
⁷ P. 8, 2, 5, § 5.
⁸ P. 8, 5, 6, § 2 & 5.
⁹ P. 8, 5, 753; P. 8, 5, 6, § 2; Thib. l. c. 10 § 929, h. op.
indeed all building materials, were included—should be placed in the wall for the benefit of the neighbour. A question now arises as to whether, if when the beam so placed in a neighbour’s wall by right of this service rot, it may be replaced by a new one. A text of Pomponius,1 termed by commentators textum mirabilem, because it does not appear consonant with common reason, prohibits it. *Si cum meus proprius esset paries, passus sim te inmittere tignum, que antea habueris, si nova velis inmittere, prohiberi a me potes; immo etiam agere tecum potero, ut eà quae nova immiseris tollas.* Now, by law, any one in whose wall a tignum be placed without the existence of a service, is at liberty to remove it of his own authority; but here an action is spoken of: this must then be understood of the case where a service of a specific tignum or tigna exists, and the possessor of the prædium dominans puts in nova such as had not been there before, and were beyond the stipulations of the service.

§ 943.

**Servitus projiciendi et protegendi.** The first is the right of building anything which overhangs a neighbour’s ground without touching it, whereby the air, &c. is obstructed.2 The second is the right of building a protectum or roof against the weather, which overhangs another’s property, which cannot be done without a service, as the air and sun belong, pro tanto, to the possessor of the ground so shaded.

**Servitus stillicidii vel fluminis recipiendi vel avertendi** consisted in the right of conducting the rain water from the roof of one’s house into a neighbour’s garden or area, or of receiving such water from his roof. In the case of eavesdrop the lord of the dominant estate must not make it lower, although he may make it higher:3 the lord of the servient estate, on-the other hand, is permitted to erect works under the eavesdrop only where such constructions do not impede the drop of the water.4 The Roman houses were built in the form of court-yards: round these squares the apartments were ranged and covered by an impluvium or slanting roof, converging towards a cistern in the middle of the court, which contained the rain water; consequently, in the dry climate of Italy, it was more often an advantage than the reverse to be able to obtain as large a supply as possible of rain water: in many cases the roof was flat; and in such case it was necessary to place gutter tiles, imbrices, to convey the water to its reservoir. The stipulation for a service therefore ran, flumina stillicidia ut nunc sunt ita sint. Varro5 thus distinguishes between flumen and stillicidium,—Fluvius, quod fluit, item flumen; à quo lege prædiorum urbanorum scribitur: stillicidia fluminaque ut ita fluant cadantque.

1 P. 8, 5, 8, § 2 & 14.
2 P. 8, 3, 2; P. 50, 16, 242, § 2.
3 P. 8, 20, § 5; Thib. l. c. § 753, n. g.
4 P. 8, 2, 20, § 3, compare with § 6; Thomasius de Serv. Stillicidii, § 68, et seq.
5 De LL. 4, 5, 8.
THE ROMAN CIVIL LAW.

Inter hæc hoc interest, quod stillicidium; eo quod stillatim cadat; flumen quod fluent continue, drippings and drainings.

§ 944.

Servitus non altius tollendi was in restriction of that natural law which allows a man to raise upon his own ground a building to an infinite height: the maxim of English law is, cujus est solum ejus est usque ad caelum, restrained by another maxim, ita uteret tua ut alterum non ledas. For the raising a house to an indefinite height not only affected the prospect and light of another, but also intercepted the free circulation of air; hence the practice of stipulating ne altius tolleret, and the origin of the servitus non altius tollendi. Many reasons contributed at a later period to cause this point to be regulated by law. We are led to believe that this question was under consideration even during the Republic, though it is more than probable that no law was made upon the subject, from a disinclination to interfere with public and vested rights. Augustus, however, introduced a law into the Senate, which limited the height of houses to seventy feet, on account of the frequent ruins which had occurred. After the burning of the city, Nero restrained the height of houses, although we are not told within what bounds. Lastly, Trajan limited the height of houses to sixty feet, giving as a ground the liability to fall, and the ruinous expense on such event taking place. Severus and Antoninus adhered to the same rule, which was also observed in Constantinople.

§ 945.

A servitus altius tollendi would arise in case of any one having agreed, or being obliged to permit another, to build an upper room or upper chamber on the top of his house; but here a difficulty arises,—how could the public law, which restricted houses within a certain height, be infringed or altered by private compacts? This probably was rather the remission of a service existing, as where a house was already within the height allowed by law, and by virtue of an agreement between the parties was not to be raised higher, and was to overlook the neighbour’s house; the abandonment of this contract would give a servitus altius tollendi, by rescinding the servitus non altius tollendi, by which it had been agreed that the house should not be raised to the full height allowed by law: altius tollendi, on the other hand, arises when a man promises to allow his neighbour to build his house higher than the laws passed simply for the reciprocal protection of neighbours permit.

1 P. 8, 2, 9, & 24; P. 39, 2, 26; P. 8, 6, 8, § 5.
2 Suet. Aug. 83.
3 Strab. Geo. 5, 162.
4 Tac. An. 15, 42.
6 J. Oiseb. ad Caii Inst. 2, 1, 3.
7 C. 8, 10, 12, § 1; P. 8, 2, 2.
8 I. 4, 6, § 2; P. 44, 2, 26; Carpzov,
Zeno's law contained several provisions with which the neighbours were allowed to dispense, by a mutual understanding; one of these was, that whosoever rebuilt his house should retain *veterem formam*, and this is law in Constantinople at the present day; he should not deprive his neighbour of light or prospect, except, indeed, he left a space of twelve feet between his own and his neighbour's house, or his neighbour permitted him by special contract so to build; if this permission was obtained by contract or prescription, *si longo tempore ita edificatum habueram*, a servitus *altius tollendi* accrued. Where the law was positive, and no option or power of dispensation was permitted, of course a private contract could not be allowed to interfere with public enactments.

The fact appears to have been that there were laws as between man and man, though of general application, dispensable by special agreement as far as regarded the contracting parties.

§ 946.

Servitus fenestrarum arose when one stipulated to make windows in his own or in the wall of another, in which it was prohibited by law to make any alteration without the neighbour's permission; this may, however, be included under servitus luminum.

§ 947.

Servitus luminum was connected in a measure with the servitus *altius tollendi*. As it is an unpleasant thing to be overlooked, it is permitted to any one to obstruct the windows which his neighbour might choose to beat out towards his premises, and whereby he was so overlooked; whence the stipulation for the service *lumina uti nunc sunt, ita sint*. Again, it was sometimes agreed that a house should not be raised, without the consent of the neighbour, so as to obstruct the light or his prospect.

§ 948.

The servitus *ne luminibus officiatur* is by some distinguished from the above. The better opinion appears to be, that this ser-
The servitus prospectus and the servitus ne prospectui officiatur has a great analogy with the foregoing, and the distinction between the two governed by the same rules. Prospectus, says Paulus, etiam ex inferioribus locis est, lumen ex inferiore loco esse non potest. The light does not come from below, consequently one may build up level with a window without obstructing the light, although he may the prospect.

Two of the greatest commentators are of opinion that there is no difference between servitus prospectus and prospectui ne officiatur, but a third affirms that the first applies to one who would beat out windows, the latter to one who hath already beaten them out. Lastly, Puffendorf thinks it a mere matter of degree, that by the first expression is meant that some prospect must be left, by the second that the prospect should not be in the least wise injured.

Servitus non prospiciendi is founded on a promise made by a person not to look out of a window.

The jus luminum, or right of light, in England consists in the right every man has of free access for the sun’s rays to his windows without obstruction from his neighbour, and this is acquirable by prescription, for although within the term of twenty years the occupier of an adjoining property may build up a wall on the boundary line, and so obscure the light or view of his neighbour’s house, built within that period on such boundary, yet if he let that period elapse, an indefeasible right accrues to the occupier of such house, and his light and view must not be impeded. But a service of this sort may be conferred by grant, and for such easement a rent is usually reserved in the deed by which it is

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1 Hopfner, Com. ed Web. § 362, and authorities there cited.
2 P. 8, 2, 16.
3 Dunellus Com. Jur. Civ. lib. 11,
cap. 5; Noodt. ad Pand. tit. de 5 P. N.
5 Tom. 2, Obs. 196, et Anamad. 33.
6 Voet. L. 8, T. 2, § 12.
granted, whereby the prescription is prevented from running, and an indefeasible right is barred.

§ 952.

Servitus cloacae was the right of driving a drain through another's property. The sewers were one of the most stupendous and best organized works of ancient Rome, the position of which upon seven distinct hills materially aided the work of Tarquinius Priscus. A tax was imposed for cleansing them, termed cloacarium; and those condemned to punishments, on account of crimes committed, were employed in this work. These sewers, before the burning of the city by the Gauls, passed through public lands and ways, so that each house could get directly at them; but after that event, the position of the streets and individual houses having been changed, supplementary drains were also rendered necessary under the dwellings, which in the hurry of reconstructing were built without regularity or regard to the original plan: this gave rise to private drains discharging into the old public ones, which from the above reason must of necessity sometimes pass through the property of a neighbour; this rendered a stipulation to that effect indispensable, and was the origin of the servitus cloacae. No obligation, however, lay upon the servient to allow faces to pass through, but only the drain-water. The right to have drains passing through another's property is also an English service, nor is it restricted as it was in Rome; any substance, excrement included, may be passed through such drains, the right being in the drain, without reference to its purpose.

§ 953.

Servitus fumi gives a right to conduct smoke into the upper parts of a house, and is the converse of the jus stillicidii.

§ 954.

Servitus latrinae arises when a person obtains the right to construct a secret chamber in a place and in a manner not permitted by the common law and statutes.

§ 955.

Servitutes, services, are either affirmative or negative: where the possessor of the pradium serviens is obliged, aliquid pati, to suffer something, the service is affirmative, as the right of way across another's ground; but where he must refrain from doing
some act, the service is termed negative, as the prohibition to build in a certain position on own proper land.

An affirmative service by grant constitutes a mere *jus ad rem*, for the real service must accrue by the exercise—that is, the *dominans* must exercise his right at least once, with the knowledge and without opposition on the part of the *serviens*, which amounts to a constructive delivery in *quasi traditio*, which cannot be had in the case of a negative service, such as the obligation not to beat out windows.

To grant a valid service, the grantor must be the real owner of the *prædium serviens*, for if he have but a temporary, qualified, or limited estate, he can only grant a service dependent on his own title—that is to say, a *servitutis revocabile*.

A *servitus discontinua* is the converse of a *servitus continua*, the first being in force from time to time, the latter being uninterrupted.

Inasmuch as personal cannot be erected into real services, such as are termed *regulares* or *ordinariae*, but as the converse is not true, and real services can be made personal, such are termed *irregulares* or *extraordinariae*.

A real service, when for purposes of pleasure, must be applicable to every possessor of the dominant estate, then termed *prædium voluptuarium*.

§ 956.

The distinction between real and personal services consists in the parties thereto: a service of real requires two things, a *prædium dominans* and *serviens*, but if personal but one, a *res serviens*; secondly, personal consist, like real services, in a *jus in re*, and are not confined to a mere *jus ad rem*; thirdly, they are confined to the person of the grantee, nor do they pass to his heirs without express limitation; in like manner, they are inalienable by sale or gift, nor has every owner of a certain estate claim to them as of common right.

All services except usufruct use habitation, and the duties of slaves can be granted as personal or real.

§ 957.

*Usufructus est jus alienis rebus utendi fruendi, salva rerum substantia.*

Usufruct is, then, the right of using the things belonging to another, without infringement of their substance; it is, moreover, a corporal right dependent on the title of the real

1 Vin. ad I. 2, 3, § 4.
2 Puffendorf, T. I, Obs. 32, § 14.
3 C. 45, 51; P. 8, 6, 11, § 1.
4 Inst. L. 2, Tit. 4, § 5.
5 P. 8, 1, 1; L. 2, 4, § 1.
6 P. 8, 3, 5; L. 2, 4, § 1.
7 Prax. 15 b. 3 Hft. S. 382-92.
8 Lühr. Mag. 2 b. 4 Hft. § 495-7.
9 P. 43, 20, § 11 & 3 pr.; P. 8, 1, 8, pr.
10 P. 43, 20, § 11 & 3 pr.; P. 8, 1, 8, pr.
Usufructus is the right to consume what the property of another produces, without damage to the substance, as the crops of an orchard or of a farm; hence usufruct includes use, from which it is clearly inseverable.

Thus usus could be willed without the fruit, but not contrary. Because fruition implies consumption of the object without reservation even of the substance; and as in this case nothing would remain, it is clear the legacy would be of none effect; but a use willed without fruit is limited by the mere necessity of the user, and not only ought the substance of the thing to be intact, but its condition also; thus use contained less than usufruct, and could not be willed in part as the latter could, neither could it be transferred, by gift, hiring, or other mode, to another party, like usufruct.

The origin of the right of usufruct is supposed to be founded in the law of last wills: by this contrivance a life-interest was left to a party without any remainder to his heirs, since at his death the usufructuary right became re-integrated with the property; but, at a later period, usufruct became acknowledged by law by means of a stipulation followed by tradition.

Usufruct was in the beginning confined to bodies only, but was subsequently permissively extended to quantities and incorporeal rights, the fructuary, as he was termed, undertaking to restore like quality, quantity, measure, or value, at the termination of the usufructuary contract, which has been hence termed a quasi usufructus. Usufructus jure civilis legari potest earum rerum, quarum salva substantia et fructus potest esse facultas et tam singularum rerum quam plurium, id est, partis. Senatus consulto cautum est, ut etiam, si earum rerum qua in abusu continentur, putata vini, olei, tritici, usufructus legatus sit, legatarii redemittatur, usufructus ad legatarium pertinere desierit.

The rights of the usufructuary consist principally in the use of the chief object and its appurtenances; in the property in all natural or civil proceeds thereof; in the inability to transfer by cession; in the ability to transfer the exercise of rights. Hence it follows that an accretion which is no fruit does not accrue to

1 P. 7, 2. 2 P. 7, 8, 14, § 1. 3 P. ibid. 12, § 1. 4 P. ibid. 19. 5 I. 2, 4, § 1. 6 P. 7, 5, 7, 8; I. 2, 4, § 2. 7 Ulp. Fr. 24, 26, 27; P. 7, 5, 1; P. 33, 2, 24; P. 7, 9, ult.; P. 35, 2, 69; C. 3, 33, 1.

This scutum is of a period subsequent to Cicero; for, in Top. 3, usufructus is made applicable to bodies, not to rights and quantities. But Maurius, Sabinus, Nerva, and Cassius commented upon it; P. 7, 5, 5; § 3; and as they flourished under Tiberius, it is probable that it dates under Augustus, Vid. et Heinec. A. R. 2, 5, § 7.

9 P. 32 (5), 91, § 5; P. 7, 15, § 6; P. 7, 6, § 1; Voet. L. 7, T. 1, § 27; et seq.
10 P. 7, 1, 7, § 1 & 59, § 1-2.
11 P. 19, 2, 12, § 2, 3, & 9, § 1; Stepper de Locat. et Conduct. Usur. Lyn. 1728.
the usufructuary, neither a treasure to the child of a slave, a accessi-

tion to the estate which may be clearly distinguishable, but the usufructuary may, to carry out his right as such, change the form of a piece of fallow, if it be done in a judicious and advantageous manner, constructing buildings for harvesting produce, but for no other purpose. But, generally, he must not change the form of buildings, even though he be specially permitted to ornament and improve, neither may he complete such as are in an unfinished state; hence it appears that the usufructuary has only received the use of a building, even although it may be useless to him by reason of its unfinished state.

§ 958.

Re uti is to use a thing without prejudice to the substance, as for instance to ride a horse or wear a garment, and this is therefore termed usus minus plenus, or the using a thing only as far as strict necessity requires. Re abuti, on the other hand, is to consume in the using, as to ride the horse to death or wear out the garment; this is usus plenus, and includes the using a thing not only as far as necessity requires, but also for the purposes of convenience and pleasure, but is not to be confounded with misuse.

Usus, the use of a thing, is counted among personal services, servitutes personales, and may be exercised in three ways. A thing may be so used as to be consumed in the using; secondly, so that its condition is not changed; thirdly, so that the object itself is neither consumed nor perish in the using. The word utor implies a necessary use, while fruor rather conveys the idea of a thing being devoted to the purposes of pleasure or luxury; it, moreover, denotes more especially that species of usage first mentioned, by which the substance itself is consumed, which is by no means the common signification of usus, which must therefore not be confused with fruition.

Usus per se confers no right to the fruits, although many changes took place in this respect in later times by means of common and inexact expressions, and the rules of interpretation, to the end that no needless impediment should be thrown in the way of business. If the object, then, be such as bears no fruit, the usuarius possesses a perfect right of use even beyond the limit of his actual requirements, at the same time he must not cede the exercise of his rights altogether to another.

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1 I. 2, 12, § 37; P. 7, 1, 68; Bynkenhoek Obs. L. 5, c. 7; Meister Prolus ad L. 28, § 1, de Usur. 68, pr. de Usur.
2 P. 7, 1, 9, § 4; Bynk. L. 5, c. 1.
3 P. 7, 1, 13; § 5; Voet. § 24; Glück Pand. 9 B. § 653 contra Feuerbach Civil Ver. 2 B. n. 4; & Madai. im Archiv. Civ. Prax. 15 b. 3 Hft. nr. 16.
4 P. 7, 1, 13, § 6, 7.
5 P. 7, 1, 13; § 4, 7; P. 7, 1, 44.
6 P. 7, 1, 6.
7 P. 7, 1, 23, § 4; 7, 8; P. 7, 1, 44.
8 Hor. Epist. 2, 2, 190.
9 P. 7, 1, 2, 15, § 1 & 5.
10 Donat. not in Ter. Prolog. And.
11 Sen. de Vit. Beat. 70.
12 P. 7, 6, 44. pr. 14, 16, § 3, 50, 25, § 1.
If the object be of a productive nature, it can be used without the enjoyment of the fruits being necessary to enable the usuary to exercise his rights, who receives, then, none of the fruits; 

on the other hand, he cannot fully exercise his rights without ususfruct, he is permitted to use so much as is requisite for the necessities of himself and those who belong to him, nor does the use of res fungibles differ from the usufruct of them; the usuarius, however, as the sole person benefited, must bear the burdens incident thereto.

§ 959.

Habitatio is in its basis very similar to usus, and has a certain analogy to usufructus, but it differs in respect of intensity from the first, for there is more in habitation than in use, for whoso hath the right of habitation can not only inhabit the whole house, but let it out on hire for habitation, but for no other purpose, although it is doubtful whether he may do so gratuitously, which is not permitted to an usuarius; on the other hand, he has a more restricted right than the usufructuarius, who may let for other purposes. Whoso hath this service may not only use the house for his necessities like a usuarius, but may also have chambers purely for pleasure. If a jus habitatio be conferred in perpetuum on any one donatione inter vivos, the grant is nevertheless revocable by heirs. But the right is not extinguished, as in the case of usus, by non user, or by capitis diminutio.

Habitatio, then, is a real right to inhabit the house of another without injury to the substance, and differs from the servitus habitationis, and the tenant has a mere jus ad rem as against the landlord. The old jurists disputed as to the nature of this service, the Sabinians holding it to be a usus, the Proculeians a usufructus, but Javolenus contended it was a peculiar service, differing from both, which view Justinian has adopted. Sed si cui habitatio legata siue aliquo modo constituta sit, neque usus videtur, neque usufructus, sed quasi proprium aliquod jus: quanquam habitatioem habentibus, propter rerum utilitatem, secundum Marcelli sententiam, nostra decisione promulgata permisimus non solum in ea degere sed etiam locare. In England a leasehold is a chattel interest, and a chattel real because it savors of the reality.

§ 960.

Both usufruct and use, and habitation, exist in the English law, under the denominations of leasings, holdings, &c. The owner

1 P. 7, 8, 12, § 3, 4; I. 2, 5, § 4.
2 P. 2, 5, 12, pr. 1 & 22, pr.
3 P. 7, 5, 5, 2.
4 Some jurists assert he can only use the parts strictly adapted to habitation, consequently neither cellars, store-rooms, nor summer-houses, &c.; but this has been held not proven, although Heineccius supports this view, A. R. 2, 5, § 5.
5 C. 3, 33, 10.
7 P. 7, 8, 10, pr.
8 C. 3, 33, 13; I. 2, 5, § 5.
of the fee may let his land or house, for the difference of the
Roman law does not exist in this respect. If by lease, the letting
is ruled by the conditions contained therein; if by yearly hiring,
by the common law applicable to such cases. The *usufructuarius*
of the Roman law corresponds to the tenant, and the *dominus*
to the landlord of the English law. A lease, however, is assignable
at law in England, which it was not in Rome; and so far from
it not being permitted to finish an unfinished house, the tenant,
whose lease requires him to keep his house in good repair, is
bound to deliver it up, not in the repair in which he received
it, but in good repair, without reference to the condition in which
he first took possession of it. Special contract in most cases
supersedes these questions, and disputes more often arise on the
construction of the deed than upon the common law right, and
are thus transferred to another category.

§ 961.

*Opera servorum* is a service of a purely personal nature, and
consists in a right to the service of the slave of another, which,
inasmuch as it only extends to the use of the labor of the slave, is
to be distinguished from usufruct and use.¹ One peculiarity of
this service is, that it is hereditable² and indivisible.³ Of like
nature is the right to the labor of animals, *opera animalium.*⁴

¹ P. 7, 7, 1, & 5. ² P. 33, 2, 2. ³ P. 7, 9, § 3; Scheppe, Rom. Priv.
⁴ P. 7, 9, § 3; P. 38, § 1; R. 2 B. S. 199.
P. 45, 1, 72.
T I T L E  V I I I.


§ 962.

In the preceding title the nature of things has already been treated of, it now remains to show by what means these things can be acquired, and subsequently the right of property in them termed dominion.

To things extra patrimonium it will be unnecessary further to allude. Res communis publicae universitatis are humani, and res sacrae religiosae, and sanctae, divini juris; but both of these, being incapable of individual possession, are not acquirable by private persons, and as a natural consequence cannot be in dominio.

The things, then, to be treated are those in patrimonio, and these are also humani juris, being corporales, such as mobiles (fungibles), mancipi, and nec mancipi; or immobiles, always connected with land, being either mancipi and nec mancipi, for this term applies to both, as has been seen; or incorporales, such as servitutes reales, which are rusticae or urbane; or personales, such as usufructus, usus, habitatio, or opera servorum.

§ 963.

Possession is so important an ingredient in acquisition, that it will be necessary to allude to it before proceeding to the modes mentioned in the Institutes. Possession regarded as a fact resembles occupancy, but in its abstract sense it does not belong in this place, but will be treated of in the succeeding Title under Rights.

Savigny confutes the maxim Possessio non est juris sed facti, and holds possession to be right and fact combined. The clearest way of explaining this is, first, to consider possession as a fact, that is, in its meaning of corporeal holding with intention to hold; and, secondly, in its abstract and legal sense as a right; hence, in one point of view possessio est facti, in another, juris, and in a third
The duration of the physical power of possession.

As to immovables.

Moveables cannot be regained by force.

§ 964.

The physical power of possession endures so long as circumstances permit a person the free disposal of an object without another having authority to deprive him thereof, for the intervention of the authorities is sufficient evidence that physical possession has been lost.

With respect to immoveables, if a party covertly, or by force of arms, assumed the possession of another's property, he may be expelled by force, if done as soon as the fact become known; but it is otherwise in the case of moveables, for no man has a right to regain the possession of a moveable by force, he must seek his remedy in an action. Hence the possession of an immoveable is...
Possessio—occupatio. 35

lost by the owner knowing that a usurpator is in possession and not immediately thereupon ejecting him, or by failure in the attempt to do so, for then recourse must be had to the law to oust such adverse possessor. But the possession of a moveable is lost on its passing into the hands of another, no matter by what means or by what agreement. English lawyers express this by the phrase, the lien passes with the possession. Here lien expresses the physical capacity to hold; and if a man give another a piece of money for the purpose of being changed, and the receiver detain it, a question of debt arises between the parties, the money having been parted with willingly.

The possession of an immovable is lost by neglect to eject.

The distinction between moveables and immovable arises clearly ex necessitate rei. A man may enter and occupy the house of another, and hold it against the owner's consent, but he cannot be said to so occupy his moveable or chattel; for in the first case a consent may be presumed, and continue to be so presumed, until the contrary is shown by some overt act of the owner; but in the second, the overt act should take place at the time of the improper assumption, and if it do not take place, then a tacit consent is presumed.

§ 965.

The Institutes enumerate three natural modes by which property may be acquired:—occupatio, accessio, to which some civilians add fructuum perceptio; and lastly, traditio. Grotius distinguishes acquisition into original and derivative; of the former description is occupatio, inventio, or finding alluvium, and the like; and the latter, modes by which a vested property is transferred, as by gift, sale, or exchange.

With respect, then, to the first of these divisions, the general rule obtains res nullius cedit occupanti; or, according to the Digest, quod nullius, est in bonis, id ratione naturali occupanti conceditur. Hence that which belongs to no particular proprietor becomes the property of the possessor by right of common occupancy; from which divine and holy things, before discussed, and those of a public nature, although nullius in bonis, are excepted.

The second mode, accession, follows a principle undoubtedly founded on natural law; namely, that whatsoever property produces naturally belongs to the same owner as such productive object, which supplies one of the leading maxims of the civil law, accessorium sequitur principale.

Modern civilians insist that fructuum perceptio, or gathering, is a mode of natural acquisition differing from accession, and under which it cannot be reckoned, because there is no annexation, but, on the contrary, a severance.

The third mode is tradition, which appears rather a civil than a natural right, yet Justinian says, Nihil enim tam conveniens est

1 L. iv. 6, § 1.
2 P. 43, 3, 3.
§ 966.

Occupation arises out of natural law, of which it is a maxim that any one may occupy an object which has no owner—referring to the original state of mankind, and the inherent right of taking from the common stock a sufficient quantity of whatever may be necessary to subsistence. This question is fully explained by Blackstone, to which the reader may refer, as it would be foreign to the object of the present work to recapitulate his detailed elucidation of this point. It suffices to remark, that inasmuch as this right exists only during life, and is of necessity the law which allows a man to inherit from his parents by succession or testament, must be based on civil right.

Occupation is the seizing of a corporeal object which has no owner with the intention of appropriating it.

The first requisite of occupation is adprehensio, or seizure, and the strictness with which this word is to be construed depends in some measure upon the nature of the object into which the question of certainty also enters. If the object be so far within control that it is merely necessary to declare the intention of appropriation, as in the case of a hunter who has killed an animal, such seizure is sufficient, for it cannot escape his possession; but a piece of floating timber is not occupied until secured by being brought ashore, lashed to a fixed object, or anchored. Notwithstanding which, with respect to minerals in the field, it suffices to declare the intention of appropriation in the presence of the object, but not in its absence.

That the second requisite is corporeality is clear, because no other is capable of apprehension, consequently rights cannot be acquired by occupancy.

The third requisite is vacancy, that the object have no owner—that is, that it be in the state in which it was at the beginning of the world, and before the existence of the human species. Things may be without owners by nature, as wild animals, uninhabited islands, and the like; or they may become so by dereliction or intentional abandonment, or by reason of the impossibility of finding the true owner, as money buried, whereby it has become res nullius; and it is an established rule that quod nullius est in bonis id ratione naturali occupanti conceditur.

The most convenient mode of classifying objects acquired by occupancy will be under wild animals, things taken in war, and things found.

1 I. 2, 1, § 40. / 2 P. 43, 2, 1, § 21.
2 Com. B. 2, c. 1, p. 3, 8; B. 2, c. 16, p. 258; B. 2, c. 26, p. 400. / 4 P. 41, 1, 3.
§ 967.

Animals are either wild, *fera*, tamed, *mansuet*, or of a tame nature, *mansuefacta nature*, and the distinction which is acknowledged the foundation whence certain distinctions are drawn.¹

Wild animals, *fera animalia*, are such as live in natural freedom, avoid mankind, and when taken endeavour to free themselves from restraint; but when such animal, having been caught and shut up, has changed its wild nature, and no longer tries to escape, *si ex consuetudine abire et redire solet*, it is called *mansuefactum*, tamed.

Tame animals, *mansuefacta nature*, are such as do not wander, but live in the company of mankind, as oxen, sheep, dogs, &c. Nevertheless, the animal that is tame in one country may be wild in another, and the same *genus* may consist of wild and tame species, as in the case of swine, geese, and ducks.²

Bees, peafowls, and pigeons, are instances of tamed, not tame animals,³ and this passage in the Institutes imports that they only belong to the owner so long as they fly away and return, but are wild by nature; nor if they have settled upon your trees do they, in the case of bees, belong to you till you shall have covered them⁴ with a hive, no more than the birds which have built their nests there, or the young in those nests before taken: hence it is lawful for any one to take the honeycomb thence, though a prohibition lies against a trespass on the land; if, however, bees be once hived the honeycomb belongs to the possessor, and although the swarm leave the hive the property in them continues so long as they remain in sight, or there be a reasonable probability of their recovery. It may be questioned if house-pigeons and peafowls in a yard are not to be looked upon rather as tame animals.⁵ The provisions of the Roman law are, however, perfectly clear.

§ 968.

Wild animals, be they beasts, birds, or fishes,—in short, whether of the earth, air, or water,—vest by the law of nature in *sua natura* him who first takes them in virtue of the *adprehensio*. Nor does it matter on whose land, or whether with or without the owner's consent, since the locality involves another and an entirely distinct question. *Et nec interest feras bestias et volucres, utrum in fundo suo quis capiat, an in alio*. Plane, *qui alienum fundum ingrediatur, venandi aut aucupandi gratia, potest a domino, si is praeviderit, prohiberi, ne ingrediatur*,⁶ and an action of trespass will lie for damages done to crops or the like, and the value recovered against the trespasser, for the owner cannot forbid the *actus occupationis*, but only the *actus injectionis*.

¹ The terms *mansuetum* and *mansuefactum* are sometimes confounded.
² Leyser Spec. 440, m. 1.
³ I. 2, 1, 15.
⁴ I. 2. 1, 14.
⁵ Puff. de Jur. Nat. et Gent. 4, 6, § 5.
⁶ I. 2, 1, § 12; P. 47, 10, 13, § 7; ad fin.
§ 969.

Such beast remains then the hunter’s property, so long as he can retain possession; but if it escape, it again becomes res nullius: escape is understood to be perfect when the object shall be out of sight, or it be not probable that the pursuit will be successful.

If the birds or beasts be slightly wounded, they are not held to be taken, for they may still escape and become the property of him who seize them, quia multa accidere solent ut feram vulneratam non capias; unless, indeed, there be a custom to the contrary, such as generally obtains among huntsmen, of which the judge shall determine according to such circumstances as may appear; for Justinian\(^1\) decided an entire caption, \textit{manu et laqueo}, to be necessary; and if a hawk be known by his bill, or a stag by something usually worn about his neck, he shall be sent back to the owner.\(^6\)

If a wolf take a lamb from a shepherd, and another rescue it, it shall be returned to the shepherd, if the possibility of his recovering it remained, otherwise not; and the same in the case of shipwrecked goods, an action for recovery lies.\(^5\)

Again, if a wild beast be taken in a trapper’s snare, \(^4\) and another take and release it, the first consideration that arises is that of place—whether public or private. If the latter, whether it belong to the trapper or to another; if to another, whether there was consent or no; whether the beast could or not have escaped by struggling. If on the trapper’s own ground, or on that of another by his permission; and if it were unlikely that the beast could escape, an action lies for taking him away or setting him free.

With respect to tame animals, \textit{mansuefactae naturae}, the case is different—such as fowls, geese, and the like, which, if they be disturbed and fly away even out of sight, are still yours, and the detention of them with the intention of profit, \textit{lucrifer causâ}, is theft.\(^5\)

§ 970.

With respect to the restriction in the right of the property in animals \textit{ferae naturae}, by positive law it is urged that to hunt, fish, and fowl in public places is originally permitted by the laws of all nations,\(^6\) and confirmed by the civil law,\(^7\) as convenient for the furnishing of public markets; and, consequently, that a prince acts injuriously to his subjects who prohibits the free exercise of this natural liberty, unless it shall have been resigned by consent. The subsequent and later law of most nations has, as well as immemorial custom, however, vested this

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\(^1\) I. 2, 1, 13.
\(^2\) Ibid.
\(^3\) P. 41, 1, 44.
\(^4\) P. 41, 1, 55.
\(^5\) Ibid. 5, 6.
\(^6\) P. 5, 2, 12.
\(^7\) P. 5, 2, 16.
power in princes. The ground is,—that princes have the same
authority in public places held of them, as private persons have in
their own particular estates. This power, too, may be for the
common good: first, for the preservation of the several species of
untamed creatures, which would soon become extinct if a general
liberty of chase was allowed; and because, in a civilized state of
society, neglect of husbandry and trade by the mass of the popula-
tion would follow: again, the hunting of wild beasts and other
untamed creatures is frequently attended by a crowd of idlers in
arms, which may be injurious to the public peace, and give rise to
quarrels and contests with the owners of the soil, as well as
respecting the division of the game in a case where all may pretend
to an equal share. Hence the feudal law determined that, whatever
accrues by hunting, fishing, or fowling, does not belong to
the occupant, but to the prince or those who claim under him;
for this power of the prince is now allowed to extend even to
prohibiting private persons from hunting on their own estates
without due license, which is, in fact, the real foundation of the
English game laws.

§ 971.

Occupancy, as far as it concerns real property, is much
restricted to a single instance by the laws of England; namely,
where a man was tenant pur autre vie, or had an estate granted to
himself only (without mentioning his heirs) for the life of another
man, and died without alienation during the life of the cestui que
vie, or him on whose life it was holden: he who could first enter
on the land might lawfully retain the possession as long as the
cestui que vie lived, by right of occupancy, and in this respect
resembled the hæreditas jacens of the Romans.1

The grantor having parted with all his interest during the life of
the cestui que vie, it did not revert to him; neither did it escheat
to the lord of the fee, for all escheats must be of the whole and
entire fee; nor to the deceased's heirs, for there were no words of
inheritance in the grant; nor to his executors, for they could not
succeed to a freehold. The statute of frauds2 have in effect
abolished the title by common occupancy by making such estates
(sec. 3) devisable by will; or heritable as assets by descent (6);
or failing a special occupant, vesting it in administrators and
executors.

Under the above circumstances, with this difference that the
grant were to a man and his heirs, pur autre vie, such heir would
succeed by special occupancy, which is the law to this day.3

Thus, there being no estate of inheritance, the heir cannot
strictly be said to take by descent; others, however, maintain he

1 Co. Litt. 416, as to title by occupancy,
vide Geary v. Beacraft, Carter 39, Vaughan
187.

2 29 Car. II. 33; 14 Geo. II.; 7 Will. IV.;
1 Vic. 54.
3 Atkinson v. Baker, 3 T. R. 229, as
to heirs and executors.
THE ROMAN CIVIL LAW.

English law of occupancy.

The title by common occupancy does not extend to copyhold, for the estate, says De Grey, C. J., is never out of the lord; yet it does not follow there can be no special occupant, when the lord has granted the estate to one and his heirs during the life of A. B., and in all others a very forced and improper phrase; and there is great force in what is said by Vaughan, that the heir takes it as a descendible freehold. Such, however, is the language of the law.

§ 972.

Occupation by war, *occupatio bellica*, is founded upon the *adprehensio* by one state of the property of another, as a state without respect to its component members, on the ground of indemnity for an insult offered, and with a view of safety for the future. The property of an enemy cannot be termed *res nullius*, although in the same category.

Such right of occupation cannot accrue in a civil or intestine war, for this is no *bellum justum*; nor even in a *bellum justum* between belligerents with respect to moveables, until they have been reduced into actual possession within the fortified places of the other; or with respect to immoveables, until they shall have been so surrounded with fortifications as not to be resumable without the destruction of such protecting works, for a simple act of volition is not sufficient. Pomponius says that immoveables accrue to the belligerent power *ager hostium publicatur*, that is, *republicae adquiritur*; but it appears that moveables belong to the individual soldiers, under the head of booty distributed by the conquering prince, whence the feodal practice probably originated. This, however, must be denied in all cases where plundering has been forbidden. Upon this point a great variety of opinion exists among the jurists. Hopfner thinks that what one individual has taken from another under such prohibition is his own, otherwise where a corps collectively has taken it, and that then it belongs to the state. But surely where there has been a prohibition of plunder, things so wrongfully taken still belong to the original owners; but if they cannot be found, to the conquering state, rather than to individuals, who have acted against the obligation

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1 Vaughan, 201; 2 W. Bl. 1150; 6 T. R. 291; 7 Bing. 188.
3 P. 41, 1, 5; § 7; I. 2, 1, § 17; however, appear to assert the contrary, *quae ex hostibus capitum jus gentium statum nostrum fiant*; but when may they be said to have been taken?
4 P. 49, 15, § 1; Ibid. 19, § 3; Ibid. 30; Voet. Pand. 49, 15, § 3.
5 P. 41, 1, 20, § 1; vide et P. 6, 1, 15, § 2; P. 21, 2, 11.
6 We have seen, in a former part of this work, § 90, that the system of appropriating a part only of the lands of a vanquished people was practised by the Romans, and adopted by subsequent barbarous Teutonic nations.
7 L. c. § 302; vid. et Cujac. Obs. lib. 19, c. 7; Donell. Com. lib. 4, c. 21; Merenda. Controv. lib. 1, c. 22; Ziegler de Jur. Maj. lib. 1, c. 23, § 79; Vinn. ad § 3, 2, § 17.
imposed upon them, and that to appropriate them is a theft upon the state to which the soldier so wrongfully taking them belongs.

§ 973.

The *jus postliminii*, which has been before alluded to, particularly with respect to persons, is the reacquirement of rights lost in war. Thus, if an enemy seize land and fortify it, but afterwards abandon the possession, the land reverts into its original dominion; but if the object captured, being moveable, be recaptured after the enemy has obtained full possession of it, as remarked in the above paragraph, it must be redeemed from whoso may have recaptured it, for the right is lost, and *postliminium* does not operate; if, however, it has not been so reduced to possession, the original rights revive with the recuperation. Things are said to be *recovered*, persons to *return jure postliminii*.

§ 974.

*Inventio*, or finding, is properly of inanimate things, and may be considered either with respect to all things whatsoever, whether moveable or immovable, which were never in the possession of any person, as an island in the sea, precious stones and gems in the sea or on shore, being on the surface, which, by the law of nations, belong to him that finds them first; for it is not sufficient that the finder first see or move toward them, but that he be the first to lay hands on them if moveables, or if immoveables to make an entry; or with respect to those things which are left by their owners, as treasure privately hidden and derelicts. Treasure of all descriptions, which has been concealed during a long time, so that the proprietor of it is unknown, *cujus non estat memoria*, and cannot be discovered, belongs entirely to the finder; but several cases may arise with regard to the place and person finding: as to the first, let the object be supposed to be found by the proprietor of the land on his own ground; in this case, there can be no doubt of its being his. The finder may, however, discover the object on land which has no particular owner, such as a *locus religiosus*; if he do so without the help of witchcraft, conjuration, or magic, the thing is likewise his without impeachment; if, however, he shall have used such illicit arts, he has incurred the penalty of death, and the forfeiture of the object to the fiscus. When the treasure is found upon the ground of another by *mere chance*, as a farmer may do in ploughing ground, half belongs to the finder and half to the owner of the soil; if the land be private, this moiety accrues to the proprietor of the soil; if public, to the crown or city to which such land belongs. But if the finding resulted from a deliberate search in the land of another, the

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1 § 406, h. op.<br>2 I. 2, 3, 18 & 22; P. 41, 1, 7, § 3.<br>3 P. 41, 2, 3, § 3; C. 8, 41, 13.<br>4 P. 43, 7, 8 & 2; P. 44, 3, 44.<br>5 P. 41, 3, 31.<br>6 C. 10, 15.
object then wholly accrues to the owner of the soil; and a person who pays a mere canon by way of rent\(^1\) for a long term of years is, for this purpose, held to be owner of the soil.

The distinction drawn between accidental and deliberate search arises out of the supposition, that in the latter case the finder had so much reason to believe the existence of the object that it could not be said to be lost or abandoned, consequently the appropriation of it by another is punishable as a theft.

But why, it may be asked, is such finder allowed only half, and not the whole, by the right of occupancy? This may probably be explained by the conflict which here arises between the right of occupancy by which the object belongs to the finder, and that of accession by which it belongs to the owner of the soil.

With respect to the finder, if a man employ a workman to seek for a hidden treasure, such, when found, wholly accrues to the employer, because he had some information or suspicion of its presence, and the presence of the workman was not a mere accident; but if such workman, being employed for another purpose, casually find a treasure, he has a claim on it to the extent of a moiety.

§ 975 - The English differs from the Roman law in that a *thesaurus inventus*, in English termed *treasure trove* or found, be it money or coin, gold, silver, plate, or bullion, hidden in the earth or other private place, the owner of which is unknown, belongs to the Crown; but if he that hid it be known, or be afterwards discovered, the owner, and not the sovereign, is entitled to it.\(^2\) Hiding is distinguished from abandonment, for it must, in the words of the civilians, be *vetus depositio pecuniae*: hence, if a man scatter his treasures in the sea, or upon the surface of the earth, it belongs, by the right of occupancy, to the first finder.

This difference in the law was probably introduced by the feodalists when the barbaric nations drove out the Roman settlers, who on their flight secreted their property in the expectation of returning; and as this was part of the property of a nation driven out, it was looked upon in the light of property recovered by the right of postliminy, and as no particular owner could be assigned to it, the property was vested in the Crown, which was supposed to be cognizant of its existence, and to succeed to the property of those who fled and abandoned it. And so important was this branch of the public revenue considered, that the punishment for appropriating it was formerly death.

§ 976 - The next question is as to what things are, and what things are not, capable of being found, and such are derelicts\(^3\) or things wilfully

\(^1\) P. 6, 2, 31, § 3. \(^2\) 3 Inst. 132. \(^3\) 1. 2, 1, 40.
thrown away and abandoned with an intention to leave them for ever; such, by the law of nations, belong to the person that finds them. This seems only to be understood of such moveables as may be thrown away; yet there is no doubt but that immoveable things also may be derelict: thus, when a man has quitned the possession of his ground with an intention that it should not be reckoned part of his estates, it returns to its former condition, has no possessor, and becomes again subject to the first occupant.

By the Roman law, things lost by negligence or chance are not to be esteemed derelicts, for there is no intention of abandonment, and the finder in both these cases ought to save himself from the imputation of theft, by giving public notice of such finding; and if no owner appear, a poor man may retain them as sent by Providence, but a rich man would do well to apply them to charitable purposes. However, it is agreed that the finder ought not to demand a gratuity if he have been at no charge, though he may fairly receive what may be voluntarily offered to him.

Neither must we reckon things thrown away upon necessity to be derelicts, as goods thrown overboard in a tempest to lighten a vessel, though it be in some degree a voluntary act; for he who may seize them on the sea or when driven on shore, with the intention of retaining them, is guilty of theft, and punished by confiscation of all his goods; neither can the Exchequer in so calamitous a case pretend a title to them. A distinction is drawn as to the animus; thus, if a person cast things overboard to preserve them they are not abandoned, but if he knew they would perish they are so. On the other hand, if the finder save them with a view of reserving them for the rightful owner, he commits no theft; it is, however, otherwise, if he have the animus of appropriation.

§ 977.

The law which regulated the question of lightening a ship under pressure of necessity was the lex Rhodia de jactu,\(^1\) which requires a passing notice in this place. It was provided in the sec. 8 of that law that goods thrown overboard were not derelicts, but still belonged to the former owner, and this was the adopted maritime law of Rome.

Every one who, by damage to his own property on shipboard, shall have saved that of another, can demand an appropriate indemnification or salvage,\(^8\) for the recovery of which an action can only be brought against the master of the vessel, who was bound to procure for the loser salvage from those whose goods had been preserved.

The greater part of the provisions of this law relate to similar

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\(^1\) P. 41, 2, 3, § 6.
\(^2\) P. 47, 2, 43, § 7, 8, 9.
\(^3\) I. 2, 1, § 48.
\(^4\) C. 6, 2.
\(^5\) P. 47, 2, 43, § 11.
\(^6\) P. 14, 2, 1, § 11.
\(^7\) P. 14, 2, 1.
\(^8\) P. 14, 2, 1, salvage is a per-centage on the object saved or salved, as a reward for its preservation.
contributions and indemnifications, under certain circumstances, respecting goods thrown overboard, and damage done to the vessel.

The Digest\(^1\) gives us the authority by which the Rhodian law was adopted as the rule to govern maritime matters. Endæmon of Nicodemia having complained to the Emperor Antoninus against the customers of the Cyclades, for having seized the wreck of a ship of his on the coast of Italy, the emperor answered that he was indeed master of the world, but that maritime matters were to be judged by the law of Rhodes, in so far as it should not be contrary to any law of his own. Augustus is reported to have given a similar judgment, \(\text{Eγώ μὲν τοῦ κόσμου κύριος, δὲ νόμος τῆς βαλάσσης. Τῷ νόμῳ τῶν Ροδίων κρώνεσθα τῷ ναυτικῷ, ἐν διὸ μὴ τῖς τῶν ἡμετέρων ἀυτῷ νόμοις ἐναντιοῦται. Τούτῳ δὲ καὶ ὁ θεότατος Αἴγουστος ἔκρυμεν.}\)

The Rhodians were a maritime nation in the height of prosperity long before the Romans occupied themselves with such matters. The Romans incorporated many of the Rhodian laws into their own codes. Harmenopolus tells us that most of these laws were very ancient, and Strabo speaks of the Rhodians as possessing the empire of the sea.

Should a ship be stranded or cast away, every one must save as much of his property as he can, as in case of a fire;\(^2\) thus, as has been above remarked, it is not to be inferred, that he who throws things overboard for the purpose of lightening the vessel, intends to abandon them after the fashion of a derelict, but is to be likened to a man overladen with too heavy a burden, who might put part of it down by the roadside, and return afterwards with others to fetch the remainder.\(^3\)

Antoninus the Great, finding that by the imperial law the revenue of wrecks was given to the prince's treasury or fiscus, restrained it by an edict,\(^4\) and ordered the goods to remain the property of the owners, adding this humane expostulation, \(\text{quod enim jus habet fiscus in aliena calamitate, ut re tam luctuosa compendium sectetur.}\)

It is, moreover, a capital offence to destroy persons shipwrecked, or prevent their saving the ship. And to steal even a plank from a vessel in distress, or wrecked, makes the party liable to answer for the whole ship and cargo.\(^5\)

§ 978.

The common law of wrecks in England originally vested all wrecks in the king,\(^6\) upon the supposition that they were derelict and without an owner. Henry I. declared that this should not operate where any human being was saved from the wreck; and Henry II.\(^7\) by charter, extended this to animals, because by their instrumentality the true owner might be discovered—if he was so

\(^1\) P. 14, 2, 9.
\(^2\) P. 14, 2, 7.
\(^3\) P. 14, 2, 8.
\(^4\) C. 11, 5, 1.
\(^5\) P. 47, 9, 3.
\(^6\) Vide & 17 Ed. II.
\(^7\) 1 Rymer Fred. 36, 26 May 1174.
Accessiones.

Accessiones are discovered within three months, otherwise they belonged to the king or lord of the franchise. Richard I. confirmed these concessions, and extended it to heirs being the children, brothers, and sisters, of an owner who had perished. Henry III. extended it further, to marks on the goods.

The first statute of Westminster extended the time to a year and a day, according to the customs of Normandy. At present, proof of the property takes them out of the category of a wreck. This revenue used to be granted out to lords of manors; but if the king's goods were wrecked, they might be reclaimed after the year and day, and the sheriff had power to sell those only which were perishable.

*Jetsam* is where the goods remain under water. *Flotsam*, where they remain floating. *Ligan*, where they are buoyed; and these may all be recovered by the owner, and are distinct from wrecks, under a grant of which they will not pass.

§ 979. Accessio is the second natural mode of acquisition, and consists in the union of the accessory thing with the principal property of the acquirer.

Accessio est modus adquirendi jure gentium quo vi et potestate rei nostra aliam adquirimus. The expressions *jure naturali* and *jure gentium* are evidently used indiscriminately in some parts of the Institutes.

Accessiones may be naturales, artificiales, sive industriales et mixtae. To these some add fortuitae, which are those which mere chance has added, such as a treasure hidden in the ground.

Natural accessions are such as are added to the original substance by the operation of nature, without premeditated human design.

Artificial or industrial accessions accrue through the presence of such design.

Mixed accessions are produced by the combination of the two former conditions.

§ 980. Thus, in all questions of accessions, the general rule is—

**Accessorium sequitur principale.**

It is first, therefore, necessary to consider which of the two is the principal thing, for it follows not that the accessory may not often be of more importance of the two. A slave girl would be the principale, her offspring the accessorium naturale; a field the principale, the alluvium the accessorium naturale; a robe the prin-

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cipale, the embroidery thereon the accessorium industriale. On the contrary, a painting has been held to be the principale, the tablet the accessorium artificiale, but without good grounds; the stone in a ring, or the ring itself, may be the principale, according as the stone was placed to ornament the ring, or the ring to carry the seal. In sowing and planting, the ground is the principale, the crop the accessorium mixtum. Napoleon affected to claim the sovereignty of Holland by a legal title, founded on the law of alluvium. "The Rhine," said the Emperor, "is mine, and the land through which it flows: Holland is an alluvial country, formed wholly by the deposit of the Rhine, as the Delta of Egypt is by that of the Nile; therefore, Holland is a natural accession to the kingdoms subject to my rule, and belongs to me." The legal conceit of the Emperor was as inconvenient to the Dutch as his droit du plus fort.

§ 981.

The last species of natural accessions is—insula in flumine nata, alluvio, vis fluminis, or avulsio, and alvei mutatio.

The word alluvion implies, however, a gradual increment. Quod per alluvionem agro tuo flumen adiectit jure gentium tibi adquiritur; est autem alluvio incrementum latens per alluvionem enim id videtur adici quod ita paullatim adicio ut intelligere non possis quantum quoquo momento temporis adiciatur, in which it differs from avulsio, which is a violent separation of a piece of ground by the force of a river, and its annexation to the property of another and neighbouring estate, in which case it belongs to the previous owner; until by length of time, and without any measures taken to prevent it, they cleave together and become firmly united. This may to some extent be demonstrated by the fact of a tree fixed in a piece of ground which was torn away, spreading its roots into another part. It, however, appears, an equitable action will lie to recover the value from the new acquisitor, because it is a maxim neminem alterius detrimento et injuria fieri locupletiorem.

§ 982.

If an island rise in a public river (not in the sea, for then it belongs to the occupant), and become fixed in the middle of a river, it is in common to those who possess the land nearest to the bank on each side of the stream, according to the breadth and length of each frontage. If it lie nearer to the frontage of one estate on either side than to that of the other, that inheritance or estate has as many more feet or yards in the island as it is nearer to it. But if the whole island is nearer to one estate than to the other, that estate claims the whole. This is to be understood where the

1 P. 34, 3, 19, § 2 & 20.
2 I, 2, 20.
3 I, 2, 21.
4 P. 6, 1, 23, § 4 & 5; I, 2, 1, § 34.
5 I, 2, 1, 12.
lands on each side have not any certain limits and bounds; for if they have, there can be no claim or title to such an island, but it belongs to the occupant. If the river divide its course, and make an island of land by uniting its streams afterwards, or shall overflow a ground, that island does not belong to any occupant, or to the neighbouring estates, but to its first owner. An island rising in private rivers and lakes wholly belongs to the private persons who are owners of those lakes and rivers.

And here it will be well to exemplify these various contingencies, and the way of determining the right of property, in such cases.

Of an island in the middle of a river.

Draw the line \( x, y \), lengthwise through the middle of the river. From the boundaries of the adjacent lands let fall the perpendiculars \( m, n, o, p \), upon the line \( x, y \).

A then gets the piece \( a \); B gets \( b \); C, \( c \); and D, \( d \).

But should an island rise—not in the middle, but entirely on one side of the line \( x, y \), it is wholly the property of those whose property is on that side of the river. Thus,

Of an island rising on one side of the middle.

A taking \( a \); B, \( b \); and C, \( c \).

Islands do not rise so readily in the sea as in rivers, owing to the powerful action of the waves; if they do, they become, as res nullius, the property of the first occupant. Not so with respect to islands formed in rivers on the continent,
flows through a second chanel, \( a, c, a, c \), converting \( x \), which was formerly land, into an eyot. The property in such eyot or islet is not divisible, but remains vested in its former owners, as before the change took place.

If a river forsake its natural chanel, and gain a new one upon the land of another, the old chanel is divided between the lands in the same manner as an island rising in a public river, if those lands were not within certain bounds and limits, and the new chanel is now made as public as the river. For though the river shall afterwards return to its old course, yet in strictness the new chanel shall also be divided among the owners of the adjacent grounds, as the old one was; but in equity and reason it ought to be restored to the owner. It is a question, but without reason, whether, if the course of a river which is the boundary of an empire be changed, the limits of the adjacent territories are not also changed?

Here the possessor of A gets the piece marked \( a \); B, \( b \); C, \( c \); and D, \( d \); but in this case the parties in question must possess the lands in virtue of which they claim as *agri arcifini* abutting immediately on the river.

*Agri arcifini quasi fines arcent* are estates given by the state to the possessor, the boundaries of which are not fixed; whereas the *ager limitatus* was granted for a given number of cattle or *adsignatus* marked out by boundary stones, but it was only in the first of these cases that the owner had a right to his proportion of the deserted channel; in the second it accrued to the state.

Temporary inundation suspends, and continued inundation destroys, the right of the owner.*

§ 983.

Bracton, who evidently in most cases follows the civil law, lays down the same rule for England; but it appears that islands rising in a river belong rather to him to whom the piscary of the river appertains. If a river between two lordships gain imperceptibly on the one, the owner loses his ground; not so if the river’s course be changed by a violent flood, for then the imperial law

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1 I. 2, 1, § 23.
2 P. 41, 1, 7, § 5.
3 P. 43, 12, 1, § 7.
4 I. 2, 1, 24.
ACCESSIONES NATURALES—FRUCTUS ANCILLÆ.

applies. With respect to an island rising in the sea, the civil law gives it to the first occupant, the English law to the king. With respect to increments on the sea-shore, if insensible, the law of England gives them to the owner of the soil, on the principle of \textit{de minimis non curat lex}; but if sudden and considerable, the \textit{jus commune} assigns it to the Crown, for the sea is the king's, so the ground upon which it flows: for like reason, if the sea encroaches upon private land, it accrues to the Crown, for the shore between high and low water mark belongs to the Crown.\(^1\)

§ 984.

The question now arises, whether the brood of cattle and slaves ought to be classed under the \textit{fructuum perceptio}; that is, under natural or industrial accessions. The conjunction of the male slaves and cattle. may fairly be considered as a \textit{cultural}, and the allatation, &c. as a \textit{cura}, which would bring the young of cattle under the \textit{fructuum perceptio}; nor has the operation of nature so much to do with the question as that element, for in the case of \textit{alluvium} the result of the increment cannot be prevented by human means, whereas in the other case it can be so. Justinian makes a distinction, placing the brood of slaves under natural accessions, and those of cattle under \textit{fructuum perceptio}. Thus, he says,— \textit{In pecudum fructum etiam foetus est sicuti lac, pilus, et lana: itaque agni hædi vituli et equuli et succuli statim naturali jure domini fructuarii sunt. Partus vero ancillæ in fructu non est; itaque ad dominum proprietas pertinet, absurdum enim videbatur, hominem in fructu esse: quum omnes fructus rerum natura gratia hominis comparaverit; \textit{etiam} quod ex animalibus dominio tuo subjectis nata sunt, eodem jure (id est accessione) tibi adquiruntur. It is then clear that, in treating of the Roman civil law, the partus ancillæ must be classed among natural, and the \textit{foetus animalium} under the \textit{fructuum perceptio}.

In Justinian's age slavery was discouraged, and we find an evident bias against it pervading all his legal works.

The principle \textit{servus homo est} had been acknowledged for many centuries; nevertheless, in the neighbouring Greece as well as in Constantinople, a slave, even in the 14th and 15th centuries,\(^4\) was a chattel, and subject to the arbitrary will of the master, save the \textit{jus vitae et necis}; besides, although the Emperor says it is anomalous to consider a man to be a "fruit" for whom nature has created all "fruits," yet this mode of reasoning, however true in the point of view of natural law, where no distinction can be recognised between one man and another, yet in a civil law point of view it is fallacious, for the \textit{homo} is no free agent, and is absolutely in the position of an animal, by the civil law, with the one exception above mentioned. Following, then, the rule so dis-

2 I. 2, 3, § 37.  
3 I. 3, 3, § 19.  
4 §§ 458, 461, 462 & 463, h. op.
The brood of slaves is a natural accession by procreation, and accrues upon the principle that the young, before it is brought forth, is part of the bowels of the mother, by whom alone it is nourished, while she on her part is fed by her owner; hence the maxim, *meum est quod ex re mea superest.* It is erroneous to suppose that the issue is the joint property of the owner of the male and female in slaves, *partus sequitur ventrem*, clearly because the paternity is always more or less uncertain. Thus the Spartans traced their pedigrees through the female side; and the principle of the Ottoman law is correct, which says the female is my ground on which you sow; hence their law claims the allegiance of the issue of all their female subjects, without reference to the nationality of the father. House-born slaves were by the Romans termed *vernae*, by the Greeks *διάρροις*, and were more highly prized than others.

§ 985.

Artificial or industrial accessions are such as arise by the industry of man, and consist in *specificatio, pictura, confusio, adjunctio, commixtio, inaedificatio, scriptura*.

With respect to such accessions, the property of the owner is either in the *principal* or in the *accessorial*. If the owner of the principal thing cause the junction, the whole is his; but here the property may be *reversible* or *irreversible*, in which latter case, under certain circumstances, an indemnification may be payable to the owner of the accessorial thing. Irreversible are such things as cannot be severed without damage to the whole, hence called *extinct*, *extinctae res vindicari non possunt*; but if otherwise, the party has an *actio ad exhibendum*, to cause this property to be recovered and delivered to him. This can be done in all cases where the severance can be effected. Thus, if one embroider gold thread upon my robe, the thread belongs to me as an *accessorial*; not so before the junction was effected. The case is otherwise with a diamond fixed in a gold ring, because it can be severed without damage to either the ring or the stone, whichever may be considered the *principal*. With respect to accessions, it is asserted by many writers that the rules of the Roman law in several of these cases are not founded on reason or the natural equity of the law of nations, but are merely positive and civil for the benefit of trade and commerce; indeed, there is scarcely any point on which the lawyers have held opinions so varying, or one more open to mistaken inferences: for natural equity seems to suggest, in some cases of accession, that the thing should be common property in proportion to that which each may have severally con-
tributed; and that, in the case of acquiring by profits, allowance ought to be made to the person in possession, at least for his expenses and labour: fixed rules have, however, been laid down, guided by certain maxims, in order to attain some degree of uniformity, which cannot therefore be questioned here, but which must be set forth and elucidated as they are found.

The most important point is the bona or mala fides of the appropriator; and if the latter be proved, he is exposed to an actio furti or condicio furtiva: if the former, three contingencies may arise,—either he has paid the full value, or less than the full value, or nothing; in the first case he is bound to pay nothing more, in the second case the deficit, in the last the value of the thing employed.

The second case is, when the owner of the accessoril thing causes the conjunction of both, which may be most conveniently elucidated by an example. A party buys a stolen robe, and has it embroidered in gold, or has lace put thereon. If the severance can be made without damage, as in the latter case, if not in his possession, he brings his actio ad exhibendum, and vindicates it: but if, as in the case of the embroidery, the severance cannot be made without damage, the question of bona and mala fides arises; if the latter, he loses the property in the accessoril thing; if the former, he is either in actual possession of the combined things or not; if the former, he can exercise the right of retention or lien till he have lost his lien, he has no remedy by Roman law—in practice it would, however, not be refused, on the principle "that no one ought to enrich himself at another's expense."

§ 986.

**Specification** is, when from the substance or matter of another person a new kind of body or species is produced. By such an accession, he that made the new species is the owner of the whole, if it cannot be easily reduced to its first state and condition, as when wine is pressed from another's grapes, or a ship is built of another's timber, the wine or the ship cannot be claimed. But if the matter may be recast into its first condition, as a vessel or statue made of another man's silver or brass, the property belongs only to the owner of the substance whereof it was made. In the first case, where the matter cannot be reduced to its first state, a just payment must be made, e.g., for the grapes and timber; and in the other, a reasonable allowance for the workmanship. But this determination only takes place in favor of the workman, where the work was designed for his own use, and where he erroneously and by mistake thought the material was his own. For if it was made in the name of any other, it belongs to such person for whose

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1 P. 41, 1, 7, § 7.
2 P. 6, 1, 2, 3, 4.
3 P. 41, 1, 25 & 27, § 1.
use it was made upon the same terms; and if it be known that the grapes are another's, and yet a party proceed to make his wine or ship thereof, he loses his labor, and the whole accrues to the use of the owner, and an action may be maintained against him. The same distinctions are to be observed where the matter is partly the workman's and partly a stranger's, when the thing made cannot be reduced to its former state, but if it can, each shall have his share, or both may possess parts proportionally to their respective contributions.

In this case the difficulty is to distinguish as to when specification gives a right of ownership, and when not—which the four following cases are meant to exemplify:

I make wine from mine own grapes; here the wine is mine, not by the specification, but by right of property in the original matter.

A goldsmith makes a ring for me at my desire, out of my gold, which is nearly the same case as the former.

When the owner gives the matter, and another the labour, on the understanding that the thing produced shall be common: Neither does this give any right, for it is a question of contract and tradition thereupon.

But if I make a table from stolen wood, here the question of ownership arises.

The old lawyers differed much on this point. The Sabinians held the thing thus produced to belong to the owner of the material, not to the specificant, as the maker was called, considering specification as conferring no possessory title.

The Proculeians, on the other hand, assigned the new modelled substance to the specificant, thus annexing a possessory title to specification. Justinian settled this dispute by a series of decisions, taken for the most part from Ulpian, Paulus, and Gaius. In the cases where a new form produced from mine and another's material, or wholly from another's materials and not reconvertible into its original form, specification is a modus adquirendi; but when reconvertible, Justinian calls the matter stronger than the form, or the form than the matter if not so, which it must be admitted is a most unsatisfactory mode of reasoning.

Some remarks, however, arise on this question. 1st. The necessity of bona fides to the obtaining of ownership: many take this view, although it cannot be ascertained from the laws we have, as Bachov. and Voet. sufficiently prove. 2nd. Whether these decisions of Justinian obtain at present where the Roman

1 P. 10, 4, 12, § 3.
2 P. 6, 3, 5.
3 P. 41, 1, 27, § 2.
4 Vin. ad I. 1, 1, § 25.
5 Bachov. ad I. 2, 1, § 25; Voet. ad Pand. de Adqui. Rer. Dom. n. 21; vide et Harmenopolus, 5, 1, 22.
aw is used? Stryk urges good reasons in favor thereof, while others substitute other distinctions.

§ 987.

Pictura, painting, appears to involve a pure question of value. Paulus was of opinion that the picture followed the tablet, but Gaius thought otherwise, as considering by fiction the picture probably as the principal thing on account of its value, to which the emperor adheres, giving as a reason the dignity of the art of painting.

If, then, the painting be in the possession of the owner of the tablet, and the artist demand it, but refuse to refund the value of the tablet, he can be met by an exceptio doli mali. But if he who painted the picture, says Gaius, be in possession thereof, the proprietor of the tablet has an actio utilis against him; and if the owner of the tablet will not pay the value of the painting, he can be met by the exceptio doli mali—certainly so, if he who painted the picture were bona fide possessor.

If the artist or another purloined the tablet, the owner has naturally an actio furti.

This applies exclusively to moveable tablets; if fixed to, or drawn upon a wall, the case is different.

§ 988.

Confusio is the mixture of things that can be poured together in a fluid state, be they of the same or of different natures—as wine with wine, wine with honey, or gold and silver, which forms electrum.

If such confusion be made by joint consent of both owners, the substance so produced is in common, but the ground of the commonalty lies in the agreement, not in the confusion. The same rule applies whether the confusion have been intentional on the part of one owner only, or accidental; except, indeed, where a separation or severance may take place without prejudice, as in a mass of gold and lead; or if by the consent of one only, the things be confounded, and a new species produced, as in specificatio, for then he who made the mixture is proprietor of the whole. Confusion by accident is to be considered merely as a method of accession or acquisition of property, in which the award of proportions may afterwards be made rateably, according to the respective values of the matters before confusion.

When, without the consent of both parties, fluid or melted masses are so mixed that no severance is possible, and the confusion be made by accident, the adjudication of this common mass will be quantity for quantity, or measure for measure; but if it be made

\[\text{[References to laws and cases]}

\[\text{[Footnotes]}


2 P. 6, 1, 23, § 3.

3 1. 2, 1, § 34.

4 P. 41, 1, 9, § 2.

5 I. 2, 3, § 27.

6 P. 41, 1, 12, § 1.
without consent of the other party, and if the specificant have a good
title, viz., if he buy wine which has been stolen, and mix it with
his own, the strange property is acquired by the confusion; but if
he have not, then the case is one of stolen wine mixed with other
wine, or of two liquids of different natures being mixed, as wine and
spirits: in the first case the mixture is common, the confusion is
a modus adquirendi, and the division takes place as before; but in
the second case they are not so, because a kind of specification has
simultaneously taken place, and confusion in this case too is a
modus adquirendi. The indemnity to the other party is as
follows:—

If the specificant have given the full value, he is bound to pay
no more; if less, then the difference between the full value and
what he had paid already; but if nothing, in that case the full
value of the accessory object.

The species of confusion may be thus summed up,—
Confusion by mutual consent.
Confusion by consent of one party only.
Confusion by accident, or consent of neither party.
Confusion which produces a new species, and which is there-
fore inseverable.

Confusion, the confounded ingredients of which are severable.

§ 989.

In con or adjunctio, it must be considered which is properly the
principal thing, and which the accessory. Conjectures may be
made from the intention of the agent. And though the accessory
should be the most value, yet it does not lose the denomination of
an accessory; as purple is accessory in respect of a coarse
garment, purpura vesti nostrae intestu aut attexta; a jewel to a
gold ring, though gold may be accessory to the jewel—when
that is made for the convenience of its carriage; and the garment
may be accessory to the purple, when that is made for the sake of
it. We are apt to call a thing by the name of a principal with
respect to another thing when it is not, but perhaps they are both
principals, and usually go together, as a last will and a legacy;
therefore, if it cannot be determined which is the principal and
which is the accessory, such names ought not to be applied.

Where one thing is added for the sake of the other there is a
foundation for it, nec plus in accessione esse potest quam in principali

1 P. 46, 3, 78 ; Alciat ad L. 151; D. da
333, n. 4; Fachet Contro. lib. 11, cap. 51.
It must, however, be also observed, in this
case, whether the specificant operated upon
the property of the other in good or bad
faith. In the first case he owes a full in-
demnity to the owner. If a person dis-
honestly convert the matter of another into
a new shape, the law allows the owner of
the material the choice of demanding the
value of the material, claiming the produce
thereof, or its value, should it not be forth-
coming. P. 10, 4, 12; § 3; P. 23, 1, 13; P.
Civ. lib. 4, cap. 52.
2 P. 34, 2, 19, § 5.
3 P. 50, 17, 178; 1, 3, 12, § 5.
and then only can the accessory follow the principal, and the owner of that which is accessory must yield up the possession to the proprietor of the principal, for *cum principalis causa non consistat, plerunque ne ea guidem quae sequuntur locum habent.* This rule holds, though the addition of another person’s goods to mine own was knowingly and dishonestly contrived, for here only regard is had to the things joined, and not to the person, as before, in specification. The property of the things added is lost so long as the adjunction continues, yet an action lies that the things added may by sentence be severed and restored at least for the price and value thereof. If any one shall by mistake join something of his own to that of another of greater value as the principal thing, supposing it to belong to himself—if he have possession he may keep the whole till he shall have paid the value of the thing added; but if this were done wittingly and *mala fide,* it may be interpreted as a gift to the proprietor of the principal.

In the case of a stone set in a ring; this adjunction is called *inclusio*; on the addition by forging, soldering, or otherwise, of one piece of metal to another, *adferruminatio;* by plugging, *adplumbatura;* by weaving, or sewing; *intextura,* by embroidering; *atttextura,* by trimming.

Commixtio, or a mixture of solids, cannot be in common, unless by mutual consent. For if by accident, or by the act of one party only, two bushels of wheat belonging to two different persons be mixed, the whole heap ought not to be in common, for each grain remains the same, although it cannot easily be distinguished by its owner on an action brought. It lies, therefore, in the discretion of the judge to divide the whole heap, making a greater allowance to one in money or corn, if his grain was better or finer than that of the other. Here the argument against community laid down by Justinian is, *quia singula corpora in sua substantia durant,* and the emperor gives the instance of corn or two flocks being intermixed. Höpfner, however, puts the case of money or firewood being mixed by accident, in which case each takes by number or measure so many pieces or chords of wood; and this, he contends, gives a title by commixtion, which Justinian denies, ruling that the things are common. Faber holds a different opinion, but Brunnemann agrees with Höpfner.

The action to be brought is not *communi dividendo,* for the mass is not in common, but *rei vindicatio;* nor is it necessary that the grains should be distinguishable, but that it be ascertained how much belongs to each in the heap.
It would not be well to quit this subject without alluding to the view of Grotius, whose opinion is always entitled to its due weight, on account of the admirable reasoning and logic it contains; and who argues, first alluding to the dispute between the Sabinians and Proculians, that

"When any one had formed a thing out of another's materials, the Sabinians gave the property to him whose the materials were, but Proclus to him who formed or put it into such a shape, because he gave it an existence which it did not before possess. Ultimately, an opinion between both was adopted, viz., that if the matter could be reduced to its first or former shape, it should then be his who owned it before; if that could not be done, then it should be his who gave it its last form. But Cononius does not approve of this, and would consider whether the work or the stuff be worth most, and thus estimate, so that which was the greater was to prevail over the lesser value—an argument deduced from the opinion of the Roman lawyers respecting accession.

"But if we consider the natural truth, as by a mixture of several materials, there arises a common title to the thing so mixed in proportion to whatever each may have contributed,—of which also the Roman lawyers approved, because the right to such a mixture could not otherwise fairly be decided; so when a thing is composed of a matter and a form, if the matter belong to one and the form to another, then must it naturally follow that the whole belongs to each contributor in proportion to the value of each part; for the form or shape is a part of the substance, but not the whole substance, which Ulpian perceived when he said that the substance was almost lost by the alteration of its form.

"But though it be not unjustly decreed that he who undertakes another man's work and spoils his materials, either purposely or for want of that skill to which he pretended, shall thereby lose his labor, and forfeit all that to which he would be otherwise entitled, yet, since this has its penalty, it cannot be founded on any natural right; for though it be natural that every offender should be punished, yet nature does not determine that punishment, nor does she of herself take away any one's property for his offence.

"And to say that the thing of a lesser value must be included in that which is of greater worth, upon which Cononius founds his arguments, though it be natural in respect of matter of fact, yet it is not so of right. Wherefore, he who possesses but the twentieth part of an estate has as much right in that part as he who has the other nineteen; and, therefore, what the Roman law has in some particular cases decreed, or in some others may decree, concerning an accession on the account of superior value, is not admissible according to the law of nations, but only by the civil law, for the more easy transaction of business, yet it is not repugnant to nature, because the law has power to create a right. But there
are scarce any one question relating to right on which both the opinions and the mistakes of lawyers are so varied. For who can admit that if brass and gold were mixed together they might not be separated, as Ulpian writes; or if metals were soldered together they must needs be confounded, as Paulus asserts; again, there is one rule for writing, another for a picture, that the latter should prevail over the canvass, but the former should attach upon the paper."

§ 991.

\textit{Inaeificatio}, building is another species of industrial accession. Building materials, of whatsoever description, are generally included in the term \textit{tignum}. As a general rule, the building is acquired by the proprietor of the soil, but two different cases may arise. The building may be built on my property with the materials of another, or on another's property with my materials.

In the first case the builder with another's materials on his own ground is the proprietor of the building, because the building follows the soil, but the owner of the materials has cause of action for double the value thereof (\textit{actio in duplum}), for in no case can he pull down the building so as to recover the materials,—because, first, the act would be a trespass,—and because, secondly, it would furnish means of unfairly annoying parties, and disturb the regularity of buildings in general, neither can he bring an action of \textit{vindicatio};\footnote{P. 47, 3, 1, pr.} these rules even extend to the poles used to support vines, whereupon Ulpian says, quoting the law of the Twelve Tables,—\textit{Lex duodecim tabularum neque solvere permettit tignum furtivum adibus vel vinearum junctum, neque vindicare quod providenter lex effecit, ne velaedificia sub hoc pretextu diruantur vel vinearum cultura turbetur; sed in sum, qui convictus est junxisse, in duplum dat actionem}, whereby the builder is indemnified for his work and labor, reckoned equal to the value of the materials; should the building, however, fall, and no indemnification have been made by an \textit{actio in duplum}, the \textit{actio vindicationis} or \textit{ad exhibendum} will lie, for the materials are then severed and reduced to their original condition, independently of the soil.\footnote{P. 41, 1, 60.}

Many cases may arise—of which the following are the principal, and will serve as examples.

Some jurists deny, although the law has decided, that an \textit{actio in duplum} will lie for the materials, when the builder acts with good faith.\footnote{Id. c. 3, § 10, et seq.; Goer. Baek. c. 2 & 3.}

If the owner demand it, the builder is at liberty to take out the materials, and return them \textit{in natura}.\footnote{Westenberg de Causis Obligat. Diss. 6, Elect. j. c. lib. 2, c. 14.}

If the building fall or be pulled down, and the owner has
received double value, he can still vindicate his materials, on proof that the builder acted in bad faith, but not otherwise.1

If a party build on another's ground with his own materials:8

The proprietor loses his materials under the presumption that he gave them to the owner of the soil, because qui scien
t in alium solo adificat, donasse videtur materiam quod eam nullo jure cogent
fit, id donari videatur,2 and this even though the transaction were
bonâ fide—that is, the builder believed the ground to be his; if the
builder, however, be in actual possession, he may hold over till
indemnified for his expenses,—but if he be not so in possession, he
has no action, and his expenses are lost.4 In cases of mala fides,
however, the builder can neither demand the value of materials
nor of labor, nor of the former alone, even though the house have
been pulled down.

If the building be pulled down, some think it just that the
materials also should be restored. It is to be observed, however,
that the building is one thing and the material of the building is
another, so that both may have owners, but in a different respect:
what has been referred to building on another's soil, applies equally
to buildings upon the wall of another.5

Under this head may be considered the nature of expenses and
money laid out on another's house,6 divisible into necessaria,
utiles, and voluntariae or voluptuariae.

Necessary expenses for upholding a house ought to be allowed
by the proprietor to the person in bona or mala fidee posses
sion, because the necessity of the case excludes at once the
presumption of blame or gift,7 as does also the obligation to
uphold.8

Usefull, or convient, are such expenses as have been incurred
for the conveniency of the possessor, and cannot strictly be
demanded, but the person lawfully in possession may take away
what he has erected, if it can be done without prejudice to the
proprietor,9 unless the proprietor make an allowance for the profit
which the possessor can otherwise make thereof. The mala fide
possessor cannot deduct the money laid out therein from the mean
profits, but can only remove the thing itself.

Voluntary, or voluptuary, expenses are such as are made at the
option of the party for his own luxury and enjoyment, on account
of which no claim can of course be made.

§ 992.

Scriptura, or writing, although in letters of gold, and the sub-

1 Westenberg 1. c. 2, § 2, 3, 4, 5; Huber, h. t. § 39.
2 I. 2, 1, § 30.
3 P. 50, 17, 82.
4 Vinn. in Quest. Sel. lib. r, c. 21
5 § 8, 9, p. m. 40.
ject a poem, history, or oration, on paper or parchment, follows
the material, upon the same principle that buildings follow the
soil whereon built; if, however, the writer be bonae fidei possessor,
the expense of the writing must be reimbursed to him and he can
defend himself against the owner thereof by a plea of dolus
mali.1

The principle whereon this proceeds makes Vinnius very
angry, who thanks God the modern law has altered this rule, and
puts a case,—I may write on the parchment or paper of another
that which, if communicated, would be very prejudicial to me,
and why should I be deprived of my accounts, inventories, or
otherwise, if willing to pay the value of the material whereon it is
written.

In England, if a bill of exchange be stolen, the indictment may
be laid for a piece of paper of a nominal value, the bill as paper
being prima facie the property of the bearer.

Sowing and planting, Satio and Implantatio, belong to mixed
accessions, because it requires industry to bring forth the powers
of nature; the maxim, therefore, which rules these accessions is,
that they are an accessorium of the ground, which is the principale
—hence they belong to the owner thereof: nevertheless, several
cases may arise.

If one man by mistake sow in another's ground, the owner of
the land acquires the crop; even so, although one party steal the
seed to sow his own land with, he will have a right to the produce.
The questions, however, which arise, are of indemnity in the first
case for seed and tillage, and in the second for the value of the
seed improperly appropriated by the owner of the soil, which
follows the rule above enunciated in the case of confusion.2

If plants belonging to one party be transferred to the land of
another, they accrue to this latter so soon as the roots shall have
struck, until which time they are capable of vindication; as in
the following case,—one party steals trees, and sells them to
another, who plants them in his garden, where they take root, a
fact which is held to be established by their budding, by which
therefore the trees become irrevocably acquired by the owner of
the soil. The same will be the case if a man plant his trees in
error in another's ground; no rei vindicatio will lie for their
recovery after they have taken root, but simply a utilis rei
vindicatio3 for their value.

If trees stand upon the boundary of two estates, four several
cases may arise.

The tree stands exactly in confinio, in which case it is common;4

1 P. 6, 1, 23, § 3; P. 41, 1, 99
2 § 987, h. op.
3 P. 6, 1, 5, § 3, Ulpian; Noorda Inter-
pret. p. 138, ed. and.
4 L. 2, 1, § 31; P. 41, 1, 7, § 13; P.
10, 3, 39; P. 17, 2, 83.
and here it must be premised that confinium can have two meanings,—firstly, the line which divides two properties; secondly, the space between them, which was by Roman custom usually from three to six feet broad, and was by a law of the Twelve Tables incapable of usucapion.

A tree stands near on the boundary—in this case it belongs to him out of whose ground it grows, in cuius fundo originem habet.¹ Weber disagrees with Hopfner’s view of this expression, that a tree is to be assigned according to its roots, because it would be impossible to ascertain how many roots were on one or the other estate; moreover, the examination would kill the plant.

In the Institutes we find,—ad autem ex eo tempore, quo radices eget planta, proprietas ejus commutatur, ut si vicini arbor, ita terram Titii presserit, ut in eum fundum radices egerit, Titii effici arborem dicamus; ratio enim non permittit ut alterius arbor esse intelligatur quam cujus in fundum radices egerit.² Gaius had before written, quodsi vicini arborem ita terra presserim ut in meum fundum radices egerit meam effici arborem rationem enim non permittere ut alterius arbor intelligatur quam cujus in fundo radices egerit.³ The framers of the Institutes, it is supposed, borrowed this passage from Gaius without understanding it, and altered it to their purpose, the meaning of ita terra presserim in Gaius being the drawing a branch over to his own side, and laying it so as to produce roots in his own ground—a supposition which certainly clears up the difficulty.

If a tree standing on a boundary line injure the building prædium urbanum, of another, this latter can require of his neighbour that he cut it down;⁴ but if it injure the prædium rusticum of another, that he trim the branches fifteen feet up from the ground,⁵ but no higher, and the neighbour must not only bear with this mitigated inconvenience, but permit the gathering⁶ of such fruits as may fall therefrom on his ground, which is enforceable by an interdictum de glande legenda.

The German practice is more liberal,—it cannot be required that a tree be cut down, but merely trimmed so far as it may be injurious, which is not limited to fifteen feet—but if not trimmed, the neighbour has a right to all the fruit which falls therefrom on to his land.

§ 994. Fructuum perceptio has been asserted by commentators, as has already been seen, to be a separate mode of acquisition, the Insti-
tutes make no especial divisions; it is therefore permissible, for
the sake of perspicuity, to divide the modi adquirendi in such a
manner as will render the subject the most clear.

In the case of fruits gathered and consumed, it is important,
first, to consider what comes under that denomination, and to
elucidate the signification of the word causa.

The word causa is divided into interna and externa.

Causa interna comprehends rights belonging to a thing, as right
of chase, jurisdiction, &c.

Physical properties, as the fruitfulness or unfruitfulness, good or
bad aspect of an estate, the good or ruinous state of a house, the
youth or agedness of an animal, &c.

Causa externa is either fructus or accessio stricte dicta.

The first, are such as have their existence in the thing, as grass
on a meadow.

The latter consists in the furniture of a house, and things which
belong thereto, but have not thence their origin.

Fructus is either ordinarius or extraordinarius.

Ordinarius, for which we acquire anything, as a meadow for the
gress, arable land for the corn, or an orchard for its produce;
hence grass, wheat, or fruit, are ordinary fruits.

Extraordinarius, which are civiles et naturales; this latter being
rather naturales stricte, or industriales.

Si occasione rei percipiuntur sunt civiles, as interest of money,
rent, and the like.

Si fructus ex re nascuntur sunt naturales, as wheat, grass,
fruit, &c.

If produced without culture, they are stricte naturales, as grass,
acorns, wild fruits, and the like.

If produced by culture, industriales, as wheat, garden nuts, and
fruit.

These fructus may be either pendentes, percepti, separati, or per-
cipiendi.

Hanging, are those still in connexion with the plant whereon
they grow.

Gathered, those severed by the owner, to be by him made
use of.

Severed, such as fall by force of the weather from ripeness or
by robbers.\(^1\)

Gatherable, are such as could have been gathered had the owner
desired to do so.

Having premised the above, it will be easy to obtain an idea of
the fructum perceptio.

Who so possesses a thing in right of ownership, dominium, as
usufructuary, hirer, antichretic creditor, or bona fidei possessor, has
a right to the fruits produced.

\(^1\) P. 22, 1, 25, § 1; P. 41, 1, 48, pr.
Traditio is the last natural mode whereby things may be acquired,—for nothing, says the emperor,\(^1\) is more consistent with natural equity than that the will of the donor should be effective in transferring any object to another.

Some of the most distinguished civilians have been of opinion that nothing but the contract was necessary to transfer a real right from one to another person,\(^2\) but by the Roman law the contract operates a mere *jus in personam*, and delivery is necessary to complete the transaction: thus it may be said that by contracts things are due, by delivery the property is altered; delivery in this case appears to belong to the civil rather than to the natural law—delivery is, however, at least the best evidence of the contract. Justinian probably, in placing tradition among the natural modes of acquisition, argued that as occupation was a natural mode of acquisition, tradition was so too—that is, the possessor abandoned it, whereupon it became fictitiously *res nullius*, and was again capable of occupation,—that the tradition was the evidence of this abandonment; but it is difficult to make it at best more than this, and the emperor would have certainly done better to have placed tradition among the civil modes of acquisition.

Tradition has a double meaning,—it is generally a corporeal act whereby the possessor transfers his possession to another, and in this sense a *depositor* may be said to deliver the object to the *depositarius*, or the *locator* or letter for hire to the *conductor* or hirer. In its more restricted sense it is the corporeal act by which the possessor intentionally puts another into possession of a real right, which some term *traditio vestita*, but the delivery in which such intention is wanting is termed *nuda*.

*Traditio vera* differs from *adprehensio* in that on tradition possession is seized, but on the contrary any one may seize without receiving tradition, as would be the case of an inheritance being seized.

Tradition is properly only twofold, actual and feigned, or symbolical, which in fact is nothing but a feigned delivery, and formerly applied only to *res nec mancipi*.\(^3\)

\(^1\) I. 1, c. 12, § 14; Strube rechtl. Bedig.

\(^2\) Grot. de I. Bet. P. 2, 6, § 1; & c. 8, § 25; Ruf. de J. N. et G. 4, 9; Huber. Digress. 4, 8; Titius ad Puf. de O. Her.

\(^3\) Ulp. 29, 7.
can transfer, as the animus sibi habendi is presumed to be wanting in the owner.

This delivery implies a mere contract, by which one party agrees to cede the other to accept the transfer under certain conditions, for it cannot be forced upon him. The consensual contract, however, was alone insufficient to pass the right of a thing, or to create more than jus in personam—tradition must accompany it, and the deliverer have a just title himself (justus titulus) to enable him to transfer: traditio, as above observed, passed no dominium.

Traditio vestita is properly a corporeal act, whereby the owner puts another into possession with the intention of conferring on him a real right.

Traditio nuda, where done without this intention, delivery may be performed by giving the thing into a person's hand, or laying it before him; leaving it at his house by his desire; by inducting one into a house, garden, &c.; by allowing a buyer to seal the thing sold, or to put one to watch it; also the marking of timber by a buyer, with the consent of the seller.

§ 998. Traditio ficta is where a delivery was supposed and took effect by the intention of the owner, and not by a corporeal act, its chief use is to pass incorporeal rights; thus the delivery of a deed is interpreted to mean the delivery of the rights or things therein specified.

Fictio brevis manus is where the goods are in the possession of a party by way of pawn, and are afterwards given or sold to the holder, in which case the supposition of a solemn delivery is alone deemed sufficient; or if a party direct his debtor to pay over to a third person, it shall be interpreted to be his receipt, especially if done in the presence of the transferer; but now, for facilitating commerce, a payment by order or letter, though at a distance, is held to be an actual delivery of the money and to be a payment.

Fictio longae manus is the verbal delivery of the possessor of lands lying at a distance by the purchaser, and was so called on account of the arm being outstretched as if touching it, though in fact only pointing towards it.

Fictio traditionis symbolicae is the delivery of the keys of a warehouse, where the things sold were contained, to the purchaser, and transfers the property by giving the means of obtaining possession; or, as above, of a deed in token of the contents—cutting a shaving from a house, and sending it to the purchaser,
By the Mahommédan law, the delivery on both sides ought to be simultaneous, and the seller must accompany the act by the words,—"I have vacated between you and the thing sold, take possession of it;" nor will a symbolical delivery, as that of a key, have effect without these words, for the mutuality of intention must be expressed: the delivery must, however, succeed the sale. A slave is held to be delivered on making a step forward at the command of the new master, and the surrender of a house is held to be invalid in which there remained aught belonging to the seller not included in the contract, for there must be an entire divestiture on the part of the seller, and an entire vacancy of possession—actually where that is possible, or constructively and by word where not.

Articles consisting in weight or capacity, when specified, are sufficiently delivered by being weighed and measured in a vessel of the purchaser, or in one borrowed by him from the seller. Delivery to a person in the purchaser's family is insufficient. A slave girl is held to be delivered by the seller when her husband, to whom the purchaser has given her, has had sexual connection with her.

§ 1000.

A corporeal thing may be delivered; and, being so delivered, is alienated from its owner, of whatever species it may be, subject to certain conditions.

The first requisite is a sufficient cause or consideration to justify the delivery, for no man can be supposed to part with his right but for some reason; therefore, if there be no such reason, it is presumed to be a gift. But even in this case a cause will be presumed, because the gift will not be irrevocable, unless it appear to be made advisedly and after deliberation, for the form of tradition prevents rash alienation. It is not pretended that there must be a real cause, for it is sufficient that the party delivering imagined or was of opinion that such cause really existed, though he might be mistaken therein.

But here a question arises,—for if, for example, one party deliver to another for one reason, and the latter one accepts it for another, does this disagreement as to the cause prevent an alienation? as, if money be only deposited by one party for custody, but is received by the other as a loan or gift, it cannot be here said that the property is alienated by such delivery, for there is no mutuality of intention between the contracting parties.

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1 C. 8, 55, 1; P. 28, 6, 14, § 1; P. 18, 74; P. 41, 2, 5, § 21; P. 43, 1, 31.  
2 P. 43, 1, 31.  
3 P. 38, 1, 47.  
4 P. 22, 2, 5; P. 50, 17, 53.  
5 P. 12, 6, 65, § 2.  
6 P. 44, 7, 55.
which is requisite upon passing of any right; or let the case be put stronger, and let it be presumed that both parties intend an alienation by the delivery, and are persuaded that there is sufficient cause for it, and yet do not agree in the same cause, albeit it be a sufficient one. Thus, if one party deliver money as a gift, and the other accept it as a loan only,—here each cause on either side is sufficient for alienation, which was not so in the other case, and therefore such delivery may well take effect, and the disagreement in opinion as to the reason should not prevent it where there is a mutuality of understanding as to the thing itself. This decision is generally approved of by Julian; Ulpian is thought by some to differ from him in this particular instance of delivering money as a gift, and of accepting it as a loan, for he says it is neither a gift nor a loan, and therefore the money seems not to belong to the receiver.

Selling, venditio, is a good cause of delivery if the buyer pay the price, or otherwise satisfy the seller, or give security or a pledge of payment and it be accepted, otherwise the thing so delivered may be recalled: this, though a law of the Twelve Tables, and connected with the old system of mancipatio per as et libram, is also part of the law of nations and nature; but if the seller trust to the faith of the buyer, it is thenceforward his. Nevertheless, the bare will of the owner will sometimes suffice to transfer a thing,—as, for instance, if any one have lent goods for a certain use on condition of their being returned in specie, called a commodatum, or deposit them with another on condition of restoration on demand, called depositum, and in English simple bailment, and have subsequently sold, given, or granted such thing in dower. For although he have not delivered it for that reason, nevertheless, inasmuch as he suffers it to become the property of the then possessor, property therein is acquired as much as if delivered in the first instance with that avowed intent.

Nor does it import whether the owner have made the livery, or another have done so, to whom the possession was allowed, at his desire; because if the free management of all his affairs were permitted by the principal, in virtue whereof such agent sold and delivered, the property vests in the receiver.

With respect to the thing delivered, it must be such as is not exempted from public commerce, for should delivery of such thing even take place, it would be ineffectual, and no alienation will follow.

The livery must be made by one who has the right to alienate— as owner, agent of owner, as guardian or proxy—and the contract be assented to on both sides. One must deliver, the other
THE ROMAN CIVIL LAW.

consideration by the law of england is threefold. when he who is not the owner can alienate, three notices necessary in england. pawnbrokers cannot sell pledges within the year. 

When he who is not the owner can alienate.

accept, and there must be a capacity to convey and take, but it is not necessary that the livery be to a certain or known person,—thus medals or money thrown by consuls and praetors among the populace, missilia, was a good delivery, and he who seizes them acquires them by a good title. such gifts were forbidden, and afterwards again allowed in moderation. if two persons buy the same thing of him who is not the master thereof, he to whom it has been delivered has the better title, though the other party may have made the bargain first, for he ought to have obtained the delivery. a delay in delivery incurs damages, if not the result of uncontrollable events.

In the laws of England a cause or consideration is threefold,—first, the cause of consideration of something of money value; secondly, the consideration of marriage; thirdly, the consideration of blood or natural affection. without one or more of these considerations, no estate at all passes upon the delivery in a bargain and sale, nor on any other conveyance, to defraud creditors or purchasers.

It might happen in some cases that the real owner could not alienate, though he who was not the owner could. a marito alienari non poterat fundus dotalis. a creditor could sell a pawn in his possession, on default of the debtor as to payment of the sum for which the pawn was security, though he was only in possession and not owner; and if such pawn were delivered to the creditor with the understanding that he should distrain it on default, no warning, denunciatio, was necessary: the same occurs when the pawn is redeemable on a certain day, and simply given.

In all other cases three notices were required, calling on the debtor to pay, and notifying that he would otherwise suffer distress. justinian abolished the three notices, making one suffice, but enacted that a period of three years should elapse before the pledge could be adjudged to the creditor, and even the debtor in the two next following years could recover his pawn on paying up the debt.

pupils could not alienate without their tutor's authority. in england goods cannot be distrained on a writ of distringas, but on affidavit of three calls and notice which might reasonably be supposed to come to the debtor's knowledge, by service on him personally, or on his servant, attorney, or agent, if he cannot be found at his usual place of abode.

pawnbrokers cannot sell pledges for default before a year and a day, but no notice is required.

trustees and guardians can alienate without the ward's con-

1 P. 51, 17, 167.
2 I. 2, 1, § 46.
3 Nov. 105, 2.
4 P. 19, 2, 21, § 7.
5 13 Eliz. 5; 27 Eliz. 41.
6 I. 2, 1, pr.
7 I. 2, 1, § 1.
8 P. 47, 2, 73.
10 C. 8, 34, 3.
11 § 7, 55, h. op.
currence, but are accountable for abuse or damage arising out of such alienations.

§ 1001.

Quasi tradition may be added, which applies to incorporeal Quasi traditio.

rights, and is satisfied by the exercice of such right once, with the knowledge and without opposition on the part of the deliverer,—as, for example, if A having hunted with the cognisance of B once over B's ground, and without opposition, the right of chase has thereby been quasi delivered by B to A.¹

¹ C. 3, 34, 2, Arg.
The triple division of rights.

Jus reale in re or in rem.

Jus ad rem or in personam.

The jus possessionis.

Jus in re or ad rem as a jus obligationis.

RIGHTS with reference to things are triple in their nature. The first is the jus possessionis, or that right which a person has in virtue of mere possession. The jus in re or in rem is a jus reale, or the right in virtue whereof one person has an action for specific recovery, against any possessor of an object who deprives him thereof. The jus ad rem or in personam, on the contrary, is a personal right, as against a party who is bound to give to, or to do something for another.

The right of possession has been treated of by Savigny, whose exhaustive treatise on the Recht des Besitzes\(^1\) gives the most logical and the preferable view of the question, although it differs in some particulars from those of most preceding commentators, and well deserves to be consulted on this subject.

§ 1003.

The expressions jus in re and jus ad rem do not occur in the Roman law books, but are borrowed from the Canon law; and it were more correct to term the jus ad rem or jus in personam a jus obligationis,\(^2\) which will be best explained by an example:—If a person buy a thing, which before delivery be sold to another, who is ignorant of the first bargain, the latter cannot be compelled to give up the specific object, for the right does not follow or attach upon it, for if such were the case a real action would accrue; the remedy is in damages against the seller for a breach of his promise to deliver. If, on the contrary, the object has been delivered, and then come into the hands of a third party, real action will lie, for the object has been reduced into the possession of the purchaser.

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1 This work has been lately translated into English by the Chief-Justice of India, Sir Erskine Perry; there existed already a French translation of the same work.
2 Caius, P. 1, 8, 1; I. 2, 2, § 2.
If a man give another the right of taking the crops off his land, in virtue of a lease, as a *jus ad rem*, and subsequently sells his land to another, by which act of the lessor the lessee loses his right, by reason of the right being a mere *jus ad rem*. On the other hand, if the same right be granted as a *servitus usufructus*, which is a *jus in re*, it matters not to whom the land pass, for the right of the lessee is not impaired thereby.

Again, one party has a claim of debt on another who possesses a house; so long as this house is so possessed by the debtor, the creditor can insist on its being sold to pay him his claim; if, however, the house-owner sell it to a third party, the creditor’s claim attaches upon the house only in case he has a hypothetical or mortgage interest in it, in which case the mortgagee may seize the house, unless the claim be satisfied.

The *jus in re* or *reale* attaches on the thing which it follows, nor does it matter into whose hands the object has come, and it is out of this right that the action of vindication arises; for although an object may have passed through several hands, yet the defect in title of the first illegal acquirer will invalidate the rights of those to whom the object has subsequently passed, and who may be said to possess, or to have possessed adversely, that is to say, against the rights of the true owner. This right is, however, insufficient to afford a remedy in all cases, for the right may consist in a right, in which case there is clearly nothing to which a real right can attach, and the remedy would be wanting without the *jus personale* to enable the claimant to recover, as against the person of the defendant, of which nature is a right of action on a contract.

A real right involves a real action, by which criterion it must be judged,—it lies against every possessor. Whoever has a right of inheritance, of pawn, or of property, can institute real actions to enforce them, and recover the objects to which they relate; and the same with services, for the quiet enjoyment of which real actions may be brought.

Real rights may be divided into four species,—right of property,—of services,—of inheritance,—and of pawn. A real right consists in the exclusive right of disposing over the substance of a thing, or in the right of deriving benefit from an object belonging to another, or of obtaining payment of a claim by means of an object.

§ 1004.

*Possessio* may, it has been seen, be divided into *naturalis* or *civilis*, but the word, furthermore, signifies a right.

*Possessio naturalis* is, it has been seen, a factum, and a mere corporeal detention without any reference to right; suffice it, that the possessor have the object physically in his power, on whom it however confers no ground for usucapion, though there may be *bona fides* on the part of the possessor, because the will to detain the
THE ROMAN CIVIL LAW.

Possessio civilis is the possession of the true possessor, one which, combined with bona fides, confers the capacity of usucapion. It requires the animus retinendi, a good title, capacity to hold property, and that the object be commerciable. Civil possession is consequently both a factum and a jus.

Possessio, be it natural or civil, is termed justa when of legal origin, and si ex justa causa possidet, and is identical with legitima or civilis. On the other hand, it is termed injusta when there is an illegality in the transaction, as in the case of possessio violenta, clandestina, or where founded on a transaction contrary to law, negotium jure civilireprobatum.

Possessio bona fidei is by one who in fact has no right to the possession, but who conscientiously believes that he has a valid title thereto, but possessio malae fidei is by one who detains an object to which he is aware he has no claim, or thinks he has on mere trivial grounds. Hence, although every illegal possessor does not necessarily possess malae fidei, yet every possessor malae fidei is an illegal possessor.

Possessio was a less perfect title than dominium ex jure quiritium: thus the ager publicus was said to be possessed by those to whom it was granted. Compared with the English law, as far as it concerns land, possession bore the same relation to dominion as the right of a mortgagee to that of the mortgagor in possession, nor was it unlike the interest in a freehold as compared with that in a copyhold.

§ 1005.

Constructive, which belongs to the category of civil possession, arises where the law implies a corporeal possession, where such is not de facto practicable,—here the animus alone is the main and sufficient ingredient, and the possession is furthermore allowed to be had for the possessor by the instrumentality of another.

§ 1006.

Although the physical capacity of retention may by external circumstances be rendered difficult or circumscribed for a certain
time, it will nevertheless not be annulled for that cause; as in the
case of a vessel at sea, the physical possession, extending to sale,
mortgage, or chartering, may be rendered difficult and circum-
scribed, but is not utterly lost, except by the sinking of the vessel;
in like manner the possession of a thing mislaid is not lost, except,
indeed, another find it.

Possession may be circumscribed by contract, and as it were divided amongst many persons, for a pawnee, mortgagee, or a lessee is de facto possessor; nevertheless, the owner has a right to do any act to the object of the contract which does not interfere with the rights of such pawnee, mortgagee, or lessee: hence several persons can simultaneously possess an object.  

As long as the physical power of disposition continues, so long does the possession endure, notwithstanding an absence, or the exercise of the power by another and not in person. This applies to the disposition over a distant estate, or to an object not always in the actual hands of the possessor, as books and the like, for manipulation, although proof of the exercise of the possessive right is not requisite to possession. Posseßio is, however, utterly distinct from usus.

§ 1007.

The affectus tenendi[1] consists in the intention not to part from an object at all, at least not at the present moment; and hence it follows that he who is not aware of the presence of a thing within his power—as, for instance, of a treasure concealed on his property—cannot be supposed to have any intention of appropriating it. Nevertheless, like all rules, this too must be modified by exceptions arising under particular circumstances: thus a man does not, by becoming mad, lose his possession; but it is otherwise with one who becomes madmen, who can retain, but not acquire possession.

If anything be given to a child he acquires possession, and if a paterfamilias or dominus make anything a present to his filius familias or servus, these acquire a possession the rights whereof vest in the pater or dominus.

The expressions possessere and possessor esse, however, differ. Classical jurists include under these expressions only such possession as confers the capacity of usucapio, and say of all others, non possident; although they sometimes relax this principle, and apply possessere to those who, although they cannot acquire by usucapion, do not possess simply in the name of another,—and even go further, and say possidere of such as possess the property of another in another's name.

§ 1008.

Incorporeal objects were not properly subject to possession, because no physical contractatio can be had of them. Thence the

1 P. 41, 1, 27, § 2.  
2 Paulus, P. 41, 1, 1, § 3.  
3 P. 41, 1, 3, § 3.
The right of the possessor, and advantages of possession.

Possession operates and effects certain legal rights, and certain rights depend upon it,—thus, every possessor is justified in using force in order to protect himself in his possession against every illegal disturber thereof, not only by defensive opposition as regards intruders, but by offensive measures, such as the ejection of those who have usurped possession. These measures must, however, be done at once in continenti, or as soon as assistance can be had, and not ex intervallo.

There is also a remedy for him who has been violently dispossessed, by means of the interdictum unde vi, for the recovery of possession, and the remedium spolii.

In pari causâ conditio possidentis melior est, where the rights are equally balanced, the advantage inclines to the side of the actual possessor, who may hold to the exclusion of others; and the same maxim stands good where the condition or consideration reflects equal disgrace on both giver and receiver, in pari turpitudine dantis et accipientis possessoris melior conditio est, the receiver retains what he has acquired.

The possessor is generally not obliged to demonstrate the title or justice of his possession.

The possessor is free from the burden of proof, and if the plaintiff fail in making out his case against him, the defendant prevails, even without showing any probable reason for his being in possession of the object.

In like manner, the English law of real property is not satisfied with a plaintiff showing as good a title as the possessor—he must show a better, and in what respect that of the defendant is faulty; hence the proverb of possession being nine points of the law. In criminal matters the case is somewhat different,—not only must the loser of stolen property prove his ownership, but the possessor must exculpate himself by showing reasonable cause for believing that it came into his possession in good faith.

A possessio non vitiosa operates a jus retentionis, which is inter-
preted to be the right which one party has to retain his own or another's property, until such other party perform his part of the condition, in default of the performance whereof the right of retention is exercised, and this is termed in English law the right of lien. No right of retention accrues where there is a vice in the possession, such as force, secrecy, or petition.

§ 1010.

Possession in another's name, or the possession of the transferee, gives claim to the interdictum of uti possidetis for immovable; utrubi for moveables; de superficiebus, sitere actuque privato. These advantages are available equally by the bonæ or male fidei possessor, as against all except him with respect to whom the possession is vitious; because the possessor is protected in his possession, as he who has a right is protected therein, possessio defenditur ad instar juris, and possessio plurimum ex jure mutuatur.

Possession in another's name is available by the bonæ and male fidei possessor.

§ 1011.

The party who aims at acquiring the property in an object, must as a general principle do so by delivery or seizure of his own motion; the exceptions to this rule are few, and among them may be named the transitus legalis.

Very frequently the seizure of an object with the intention of appropriating it is alone sufficient, but in certain cases some transaction must precede the outward form of delivery so as to operate the dominion or ownership together with the possession; and this former, says Thibaut, is now termed the titulus, and the circumstantial act which completes the acquisition of the ownership, the modus adquirendi.

Höpfner separates the titulus from the modus adquirendi thus: To the acquisition of a real right, he says, two conditions are necessary,—a titulus and a modus adquirendi. The titulus is a legal ground, which makes the acquisition valid; the modus adquirendi a form whereby the real right is transferred.

1 Höpfner, § 283, n. 8.
2 P. 41, 2, 53.
3 P. 41, 3, 49.
4 P. 5, 3, 25, § 11, & 31, § 3.
5 H. Gephanius ad Let. de A. R. D. Heinold D. ad Eund.
6 P. 19, 1, 31, § 2; C. 4, 49, 8; C. 2, 3, 50.
7 P. 31 (11), 80 & 77, § 3; P. 36, 1, 63, pr.; P. 39, 44 14.
8 Syst. des R. R. § 736.
9 C. 3, 32, 24; L. 2, 1, 40.
The title may be founded on an act,—such as bargain and sale; or in a provision of law,—such as prescription. Thus, in the first case, if a man purchase an object, and has it delivered to him, the purchase is his title, the delivery his mode of acquisition; in the second case, if a man would possess an object by a prescription of three, ten, or twenty years, a fact must actually or constructively pre-exist, such as a grant by way of title, in order to render this mode of acquisition possible. But let us suppose the object to have been granted by one who was in fact not its possessor, and who consequently could transfer no valid title: in such case the long uninterrupted possession becomes at once the \textit{titulus} and the \textit{modus adquirendi},—that is, the law supplies the want of title. Lastly, if a party find a thing which belongs to no one and appropriate it, the title of possession is the \textit{maxim res nullius cedit occupanti}, and the \textit{adprehensio} or seizing the object is the \textit{modus adquirendi}.

There is therefore a \textit{titulus traditionis}, and a \textit{titulus prescriptionis}, and another by all the other modes of acquisition. There are many legal grounds by which real rights may be acquired in Roman law, and consequently many titles, such as \textit{pro empto, pro legato, pro donato, pro soluto, pro dote, pro derelicto, pro permutato, pro transacto, pro adjudicato}—the rest being included under \textit{pro suo}.

It appears, however, exceedingly difficult in the abstract to separate the \textit{titulus} in all cases from the \textit{modus adquirendi}, inasmuch as the latter often is of itself the title: indeed, the distinction appears then only possible in the case of a \textit{titulus lucrativus}, or a \textit{titulus onerosus}; the former being that by which an object is acquired gratuitously, as by testament or gift; the latter where there is a consideration, such as of bargain and sale, or of dower—and this is the true and distinct meaning of \textit{titulus}.

Some \textit{modi adquirendi} are founded in a natural right, and confirmed by the civil law; others spring wholly out of the civil law, and are termed respectively \textit{modi adquirendi juris naturales} or \textit{civiles}.

\section{§ 1012.}

Dominion was applicable equally to \textit{res mancipi} or \textit{nec mancipi}, and by the law of the Twelve Tables a legacy came immediately under the dominion of the legatee.\footnote{P. 20, 6, 8, § 13; P. 42, 8, 25, § 1.} In the same manner acquired property, escheating or forfeited, was termed \textit{bona caduca} or \textit{eruptitia}, whether by the fiscus or by individuals to whom \textit{caduca} were in some cases granted,\footnote{Cujo. ad Nov. 1, Scrip. Gentil. de Ulp. 19, 17; P. 50, 16, 1203; P. 15, Jur. Accres. c. 10.} as wrecks, forfeitures, fines, and escheats, were in ancient times in England.

There was a difference, however, in the species of \textit{dominion}, which gave rise to the distinction of \textit{quiritarium}, otherwise termed
JUS IN RE—DOMINIUM.

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legitimum or ἑνομον,—and bonitarium, otherwise termed naturale or φυσικον. When property was acquired by a Roman citizen in the way provided by law modo civili, there accrued to him a right of vindication, ex jure quiritium, or that of following his property in the hands of a third party, which was termed dominium quiritarium; on the other hand, he could not be dispossessed, and this was consequently the best title which could be had to property.

If property was transferred to a person not a citizen, or to a citizen even in a mode not recognised in the Roman law, modo naturali, the dominium was said to be bonitarium, the object in bonis esse, and no action of vindication accrued to the dominus bonitarius, his property was lost with possession.

Justinian abolished this difference, or does any trace of it remain in his laws; nevertheless, the obscurity of some passages in the Pandects is supposed to arise from this cause.

§ 1013.

Dominium is real right of property in a corporeal object, in virtue whereof a party may dispose of the same of his own free-will, except in so far as he may be restrained by law, and may demand it back from every possessor.

First, then, it is a right to a corporeal object, consequently it is erroneously applied to such as are of an incorporeal nature, such as tithes, or claims in debt.

Secondly, dominion supposes some specific thing, consequently a number of individual things constitute so many several dominia.

Thirdly, the dominus, or proprietor, can dispose of the object in every possible way, and perform all species of acts with respect thereto; and, as this is founded in law, it can only be restrained by special legal proviso.

Dominium directum, then, is the right of alienating the substance, in part or in whole, conditionally or unconditionally. The capacity of disposing of the whole substance according to pleasure, including the raising of buildings to any height, beating out new windows, when no particular law forbids it; enclosing land, which does not extend to erecting a fortification in time of peace; in short, making any like change in the substance, so it

1 Ulp. Fr. 116; Theophil. Inst. ad Fin. Tit. de Libertin.
3 C. 7, 25; C. 7, 31.
5 C. 5, 23, 1.
6 C. 4, 51, ult.
7 P. 8, 2, 24; C. 3, 34, 8 & 9.
8 C. 8, 10, 12, § 1; C. 3, 34, 8 & 9.
9 H. Kluer, Com. Íctor: axioma cuiuslibet in suo ad caelum usque sedificare licet. Leu. 1709.
10 C. 8, 5, 8, § 5; Puf. T. 1; Obs. 196; Donell. Com. 11, 5, contra; Duaren. Dia. 1, 33; Cuj. Obs. 1, 31.
11 C. 8, 10, 10, Arg. Westphal, de Lib. Pred. § 23.
be not alone with the view of annoying another (in emulationem). In a word, in the capacity of protecting oneself of one's own motion in all rights of property or use, including that of destroying the property of another when it endangers one's own, in addition to which the law gives also compulsive remedies. The possessor of these rights is termed the dominus directus.

Fourthly, the dominus directus can demand the object from whomsoever may be in possession thereof; in technical language, he can vindicate it.

§ 1014.

Dominium is divisible into two chief classes—nuda proprietas and usufructus, the former relating to the substance, the latter to its fruits.

Dominium is said to be limitatum when it is circumscribed in any way,—thus, the dominion of a court-yard would be limited when a neighbour had a right of way through it, or of light on that side.

§ 1015.

When the two component parts of property are divided, which is the converse of condominium, such interest is termed generally dominium minus plenum, divisum, or dimidiatum; but when this is not the case, the dominium is termed plenum.

Two parties are domini minus pleni when one has an interest in the property, and the other also an interest in the property, but the whole usufruct. This may be exemplified by the case of feods, where the vassal cannot alienate the feod without the concurrence of his lord, nor the lord without his vassal's consent; but the vassal can alienate the produce, for of that the lord has no part, the usufruct being in the vassal.

Both dominium plenum and minus plenum may exist in condominium and dominium solitarium, for in the case of a feod both lord and vassal may have severally a dominium minus plenum solitarium; but if in the case of a feod there should be many lords and many vassals, both have a condominium minus plenum.

If the whole dominium be circumscribed, it is sometimes termed dormiens or naturale; and that which for a time only is transferred to another, civile or interimisticum.

The dominus utilis, on the other hand, is he who has the entire use of the property termed dominium utile. Here the dominium utile differs from usufruct, for the usufructuarius cannot sell or transfer to heirs, which the dominus utilis can. It is to be observed, however, that these terms and divisions of dominium into directum and utile, plenum and minus plenum, is an invention
of the middle age, introduced for convenience, and deduced from
the spirit of the old civil law.

§ 1016.

Dominium is said to be irrevocable when it cannot lapse to the
former proprietor, or pass to any other person through or by his
authority, against the will or without the leave and licence of its
then dominus.

Dominium may, however, be revocable, or revert to its former
proprietor, of which there exist divers instances.

The property possessed by the husband in the dower, dos
adventitia, of his wife is revocable, because, upon divorce without
or against his consent, it relapses to the wife, her heirs, or even to
a third party. A gift relapses, if the donor afterwards have
legitimate children, or the donee be guilty of gross ingratitude.

A vendor who has defrauded the purchaser of above half of
the intrinsic value of the object sold can obtain its return; the like
where an article has been sold subject to approval, cum pacto dispi-
centiae, or to be returned within a given time; or where the sale has
taken place cum pacto addictionis in diem, which is a sale with liberty
on the part of the purchaser to recede from the bargain before a
certain day if a higher bidder present himself; also termed de
retrouvando or cum pacto commissorio, which is a contract to pay
the price before a given time or to forfeit.

The right in revocable property may determine in such a way
that the second possessor may be said never to have had a pro-
erty therein, but that the first possessor may be in a position to
commence a real action against the actual possessor, whoever he
may be, in which case dominium resolvitur ex tunc, as when a
contract is continued by which it was agreed that the transaction
should under certain circumstances become, or as being contrary
to general law, or of its own intrinsic nature, is, de facto, null
and void. Or the second possessor may be only bound to deliver
the object to the original possessor, who is entitled to a real
action in this behalf, in which case the right of property ceases
with the action, in which case dominium resolvitur ex nunc.

When the right in property is determined ex tunc, it is said
resoluto jure dantis, resolvitur jus accipientis. Thus, Titius is the
proprietor of a thing, subject to revocation; he alienates to
Sempronius, or gives him certain rights in respect of the object,
now Titius's right expires ex tunc, the right ceded to Sempronius,
be it a right of property or otherwise, expires also thereupon. Thus,
if the proprietor of a forest sell it to Titius, under the condition
that if he do not receive payment within the year, the bargain shall
be null, and Titius sell it to Sempronius, from whom he receives
payment but neglects to pay the first seller, his right determines

1 P. 24, 3, 35; P. 23, 3, 43, § 1; Ulp. Frag. 6, § 6; C. 5, 13, 1, § 6 & s 13; P. 24, 3, 22.
By the more ancient law this was not the case, Ulp. l. c. 5, § 5; Höpfner, § 132.
with his default *ex tunc*, and that of Sempronius likewise. If, on the contrary, Titius receive a forest of free gift, and give Sempronius a right of chase, but lose his property by ingratitude to the donor, Sempronius's right of chase does not determine *ex tunc* but *ex nunc*, and the fruits which the owner of a revocable gift has enjoyed remain his,—but if it had been determined *ex tunc*, the fruits would have been returnable, save and except particular cases.

§ 1017.

In respect of property, regard may be had to the person claiming, or to the rights it comprises.

*A universitas personarum* of its nature belongs to the category of individual persons whose property is termed *dominium solitarium*, or in severalty, according to the expression of the English law,—that is to say, without the estate or interest therein being enjoyed by more than one person; whereas that of many is termed *condominium* or *communio*.

§ 1018.

This includes the *joint-tenency*, and *coparcenary*, and *tenency in common*, of the English law, which are more subtly distinguished than any which existed under the Roman system, arising as they do out of, and the distinction introduced between, real and personal property. Thus, *joint-tenency* applies to lands or tenements granted by deed or devise, with unity of interest, title, time, and possession, to two or more persons to hold in fee simple, fee tail, for life, for years, or at will. Such estate is said to be in *joint-tenency* or in *jointure*, and each joint-tenant having a right to the whole estate being seized *per my et per tout*;¹ hence, too, he has the *jus accrescendi* or right of survivorship or accretion of the shares of the joint-tenents—the act of any one of whom is the act of the whole, and all must be joined in a suit, though one only be in fact sued.²

*Coparcenary* is the second species of *condominium* in the English law, and arises either by common law or particular custom, where lands of inheritance descend from the ancestor to two or more persons, who together make but one heir. Parceners or coparceners differ from joint-tenents in four points:—1. They claim by descent, not by purchase. 2. No unity of time is necessary. 3. Parceners have a unity but not an entirety; hence no *jus accrescendi* arises. 4. As an estate in coparcenary may be dissolved, and the possession thereby disunited, the title and interest may also be disunited; or the whole descending to and vesting in one person, it becomes an estate in severalty.

*Tenents in common* occupy promiscuously, but hold by unity of

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¹ Much discussion has taken place as to the meaning of this expression, of which the first interpretation appears the clearest, that the tenant is seized of his half particularly, and of the whole generally.

² Black. Com. b. 3, c. 12.
possession but not of interest, none knowing his own severalty but by several and distinct titles—some by descent, and some by purchase in fee simple, fee tail, or for life, or the like.¹

§ 1019.

The actions by means of which a real real right may be enforced, are the *rei vindicatio* and the *actio publiciana*.

When no fact or transaction is traversed or denied, the action is either a *querela nullitatis*, which is a prayer that some transaction be declared null and void on a point of law, and that the object of it be returned, or an *actio recissoria*, by which it is prayed that some transaction, the strict legality of which is not denied, be rescinded on equitable grounds, and both are included under the term *qualificata*; but a *simplex rei vindicatio* arises out of an actual ownership, and is termed *civillis*, or one by legal construction, termed *actio pratoria*, or *publiciana*.

The *actio rei vindicatio* is brought by the owner, who must prove his right to the object at issue, by showing that the true owner made over the object to him in virtue of a *justus titulus*, that he has obtained it by prescription, or purchased it from the sovereign of the country; for in this latter case, the title of the vendors is not to be inquired into. This may occur in the case of an intestate inheritance where there are no heirs, and which, in consequence, has lapsed to the fiscus, there being in the estate articles which were not the property of the deceased.²

The owner is likewise at liberty to prove that the object was a *res nullius*—was taken in war by himself or his predecessor—accrued to him by accession—was the produce of an object, the use whereof he had; in certain cases that it was bought by himself with his own money, for it will not lie when another has found the money and laid it out in a purchase. An exception is made in favor of pupils, minors, and churches,³ in cases where the tutor, curator, or bursar purchases something with their money for himself.

As the *rei vindicatio* lies against every possessor, if the defendant do not possess as owner, but as depositarius or usufructuarius, he may meet the action² by an *exception auctoris*, and cause the object to be transferred to the real owner. But one who has fraudulently, *dolo*, ceased to possess— that is to say, has transferred the object to another party to render the action futile, he can be sued.

The plaintiff prays that the object be returned *cum omni causâ*, consequently accessions and produce are also due; with respect, however, to the latter, the *bona* or *mala fides* of the vindicator

¹ Bract. 1. 5, tr. 5, c. 26. ² C. 7, 37, 2-3. ³ C. 3, 32, 6; C. 3, 38, 4; C. 4, 50, 8. ⁴ P. 6, 1, 23, pr.; P. 6, 1, 25, pr.; P. 6, 1, 36, et ult. ⁵ C. 3, 19, 2. ⁶ P. 6, 1, 20; P. 6, 1, 31.
makes a great difference; thus, the fructus perpectos et percepientios are due when mala fides is evident on the face of the transaction, but if bona fides be proven, growing fruits alone can be awarded, and of those gathered such only as are still extant and have not become vested in any one by usucapion—these must, moreover, be replaced, if, during suit, they shall have been wasted by the fault of the defendant; but, if there were mala fides on the part of the defendant, it is part of the causa that he remedy any damage which he may have done to the object; but the bona fides possessor is not bound to do this before action brought quia re suad abiit putavit, rem quasi suam neglexit, although he is responsible for every damage which accrued after suit commenced, or by neglect and not by mere accident.

The owner is not bound by the rule, to indemnify the bona fide possessor for the sum he may have expended in the purchase. Exceptions from it occur when the object has been preserved to the owner by the purchase, or the purchase-money was otherwise expended to his advantage.

§ 1020.

It was Quintus Publicius, the prætor, introduced the equitable action, called, from its author, actio Publiciana, to remedy the difficulty the owner sometimes found in proving his title; for, though a man may prove his title so far as he is concerned, yet he may be unable to show from whom he derived it, or, technically speaking, his auctor. To make this action available, the period of prescription too must not have expired, since that, of itself, would give a good title. Si quis id quod traditur, ex justa causa non a domino et nonandum usucaptum petet, si ea res possessoris non sit, judicium dabo—that is, when a party has a justus titulus, a modus adquirendi, and bona fides, but if it be evident that the defendant in possession is not the true owner, the plaintiff shall have his action as if he have formally proved his property, and may require the surrender of the object.

The foundation of this action is a dominium fictum, praesumptum, or putativium, supposed to pre-exist, but can only be used si res possessoris non sit against one who is not owner; if the possessor be not owner, the action will lie only in cases where the defendant holds infirmiore, deteriori, or debiliore jure—as, for instance, when he has no justus titulus, is not in good faith, or when he has shown a legal title which tells more against himself than against the plaintiff. If the defendant have as good a case as the plaintiff, viz., that one who was not the owner sold and delivered...
the object to him, but another putative owner (who, in fact, is not so, and who did not derive his right from the plaintiff) has sold and delivered it to the defendant and present possessor, both are in good faith; here the plaintiff has no remedy in a Publician action, because its object is that the dominium putativum of the plaintiff be admitted, and that the defendant be ordered to deliver the matter in issue cum omni causa.

§ 1021.

All species of services are acquirable by contract, which to be valid must not be drawn in terms too general; the granter must be in a position to dispose of the object in virtue of an unlimited and exclusive property in it. If an object be already burthened with a service which will be circumscribed by the erection of a new one, the principles of the Roman law forbid the imposition of such new burthen by the owner, even with consent of the possessor of the existing service. It has been sought to amend the reading of this law, but this hardly appears necessary, the evident object being to obviate confusion, and to prevent heirs being prejudiced by an estate being rendered next to useless, by an undue number of services being imposed upon it. Whoever will obtain a service must be capable of acquisition; for instance, in the case of real services, possess the dominant estate wholly and solely. Originally, the grant must be unfettered by time or condition; this is now no longer the case. Quasi traditio and, what is equivalent to it, the constitutum possessorium must be added to the contract in the case of affirmative services being obtained over the property of another, when they do not as a matter of course follow the tradition of the dominant property, nor does it matter whether the contract was express or implied; but it is worthy of remark that if a proprietor, being possessed of divers objects, and having used one for the good of the other, sell one, he does so with an implied service attaching thereupon. Should, in this case, the use which has hitherto obtained be indispensable to the preservation of the object alienated, the acquirer thereof can continue the use thereof as a service. Or a service can be acquired by one party only by means of a decree of the Court, which, however, seldom takes place except in judiciis divisorii.
An exceptional rule\(^1\) of the Roman law has induced the later jurists to declare that the judge has a constant power to burthen with a service an object which cannot be enjoyed without it, on the petition of one of the proprietors.\(^8\)

Prescription and Testament are also means of acquiring services, which will be treated of under those heads. The servitus legalis, imposed by law, is also a means by which services may be acquired, under which is comprised all the above-mentioned legal restrictions of property\(^5\) for the benefit of another.\(^6\)

Usufruct is also by law specially acquired by a father in the adventitia of his children,\(^5\) and in a virile portion of that which his emancipated sons inherit of their mother.\(^6\) It thus accrues for the benefit of children of a first marriage, from the parents who inherit jointly with such ab intestato, or proceed to a second marriage in the case of property inherited ab intestato, or received generally from a deceased parent, or from property acquired through the inheritance of children.\(^7\)

\(\boxed{\text{§ 1022.}}\)

**Usus** is living in a house, driving in a carriage, or riding a horse; but abusus, pulling down the house, breaking the carriage, or riding the horse to death.

**Usus plenus** is full enjoyment, as the term implies, not merely supplying necessities, but deriving that which minister to pleasure and enjoyment; whereas, in the case of usus minus plenus, necessities are only supplied, and nothing more—it is a limited use.

In that species termed usus minus plenus, or nudus usus, that user is called usuarius, who is not permitted to take more of the produce than is requisite of necessity; whereas, the usufructarius is entitled to all produce: it is, however, a more limited right, minus juris est in usu quam in usufructu. Both, however, concur in the following respects:—(1.) That they must use the thing, salvà substantia, without prejudice to the substance, which must be neither deteriorated nor its form changed. (2.) Both must give security for proper usage and restoration. (3.) And lastly, the usus and usufructus originate and are determined in the same way.

**Usus** is a personal service due to a person thus defined in the Institutes:—**Usus est jus alienis rebus utendi ad usum quotidiamum salvà rerum substantià.** This does not consist in taking the profits; for though an usufruct comprehends an use, yet an use does not include a usufruct, or right to take the profits,\(^9\) for the

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1. P. ii, 7, 12, pr.
2. Voet. L. 8, T. 3, § 4; Westph. § 871; Puf. T. 3, Obs. 140; Glück Fand. 9 B. § 628; Thib. P. R. § 767.
3. § 1025, h. op. et seq.
5. The property is in the child, the usufruct and administration in the father. C. 6, 61, 6, 8, § 5; P. 5, 9, 6, 55, § 1; I. 2, 10, pr.; F. 24, 3, 7, § 12, vid. adventitus.
6. Nov. 118, C. 1; comp. C. 6, 60, 1, 3; Glück Intestaterbfolge, § 95.
7. C. 6, 18, Auth.
8. I. 2, 5, 1.
9. D. 7, 8, 14, 1.
usuarius cannot take the profits generally, but only his daily use and necessary subsistence, according to his quality and character—if he take more, he may be restrained; but the usufructuary may take things for pleasure, may claim all manner of profit and advantage.

He who has the use of land may take for his daily use, and for that of his family, all manner of herbs, apples, hay, straw, and wood, also corn for bread, with other fruits of the land, if he bear a proportionate share of the extraordinary charges of sowing, ploughing, and husbandry thereon; and if the profits of the land are sufficient only for his family, it is equitable that the person having the use should alone be at the charges of manuring. By daily use is not implied that he take day by day, and that he may not lay up a store for a longer time—say a year, but if anything remained at his death, the proprietor, not the heir, is entitled thereto.

During such time as he is taking these profits for his necessary subsistence, being resident on the land, he must not be an hindrance to the proprietor or his workmen, neither must he pretend to sell his right, underlet it, nor assign it over to other parties, for it is a personal right to him alone, and another might be of a higher character; and have a larger family. This cannot, however, serve as a general rule, for sometimes it may appear, by circumstances, that the testator designed that the use should be sold or let to hire—as if the use of a wood lying afar off, where the cost of carriage would exceed the value of the wood itself, were given by legacy, it might be to no purpose and of no advantage; and if the testator should bequeath the use of horses to one that got his living by letting horses out to hire, the trade of such legatee is a circumstance whence it may be easily inferred that the testator designed they should be let out.

The usuarius of a house must reside therein himself, but not make it over to others, which is also required in other uses, and except the restraint of this liberty, has it as largely as if he had the usufruct. And though he cannot transfer this right, it is not to be understood that he must live alone there, for if he inhabits there himself, he may let out part of the house on rent, which part would otherwise be useless to him, as being too large for his family; but this is not transferring his right, unless he too forsake the abode. And though he may receive a guest, either for money or friendship, as well as his wife’s children, clients, freemen, and bondmen, yet he cannot make a public inn or tavern of it, for the reception of all strangers and travellers; it must be confined to his own family, which if it increase must be received, except
the granter has directed otherwise. If a married woman, apart from her husband, has such an use granted to her, upon condition that she shall be divorced from her husband, the condition being bad, her husband and family shall live with her therein; and if a spinster or widow have such gift or legacy, and afterwards marry, such husband shall be also received.

He that has the use of cattle for carriage may also use them for his wife and children; he shall have the profit of what they earn if employed on the business of the usury.

Thus cattle—as horses, mules, asses, oxen—may be employed to plough, draw, carry burdens, according to the custom of the country; but cannot be hired out by, and for the profit of, the usury, unless the testator have so directed, or unless the bequest would have otherwise been ineffectual.

In regard of the use of other cattle—as cows, sheep, or goats—the usury cannot take the milk, lambs, or kids, for those belong to the usufructuary; but he may make use of them to dung his land,—and if he take a small quantity of milk, it may be allowed, for last wills and testaments are not to be interpreted strictly.

§ 1023.

The principles of a usufruct may be summed up under the following six heads:

1. To the existence of a usufruct two parties are necessary,—the proprietarius and usufructuarius.
2. It attaches to the person,
3. And is a limited right on the corporeal,
4. Property of another,
5. The whole proceeds of which belong to the usufructuary, whose right to them is to be exercised,
6. Without damage to the producing substance.

Usus fructus is being jus alienis rebus utendi fruendi salvā rerum substantiā, it follows that the accessoria do not belong to him; he may claim half a treasure-trove as finder, but not as usufructuary. Again, if a slave in whom a person have a usufruct be named heir, the inheritance is an accessory, not a usufruct, and does not belong to the usufructarius; but it appears anomalous that the child of a slave girl in whom a person has a usufruct belongs not to the usufructuary, nor are any of the reasons given: therefore, Ulpian says the fruit is her labor; Caius that a man cannot be a fruit, because all fruits are given for his use, which almost amounts to a play on words. Bynkershoek, however, gives a somewhat better reason,—that a fruit must be what can be

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1 D. 7, 8, 8, 1.
2 D. 7, 8, 4, 1.
3 D. 7, 8, 13, 5 & 6.
4 D. 7, 8, 20.
5 D. 7, 8, 12, 3 & 4.
destroyed and consumed, which the young of animals can, but not those of the human species.

Opinions are divided as to whether the usufructuary can farm the thing whereto the usufructuary right attaches. The better opinion would appear to be that he can do this, as the proprietor might have done had he not divested himself of the profit; but he certainly cannot alienate the right, for that is personal; and if he were permitted so to do, it might never revert to the proprietor, who would lose all hope and chance of reuniting the proprietorship with the usufructuary right.

The usufructuary must do small repairs to preserve the building, but must not alter their form without leave, nor plough up grass land; he must pay the taxes and other duties laid upon it, unless there be an order by the testator, or some agreement to the contrary. He ought not to cut down timber trees unless for repairs, nor trees bearing fruit, for hereby the proprietor would be injured. If he erect a building upon the estate, he cannot afterwards take it down.

He must take care for the cattle that are sick, recruit their number if any die, plant young trees in the place of those that are fallen, unless they fall by an inevitable accident, and in general act as a wise and prudent man would act with regard to such an estate were it his own.

An usufructuary right cannot continue for a longer time than the life of the person claiming this right. It certainly cannot be for ever; but if the heir of the usufructuary be nominated also by the testator, two usufructs are appointed, for it cannot come to the heir by descent; and if it be given jointly, the survivor shall have the whole, it may be constituted for a less time than the life of the usufructuary, upon condition and in a certain manner only; but whosoever has this right may take to himself all manner of profits arising out of the thing, and dispose of those profits as he may please.

Inasmuch as the usufructuary cannot claim the profits of the estate, or thing, unless he actually had received and severed them, as corn and hay from the ground, grapes from the wine, wool from the sheep, milk from the cow, &c. So if he die before they be severed from the soil or thing, they shall not pass to his heir, but shall belong to the proprietor or to him in reversum, for by the death of the usufructuary the title vanishes, so that he cannot have a proportionate rate according to the time

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1 D. 7, 1, 12, 5.  
2 D. 7, 1, 65.  
3 D. 7, 1, 7 & 27, 3.  
4 D. 7, 1, 10, 11, 12, 13, § 4.  
5 D. 7, 1.  
6 D. 7, 1, 68, 1; I. 2, 1, 38.  
7 D. 7, 19 & 65.  
8 D. 45, 1, 38, 10.  
9 D. 7, 4, 5.  
10 D. 7, 1, 1.  
11 D. 7, 14.  
12 C. 3, 33, 82.  
13 D. 7, 1, 7 & 9.  
14 I. 2, 1, 36.  
15 D. 23, 3, 7.
Right of the sub-usufructuary.

Usufructus verus et quasi.

Usufructus requires security,
or caution.

§ 1024.

An usufruct is twofold verus (a proper usufruct), and quasi usufructus (an usufruct improperly so called).

A true and proper usufruct consists in the right of taking the profits of those things which do not perish in the using, as the right of taking the profits of land, houses, cattle, and bondmen.

An improper usufruct is of those things which perish in the using, quarum usus consistit in abusu called res fungibles, such as of wine, oil, &c.; also money, for that too, by continual exchange, seems to vanish from us, as if the use of so much money for life were given in legacy, upon security and caution that so much should be repaid to the heir by the legatee when he die, or so much wine and oil, upon caution and security that at the time of the death of the legatee the value of it should be repaid to the heir in money. The following passage of Ulpian,—et si vestimentorum usufructus legatus sit, non sicut quantitatis usufructus legetur, dicendum est, ita uti eum debere ut non abutatur,—has given the commentator much employment.

Caution or personal security is to be given of necessity in an improper usufruct; first, for fair use, such as a man would exercise on his own property; secondly, for restoration either of the same thing in kind, safe and sound, or the value of it when the usufruct is at end; for caution belongs to the very substance of it, and must be given of course, unless remitted. This caution makes an improper usufruct to differ from borrowing, letting on hire, &c.; for there, security is not necessary. Lastly, that is deemed to be returned safe and sound, the substance and form of which is not changed, which may, however, be done so far as improvement is concerned, for it is a maxim that fructuarius causam proprietatis deteriorem facere non potest, meliorem facere potest; the same principle it will be remembered is applicable to the dealings of a son, or slave for his master, or of a guardian on account of his ward, as well as to the ward's own acts under age.

1 D. 7, 1, 27.  2 D. 10, 2, 51.  3 D. 7, 1, 58.  4 I. 2, 43.  5 D. 7, 1, 15, § 4.  6 I. 2, 40, § 2.  7 D. 7, 1, 13, 44.
§ 1025.

Estates for life, for own or pur autre vie, created by express deed or grant, most nearly resemble the usufruct of the civil law.

Another incident to estates for life relates to under tenents, or lessees, who have the same or greater indulgences than their lessors or tenants for life; the same as regards estovers and emblements; for they stand in the place of the tenant for life, and greater, for in the case where the tenant for life has not the emblements, because the estate determines by his own act, he does not touch the under tenant, who is a third person.

The lessees of tenants for life had also at common law another most unreasonable advantage; for at the death of their lessors, the tenants for life, these under tenants might, if they pleased, quit the premises, and pay no rent to anybody for the occupation of the land since the last quarter-day, or other day assigned for payment of rent; this is, however, remedied by statute.

§ 1026.

As habitation is the real right to inhabit another's house without prejudice to the substance, the servitus habitatio is very different from the right of him who hires a house to live in.

The possessor of this service can use this house, not only as the usuarius for his own personal purposes, but may have chambers more than necessary for luxury; he can let it or sell his right, which the usuarius cannot; still, he has a lesser right than the usufructuarius, for he can only let it as a dwelling, and not for other purposes. Some lawyers contend he can only inhabit and use those parts of the house which are habitable in the strictest sense, and not the cellars, lofts, summer-houses, and store-rooms; but this is mere argument for the sake of argument, and not founded on logic, but rather the contrary.

§ 1027.

In all personal services, it is a reciprocal obligation to redeliver in specie and in good preservation the object to be so returned, and to use it with the same care as own property: in all cases to deliver the object at the proper period, in natura, in specie, or secundum pretium, conformably with the inventory, or where there is no exemption in this respect, with a specification on oath; and, in addition to this, to give security for the fair usage and ultimate restitution, or the latter case only, according as the right may be stricti or non stricti juris. This cautio is usually to be given by sureties, except where the object is determined by pledges; but when this is impracticable, the judge must decide whether security on

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1 Co. Litt. 55.  
2 Roll Abr. 727.  
3 Def. 9.  
4 Id. § 2; Id. § 3; Id. 65-6; P. 7, 9, 1, § 2, 7, Id. 2.  
5 P. 7, 9, 1, § 4; Carposov. P. 2, C. 10; Def. 9.  
6 Puf. T. 1, Obs. 98.  
7 P. 7, 9, 1, pr. § 3, 5, 6.  
8 P. 9, 7; C. 3, 33, 4.
The obligation of real security.

The obligation of real security is not imperative when it is waived by contract, which happens in cases even of quasi usufruct. A testator, however, has it not in his power to waive the security in the case of one to whom he has bequeathed a legatum usufructus, except, indeed, he lay the obligation of furnishing such security upon another. Certain persons are, however, excused from this burthen. A father, in respect of the adventitia of his children: he who receives a marriage portion,—and this principle is extended to the husband in his capacity of usufructuary of the goods of his wife, and to every one in whom the ownership will certainly vest. Practice has added to these by analogy—donors, who have reserved themselves a service; parsons, in respect of their church freehold. It is, moreover, an admitted principle that those can be called upon to furnish security to whom it has been remitted, in event of misuse of the object. Some assert that a widow contracting a second marriage is legally bound to give security; but a simple verbal promise suffices to the fiscus.

Remission when not valid.

In cases where cautio is required, the owner is protected in divers ways. He is justified in withholding the object until the cautio is actually given; or, if the matter in issue have been actually delivered, in demanding it back until such time as this shall have been effected, or in compelling such cautio by a condictio inuerti; but if the usufructuary interest have expired, he may resort to the general actions for indemnity, and the return of the subject-matter. If there be no special reason for throwing the fruits into the general funds of the estate, such as have been collected by the owner himself up to the time of the security,delayed without the fault of the owner, being completed, vest in him if he have gathered them himself; but those gathered by the usufructuary cannot be demanded back.

§ 1028.

As services which, it has already been seen, may originate in

1 Lauterbach Coll. L. 7, T. 9, § 10; Voet. 7, 9, § 33; contra Luescher de Cant. ob. usuf. pret. Heidelb. 1811, § 1213.
2 Glück Pand. 9 B. S. 654; Westphal. § 628; Noodt. de U. F. L. 3, c. 39; Dnoell. Com. L. 10, c. 4; contra Galvan de U. F. c. 19.
3 P. 75, § 8; C. 3, 33; C. 6, 54; 7; Höpfner Com. § 373; n. 3; Luescher, § 89.
4 C. 6, 61, § 4.
5 C. 5, 20, 2.
6 Carpzov. L. 6, Resp. 53.
7 P. 79, 9, § 2.
8 Voet. 7, 9, 9, § 8; Coccei Eod. qu. 3.
9 Wernher, P. 6, Obs. 58.
10 Hellfeld Jur. For. § 655.
11 P. 5, 9, 6, § 1.
12 P. 36, 5, 1, § 18; Id. 6, § 1; Glück Pand. 9 B. § 654; Schönmann Handb. 1, E. S. 348-350.
13 P. 7, 1, 13, pr.
14 P. 75, 9, 7; P. 7, 5, 5, § 1.
15 P. 7, 1, 5, § 1; Cit. 83, § 2.
16 P. 7, 5, 5, § 1; P. 33, 2, 24, pr.; vide et Voet. L. 7, T. 9; Emminghaus ad Coccei, L. 7, T. 9, qu. 1; Coccei, f. c. Tit. de fruc. ab usufr. ante pret. caut. ad juvenis, Jen. 1762; Luescher, § 18.
grant, under which is included donation, sale, exchange, and the like; in last will and in prescription, so they may cease to obtain by consolidation, or confusion, remission, or non user, or expiry.

Consolidation, or Confusion, is the vesting of the rights of the pradium dominans and serviens in one and the same estate; for either the dominus of the pradium serviens may purchase the pradium dominans, or è converso, because of the maxim res propria nemini servit; and should after this the two pradia again become severed, and fall into the hands of different parties as before, the service will not as a general principle revive, but is utterly extinguished by the consolidation, for the Romans look upon services in the light of an integral part of property severed from the parent manor, and when reunited with the principal, to be reconfounded as one drop in a glass of water. The prevention of a too great subdivision of property may be perceived in this rule, for, as it cannot be denied that such services are an evil, so it was the policy of the State to check them—and, in doing so, a logical principle was kept in view, that of the accessory following the principal. To carry out this more perfectly, it is required that the two pradia should be vicina, for services can only be justified ex necessitate rei; and this necessity has the effect of limiting the practice. Such principle has been lost sight of in modern times; as, for instance, in England, the case of the tithes assigned to a lay improprietor. In like manner, if the pradium dominans lost its own rights, those external rights which it possessed in aliano solo are likewise extinct.

The exceptions to this rule are to be found under Pawns and Pledges; but a service lost by Confusion will revive, if founded upon a title granted for a certain period.

§ 1029. Secondly, services may be extinguished by remission, which is the formal abdication of the service by the dominant, by deed, or by the permission to do acts inconsistent with the continuance of the service or with the contract, with the consent of all parties interested. The question has been raised, as to how far silent consent will extinguish a service as, for instance, the neglect to take notice of an act contrary to the duty imposed by the service,
such as the closing a road or door through which the dominant has a right of way; but here there appears to be no mutuality of contract nor sufficient certainty. Those who support this view, found their arguments on a misunderstanding of a passage of Paulus, *si stillicidii immittendi jus habeam, at permisero jus tibi in ea area edificandi, stillicidii immittendi jus amitto et similiter, si per tuum fundum via mibi debetur et permisero tibi in eo loco, per quem via mibi debetur aliquid facere, amitto jus via.* Permitto appears to relate to an express not implied permission, since otherwise, the expression would have been *passus sum, patior* being the word used with regard to services, *servitus consistit in patiendo non in faciendo.* Hoppnir	extasteriskaccent thinks the possession is lost, but not the right to the service; except, indeed, the neglect continues respectively ten or twenty years, where prescription will operate an extinction.

§ 1030.

It remains to be seen how far *non user* will operate extinction. Prescription is limited to ten years if the parties be present, and twenty if absent, but it is doubled if prescription be sufficient without a *usucapio libertatis*; that is to say, if it be necessary that the servient do some act to prevent the possible exercise of the right during the time the prescription is running; some jurists draw fine distinctions, and say, that if the service be *simplex,* such as a right of way, it is lost by simple *non user*; not so if *qualificata,* such as the right of making holes in another's wall to lay in beams, &c.; others draw a distinction between rustic and urban services; but following the principle before laid down, it would appear that a *usucapio libertatis* is indispensable; that if it be a qualified service consisting on the part of the dominant in an *opus manufactum,* its exercise must be opposed, or at least neglected; if *simplex,* merely opposed, as by blocking up a pathway or the like, prescription therefore supervening the service would be extinguished, and this is in accordance with the provisions of the later law of Justinian.

§ 1031.

*By expiry,* or when the right has been granted for a limited time only, and such period has expired.

But the right does not expire when an irrevocable proprietor grants such right, and subsequently sells his property, for it is a real right, and follows the rule *res transit cum onere*; but when the revocable proprietor grants the right, his property is revived *ex nunc* or *ex tunc:* in the last case it expires, but not in the first.

It will not be without advantage here to remark the difference between *dominium utile* and *usus fructus.* (1.) This latter right,
when not expressly granted to heirs, dies with the usufructuary; but the dominium utile, in its nature, devolves on heirs.

(2.) The usufructuarius cannot alter the form of the thing, which the dominus utilis can.

(3.) The usufructuary derives only the ordinary profits, but the dominus utilis the extraordinary in addition.

(4.) The first cannot grant away his right, which the latter can do absolutely, or at least, with few restrictions, they continue one hundred years, that being accounted the extreme legal period of human life. Capitis diminutio maxima or media will determine the right; for it is civil death, and precludes his using his right.

§ 1032.

Estates for life will, generally speaking, endure as long as the life for which they are granted; but there are some estates for life which may determine upon future contingencies before the life for which they are created expire. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice, in these and similar cases, whenever the contingency happens when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet while they subsist they are reckoned estates for life, because the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And, moreover, in case an estate be granted to a man for his life generally, it may also determine by his civil death; as, if he entered into a monastery whereby he is dead in law, for which reason, in conveyances, the grant is usually made for the term of a man's natural life, which can only determine by his natural death. The representatives of a tenant for life have the emblements.

The estate held by an incumbent in England in some respects resembles the usufruct of the civil law, but it is a limited and ascertained usufruct, extending to one-tenth of the net profits; his estate is determined on his death, but his executor may recover arrears of tithes which fell due in the testator's lifetime.

§ 1033.

Destruction will suspend or extinguish services: thus, if a house having a right of service on a neighbouring estate be burned down, the service is suspended, except the case of prescription, until the house be reconstructed; or if a road be washed away, the service thereon attaching is extinct, except, indeed, the road be restored.

The redemption of a pledge is in the nature of the extinction of

1 Co. Litt. 42 a; 3 Rep. 19 a.  2 a Rep. 48 b.  3 P. 8, 2, 30, § 2.
a service, as also the expiration of the time or failure of the condition upon which the grant was founded.

If the form of the subject of service be gradually changed, but not imperceptibly, or be so covered or coated over as to make access to it impossible, it is considered as destroyed; but here the rule of real differs from that of personal services; in the case of the first, it has been seen the interruption is to be considered as a mere suspension reviving with the object; but not so in the latter case, except when the restitution consists in the laying bare an object covered, the form whereof is, however, not altered, or where the owner of the service possessed a continuous right thereto under any form of the subject-matter, as in the case of the usufructuary right of the father in his son's adventitia.

§ 1034.

Personal services are lost by the death of the possessor of the service, or when it devolves directly on heirs. On the death of the heirs of the first degree, but in the case of fictitious persons (corporations), its continuance is limited to one hundred years. But when a usufruct is given to a son, it vests as adventitium in the father, and is not extinguished on the death of the son; or if a usufruct be granted to one during the lunacy of a third party, it does not expire with the death of the lunatic.

Civil death and the loss of liberty, but not, as was formerly the case, the loss of family rights, destroy personal services.

Permission to sell the subject-matter of the service by the possessor thereof extinguishes the service.

§ 1035.

There are two species of actions which appertain to services; the possessory and the petitory. The former of these prays protection in the exercise of a right enjoyed up to that time (quasi possessio), rather than claiming any right or to be freed from the burden thereof, but as a preliminary step, the question of being in possession must first be established; the latter action, however, relates to the right to a certain service, or to the freedom from it, and of such nature are the actiones confessoriae et negatoriae; for the former sets up the right to the service, the latter that of the natural liberty, to do which, the usurpation of a service merely gives an opportunity.

These actions are divided into directae and utiles, because they are applied to rights which, in fact, are not services; hence, when...
applied in their strict sense to services proper, they are termed direct; but equitable, when applied to other claims.

The actio confessoria directa may be instituted by one who claims a right to a service for his person or, for something belonging to him, against him who withholds it, throws obstacles in the way of its exercise, or so treats the object of the service as to frustrate the exercise of the right, if some measures were not adopted against the defendant; the prayer of the petition being, that the service be decreed to the plaintiff, all obstacles thrown in the way by the defendant be removed, and he himself bound to give security to that effect, termed cautio de non amplius turbando. This may occur in a question of right of way, of pasture in the forest of another, or of cutting woods.

The actio negatoria directa, on the other hand, arises when the land is free, but another claims a right of service thereupon, and here the prayer of the petition is, that the object be declared free, and that the defendant be ruled to forbear from the usurped service, and give his cautio de non amplius turbando as in the former case, which may be done before the judge by word of mouth.¹

The actio confessoria utilis accrues when a jus singulare privativum, or particular right, is claimed, but which, however, is not properly a service when others deny it and throw obstacles in the way of its exercise. The prayer of the plaintiff is, that the existence of the right be acknowledged, and that the defendant should no longer disturb him therein; but the negatoria utilis is brought when another usurps a particular or exclusive right, and will not permit the plaintiff an act inconsistent with such right, here the prayer is, that such exclusive right be declared not to belong to the defendant, and that he throw no impediments in the way which may militate against natural liberty, or whereby common or equal rights may be infringed. Hence the actio confessoria utilis premises a particular or exclusive right whereon the action is founded; but the negatoria prevents some act either on the ground of natural liberty, because by the law of nature every man may perform such acts; on the ground of a common right, because the Roman law permits their exercise to all; or, lastly, on the ground of equal right, that is, because the act is lawful for the plaintiff as well as for the defendant.

Thus, by the confessory action, the plaintiff claims the exclusive right as against a defendant who infringes it; in the negatory action, the plaintiff becomes defendant, and the defendant, plaintiff. The confessory, therefore, will lie for the ninth sheaf claimed instead of the tenth; but the negatory, by the proprietors of the oil, that they should not pay the ninth instead of the tenth.

§ 1036.

A possessory as well as a petitory action lies for the protection ¹ C. 6, 38, 3.
services, although not in all cases. The possessor of a personal service may have resort to the interdictum uti possidetis and utrubi in case of disturbance in possession,¹ and of the interdictum unde vi in case of dispossession, and that against any party soever.⁸ The interdictum uti possidetis applies in real services, if the lord of the praedium servientes do no act; or when the lord of the dominans do some act being a violation of the possession, not amounting to deprivation;³ but on grounds of policy the interdictum uti possidetis is excluded by the interdictum de cloacis, which applies to the repair and cleansing of the sewers,⁵ and is exceptional, in so far as a possession obtained clandestinely, forcibly, or by request, is protected.⁶ In respect of all other services which confer mutual rights on the serviens independently of the dominans, the general interdicts obtain concurrently with particular interdicts applicable to certain cases.⁷

These particular interdicts are the interdictum de itinere actuque privato, which every one can have resort to who has been disturbed⁸ in a right of way which he has exercised⁹ in his own name,¹⁰ thirty days in the year last past, neither clandestinely, forcibly, nor by permission, the possession of the predecessors and successors being considered the same person;¹¹ and if any one has recourse to this interdict, on the ground that the repair of the road be impeded, he must thereupon prove his right.¹²

The interdictum de aqua quotidiana et aestiva follows the rule of the interdictum uti possidetis in all material points,¹³ and applies in all cases of aquaeducts, the possession whereof has been exercised not clandestinely, forcibly, or permissively, and in good faith, within the year last past.¹⁴

The interdictum de rivis for disturbance in the repair of an aqueduct, can be obtained on like grounds;¹⁵ in like manner, the interdictum de fonte, where a person has drawn water and driven his beasts thereto within the year last past.¹⁶

¹ P. 43, 17, 4; Sav. on Possession, 4 Ed. p. 526-533.
² P. 7, 1, 60, pr.; P. 39, 5, 27; P. 43, 16, 3, § 13, 14, 15, 16, & 9, § 1, & 10.
³ P. 8, 5, 8, § 5; Sav. l. c. § 46.
⁴ P. 43, 17, 1, pr.
⁵ P. 43, 23, 1, pr.
⁶ Id. 1, § 7.
⁷ P. 8, 1, 20; Voet. L. 43, T. 16, § 2.
¹ T. 17, § 1, vide, et authorities quoted by Thibaut, P. R. § 769, n. u.
¹ P. 43, 19, § 5.
² Id. 1, pr. & 3, pr. § 1.
³ Id. 1, § 7, 8, 11, & 3, § 4.
⁴ Id. 1, § 2, 6-10, & 6; Sav. l. c.
⁵ Id. 1, § 13, 14.
⁶ P. 43, 20, 1, pr. § 23, 26, 27.
⁷ Id. 1, § 31-36, & 6.
⁸ P. 43, 21.
¹⁰ P. 43, 22.
§ 1037.

Property might be acquired in two ways, either by a man immediately, or mediately through those under this control, such as a filius or filia familias, mater familias, or servus.

It has already been seen that, by the law of Romulus, the condition of children was, indeed, not much superior to that of slaves; and what either the one or the other acquired vested forthwith in the father or master, and this extended to all under the father's power; consequently, the wife and daughters might also acquire for the pater familias.1

§ 1038.

The origin of this vested interest of the father in the property accruing to his children, &c., is founded on the patria potestas, or patriarchal system of the early Roman State, when the whole family lived together from a common fund,2 like a miniature community; the same system prevailed under the patriarchs of the early biblical period, where we find sons and daughters, when emancipated or married, took their portions during the father's lifetime, and thus, again, formed the nucleus of new patriarchal communities;3 in like manner, if a son had separate means of subsistence, the father was in the habit of granting him a peculium or peculiolum, because in earlier times no revenues were connected with military service and offices of State; but although the administration4 of this private property was left to the son, the legal estate resided in the father;5 hence it follows that, without

1 Sext. Empir. Pyrrhon Hypot. 3, 24; Senec. de Ben. 7, 4; Dionys. Hal. A. R. 8; Suet. Tib. 15.
2 Val. M. 4, 4, 8; Plut. Æmil. Paul. 5; Cat. Maj. 24; Crassus, 1.
3 Alluded to in the parable of the improvident son.
4 Plaut. Mercat. I. 1, v. 95.
5 P. 15, 1, 46, 48; Æ. 46, 2, 34, pr.
his concurrence, the son could neither make any gift nor manumitt, the less so could he testate, being in all respects the mere attorney of his father, and no one could make a will by attorney.

\[\text{§ 1039.}\]

In the process of time the law was relaxed, and a certain amount of private property gained in military service, which the plunder of more civilized states rendered profitable, was allowed; this, then, was the origin of the peculium militare; about this time it is supposed that, under Augustus (some think under Julius Caesar), the right to testate was granted to military persons, which was soon followed up by the power of manumitting a slave forming part of the booty. The legal view which afterwards obtained was, that filii familias could will such property as freely as if they were patres familias, and that the father's rights on the peculium came then first under consideration when the son had actually disposed of the property.

There can be no doubt, on Ulpian's testimony, that the privileges attaching to such property were afterwards considerably extended by Titus, Domitianus, Nerva, and Trajanus; and, although it is clear that the military peculiar under Claudius was not unknown, yet it was Constantine the Great who enacted the first specific provisions respecting it; and this inclusion of property gained in the civil service of the State, in that of the emperor, or by personal thrift, gives a strong presumption that this was but an extension of the principle upon which the peculium militare was founded, and which, for that reason, must have existed long before; the more so, as the words in sacro palatio militantibus is used in the Codex Theodosianus, as if by this fiction to bring their peculium within the old law.

Another exception obtained in the case of property inherited by the child from the mother, which by the old rule devolved upon the father; nor could the mother evade this, except by making the child her heir on condition of the father emancipating it. Constantine, however, decreed that such property should belong to the child, the father retaining the administration and usufruct only, a provision thereafter extended to other cases.

In Justinian's age the old rule, although theoretically existent, had become also impracticable by reason of the numerous exceptions; it was for this reason that the emperor reversed the order of

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1 P. 2, 14, 28, § 2; P. 21, 3, 1, § 1; P. 39, 5, 7, pr. § 2; 46, 5.
2 Suet. Tib. 15; P. 37, 14, 13.
3 P. 28, 1, 6, pr.; P. 39, 6, 25, § 1.
4 I. 2, 12, pr.; Ulp. 30, 10.
5 P. 49, 17, 13, 19, § 3; P. 37, 14, 8, pr.; P. 30, 2, 3, § 8 & 22.
6 Vide ante.
7 Juv. Sat. Ult. 52.
9 Plin. Ep. 4, 2; & 8, 18; P. 27, 10, 16, § 2.
10 C. 8, 18, 12.
11 Id. 6 & 7; C. Th. 8, 19; C. 6, 6, 1—5.
12 C. Th. 8, 18, 6 & 7; C. Th. 8, 19; C. 6, 61, 1—5.
things, decreeing that, in the case of all property not accruing out of his substance, the father should have the life interest, though not in all cases, and the child the legal estate without power to will; which, however, made no alteration in the peculium gained in military or civil service, and confirmed to the child by the pater familias.

§ 1040.

The peculium militare was everything that a filius familias obtained per militiam directly or incidentally, and which he would not have gained had he not been in militia, a term under which the Romans understood, it has been seen, not only service purely of a military nature, but also all offices and dignities, especially the profession of advocates.

The profession of arms was strictly called militia sagata, and civil offices militia togata; the peculium resulting from the first was called castrense, and comprehended plunder, largesses from his superiors for good conduct, the outfit given by his father, whatsoever he may have gotten from a comrade, and even from a brother in the same service, and who had made him his heir at his death in consideration of military service; moreover, whatever he may have bought with money so gained. The peculium castrense did not, however, extend to camp followers and civilians attached to the army, such as commissaries, sutlers, and preachers. If a filius familias brought his suit for things bought with such funds, the rule res succedit in locum pretii obtained.

Particularly, then, the peculium castrense may be thus stated to consist of every moveable thing (chattel) given by relations or friends to a filius familias on his entry into military service, his outfit; all moveable and immoveable things obtained in war, under which are included presents, and inheritances of comrades of the same garrison, by will made after the commencement of such companionship; everything a soldier obtained from his wife as heir, but not as legatee, but no other gift, though made under this condition; and everything bought with the proceeds of things gained in war, as above.

Military feods come under this head, but in cases of doubt they must be taken to be profectitia or adventitia.

§ 1041.

Peculium quasi castrense was obtained by either a secular or clerical office,—as that of an advocate, master, doctor, practising...
arose out of secular or clerical offices; the profits of any public office. Presents on account of the liberal professions, or the gifts of the royal family.

Privileges of the peculium militare castrense et quasi castrense. Disponible inter vivos et mortis causa. By inheritance. For the purpose of contracts and suits.

physician, professor of the sciences; or as a public officer, secretary, keeper of records, Government councillor, privy purge, privy councillor, professor, or priest, &c., saved out of his salary, or gained by fees of office; also from the emoluments arising out of an office requiring no scientific education,—as that of a head groom, fencing or dancing master, or clerk of the kitchen. Lastly, any public office which gave the opportunity of such profits conferred the right of the peculium quasi castrense.

If a professor make a colleague his heir as such,—if a father make his son, who is a doctor, physician, or advocate, a present in consideration of such dignity, it comes within the exception; it is, of course, unnecessary to remark that the acquisitor must be a filius familias.

It has been a question whether donata à Principe vel Augusta be portions of the peculium quasi castrense. Now, if the sovereign make the filius familias a present on consideration of his military service, the property so acquired is to be classed under the peculium quasi castrense; but if it have been made for some other reason, it nevertheless falls under the rules regulating the peculium militare.

§ 1042.

The peculium militare castrense, or quasi castrense, enjoys greater privileges than any of the other kinds, the privilege enduring after the possessor of it has retired from service. The son possesses a plenum jus, and, as far as concerns this peculium, is to be looked upon as a pater familias, capable of acting as such as far as regards such peculium: if he borrow money on the strength of this peculium, he is excluded from the benefit of the Senatus Consultum Macedonianum, and is barred from pleading his minority.

He can dispose of it inter vivos or mortis causa: if he die intestate, it goes to his heirs, children, brothers, sisters, or parents, nor can the father lay hold of it, according to the older laws of the peculium; but if the son be transported, the father retained the peculium. According to the Novels, the parents inherit the peculium militare, together with all the brothers and sisters of the full blood of the deceased. The son can, by virtue thereof, make contracts with his father, nay, he can even prosecute a suit against him, which in other cases he cannot do.

1 Punctis solatis aliter functis solatis (salaria functiones); C. 2, 7, 4, § 1; Heinec. ad Brison. de Verb. Signif. Voc. Pungere. 2 C. 1, 51, 7; C. 12, 31; C. 12, 37, 6; C. 3, 28; C. 12, 37, 1; C. 3, 36, 4; Cocceii Jur. Controv. Tit. de Pecul. Qu. 1. 3 C. 6, 61, 7; Galvan. de Usufr. c. 7, n. 10, p. m. 58, calls it quasi castrense, but perhaps more properly it is quasi militare. 4 P. 49, 17, 17, § 1; Id. 19, § 2. 5 C. 4, 28, 7, § 1; P. 14, 6, 1, § 3. 6 P. 49, 17, 2, 9 & 14. 7 C. 9, 49, 3. 8 118.
§ 1043.

Peculium paganum, including everything not obtained by militia either directly or incidentally, is divided into profectitium and adventitium.

Profecitium is everything received from the father, or that which comes to the filii familias through the father—which latter is implied, though nowhere directly expressed. Of the first description, is an estate granted to the son by the father that he may live on the income thereof; a magazine given up to him for commercial purposes. Of the second description, is a present made by a third party to the son for services rendered him by the father. In all these cases, the children are supposed still to be sub patria potestate, otherwise it ceases altogether to come under the denomination of peculium.

§ 1044.

Such profecitium belongs altogether to the father—that is to say, he has the legal estate and civil possession thereof, the children have nothing but the corporeal possession and administration; but should the father’s property be confiscated, the children’s profectitium is protected by a special edict of Claudius,—Si patris bona a fisco propter debitum occupata sunt, peculium ex constitutione Claudii separatur.*

If the father emancipate his children without demanding this peculium, he is held to have tacitly given it to them: in case of the father’s death, however, the children must account for such peculium profectitium in the schedule of the estate.

§ 1045.

The peculium adventitium ordinarium is whatever the children gain neither from or through the father, but by their own exertions, from their mother or other persons, therefore derelictum which they acquire by occupation.

In such cases, though the property vests in the child, the usufruct belongs to the parent, without the obligation of security, inventory, or specification on oath,—together with the right even of sale, in case of necessity, without a decree of the authority. This usufruct lasts as long as the paternal power, and even longer, as in cases of emancipation, when the moiety of the usufruct may be retained as a consideration therefor; and in case of the death of the child, this peculium follows the rule of intestate property, and devolves upon the parents, and brothers, and sisters.

1 P. 7, 1, 21 & 22.
2 P. 4, 4, 3, § 4; Vin. ad I. 2, 12, pr. n. 5.
3 Puf. tom. 1, Obs. 98, § 18.
4 C. 6, 61, 8, § 5; C. 3, 32, 14; C. 4, 51, 3; C. 8, 45, 14; Thibaut, P. R. § 325; Glück, P. Th. 14, § 909, vide, et Höpfner, § 433, n. 3.
5 Nov. 118, f. 2, originally C. 6, 56, 7, § 1.

*Puf. torn. 1, Obs. 98, § 18. *Nov. 118, f. 2, originally C. 6, 56, 7, § 1.
§ 1046.

The peculium adventitium is said to be extraordinarium in cases where the property has been gained against the father's consent, as in case of an inheritance which the father has refused and the son accepted, or when left with an express condition excluding the father, in such cases the father has no usufruct; or when a child dies and the property devolves on the brothers and sisters, in this latter case the father has no usufruct of their portions, Thus,—

B dies leaving 300 aurei. A, the father, has no power over the 200 divided between C and D. This arises from the provision of Nov. 118, 2, for the Codex gives the father nothing, — nullum usum ex filiorum aut filiarum portione in hoc casu volente patre sibi penitus vindicare, quoniam pro hac usus portione haereditatis jus et secundam proprietatem per presentem dedimus legem. This is, however, only applicable to intestate successions, and not to cases arising out of wills or contracts where the father inherits in common with his children. Lastly, the case mentioned in the Sctum Trebellianum\(^1\) belongs to this place. The father was instituted heir under the condition of restoring the inheritance to the son when he passed from under the patria potestas; the Emperor Hadrian decreed, however, that if the father betrayed his trust and wasted the property, he should deliver it over during the continuance of patria potestas, and lose his usufruct.

Hence that peculium in which the father has a usufructuary right has been called by modern jurists, ordinarium regulare minus plenum; that in which he has none, extraordinarium regulare plenum.

The son can dispose of this latter inter vivos or mortis causa, at his pleasure, but not by will, because the testamenti factio belongeth not to filiis familias except in the exceptional case of peculium militare; in which case, they are regarded as patres familias.

§ 1047.

A slave cannot possess anything for himself, for everything he apparently acquired vested in his master, who may then unconsciously become entitled to property; the slave cannot, however, assume possession without the consent of the master, for possession is the detention of an object with the intention to retain it;\(^2\) but in the case of an inheritance the master must give a direct order, for if a slave acquire a thing without order, which the master afterwards finds advantageous, he may retain it or not, as he

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1 P. 36, 1, 50.
2 I. 2, 11, § 3; contra vide I. 41, 2, 1, § 5; Id. 4, & 44, § 1.
peculium was concerned, which the owners seldom deprived them of, it was usually acquired by thrift and economy in their board wages, termed menstruum, amounting to five bushels and five denaria, which they received instead of their keep or demensum; the sum so amassed they put out to interest or traded with it, acquired themselves slaves, termed vicari, and often became even rich themselves.

Moreover, as the patrician Romans considered trade below their dignity, and were yet unwilling to forego the profit, they carried it on through their slaves, who were the ostensible traffickers, for whom the owner was, in fact, responsible, and for whom, on the other hand, they acquired; and although a master possessed a mere usufruct in a slave, yet what such slave acquired accrued to the master, for he had a right to the labor of the slave, and, consequently, to whatever that labor produced, without having a right to the slave himself.

§ 1048.

According to the old law, filii familias and servi were the only persons through whom property might be acquired; the later laws, however, let in the principle of acquisition by attorney per procuratorem, and first of all was acquired,—the possession, as when he enters for me; secondly, the property when he buys at my request and receives delivery. The right of pledge, as when he lends my money on a house. Servitudes, this has been questioned, but on no sufficient grounds. If the attorney obtain quasi possession in my name, he has acquired the servitude for me. The right of inheritance could, on the contrary, not be acquired by attorney pacta successoria, being wholly prohibited.

This is not the case in Germany at present, where, moreover, one may acquire by the act of a friend acting of his own motion, and without authority.

§ 1049.

Property might be acquired either of natural or civil right; which latter is either singular, whereby particular things only are acquired, being parts of some integer,—these m:di singulares are donatio, usucapio sive longi temporis prescriptio, legatum, and fidei commissum singulare, which are treated of in this title,—or universales, which belong to the next, and consist in hereditatis acquisitio, bonorum possessio, adquisitio per arrogationem, addictio libertatem servandarum causid, adquisitio per sectionem bonorum, adquisitio per Sicum. Claudianum, to which may be added, though

1 P. 28, 5, 88.
2 Sen. Epist. 71 & 10, 40.
3 Ter. Phor. 1, 1, 5.
4 Lauterbach Coll. Th. pr. Tit. de Serv. § 9 & 932; P. 41, 1, 13, 59; P. 41, 2, 1, § 20; C. 7, 32, 8; C. 7, 10, 2.
not mentioned by Justinian, *successio fisci in bona damnatorum et vacantia*. By assuming the monkish habit, and *conventione in manum sc. mariti*.

1050.

A gift is a means by which property is transformed gratuitously, or without consideration, *nulla jure cegente*.

If the object be at once delivered, there is a perfect *modus adquirendi*; but if there be a mere promise, there is a *titulus* only, and the *donatarius* acquires a *jus ad rem* or mere right, but not possession, and in this case the gift may be coupled with a condition; it is, in fact, a contract to deliver an object without consideration.

A question has arisen as to whether Justinian was correct in assigning gift a place among the *modi adquirendi civiles*, because it is not unknown to natural law. In support of Justinian's arrangement, it is said, that gift was accompanied by the civil condition of stipulation; that gift, in contemplation of death, required five witnesses; that the donation, in contemplation of marriage, is unknown to natural law; and Contius thinks gift is not valid without tradition.

On the other side, it is urged that the promise gave a right of action before Justinian's time. That the question resolves itself into this, whether tradition is a civil mode of acquisition, and that the fact of the civil laws prescribing positive conditions will not make a *modus adquirendi* civil. That if the law of nature ignores the *donatio mortis causa*, it is not, for that reason, a civil mode of acquisition. That it cannot be proved by natural law that no gift is valid without tradition, and that if it were valid, the case is not proved. Justinian, however, appears to be right, for an action is certainly of civil institution; and, at all events, if it were not a civil mode of acquisition before Justinian, he made it so.

§ 1051.

Donatio, or gift, is a civil mode of acquisition.

Generally gifts are either *simplices*, such as are given of mere free will, or *remuneratoria*, such as imply some consideration, which may be *mortis causâ, inter vivos, or propter nuptias*. *Donum* is a generate term applicable to all gifts, though sometimes used in a narrower sense, for gifts by the rich and powerful to the poor or indigent, also largesses given to soldiers in camp; but *munus*, a particular one, being such as were given by a friend, client, or freedman, for the protection afforded him by his patron.

*Munus* more particularly applied to a gift on account of services rendered resembling the *honorarium*, from the term as applied to a public burthen or office, and thus *munus* is the contrary of *donum* in its narrower signification, for *munus* was given by the inferior to the superior, *donum* by the superior to the inferior. Clients


sent their patrons munera for managing their legal or other business; freedmen, for the same reason, or out of gratitude, or propter operas; slaves, at certain periods of the year and on certain occasions, such as new year gifts on the kalends of January, on the marriage or birth of children or grandchildren on their birthdays, initiations, &c.

The emperors also received new year's gifts under Augustus. Tiberius, however, checked by his edict the practice, grown into the emperor's abuse, and refused the strenae; but Caligula revived it by edict, and so it continued until Claudius again forbade the practice by edict; later, however, scarcely any of the emperors refused the so-called munuscula.

Although provincial magistrates were forbidden to accept gifts, whether under the denomination of dona or munera, yet they were allowed to take xeniola, gifts from strangers, as the word imports. Cicero, however, appears to have rejected even these when in office.

The Ottomans have three sorts of presents. The general term is Baksbsh, بخشیت, being a small gift in money from a superior to an inferior. A present between equals is termed Hedjet, هدیه, Ibissan, a largess, royal benevolence, grace, or goodness, is seldom applied but to persons in high station, such as the Sultan. Athyet, عطیه, a gift, present, benefit,—this word is more generally used when speaking of a present from a superior. Peshkesb, پخشکش, is a present from an inferior to a superior in the hope of a return.

The new year was celebrated by presents of sweet things of various kinds for good omen,—probably the practice of throwing sugar-plums about during the carneval at Rome has its origin hence; they appear to have been given chiefly by the poorer classes, for the rich sent objects of gold and silver, especially to the emperors; hence the aurum oblatitium, which occupies a whole title in the Codex Theodosianus. There were, however, other days upon which strenae were given. Tiberius, however, limited this practice to the kalends of January, by edict.

At the Saturnalia the men were in the habit of giving and receiving strenae or sigillaria (munera), and apophoreta, things to be carried home, ἀποφορέτα,—the women on the matronalia. The Publician law, so called from its mover, the tribune of that name, confined the avidity of patrons to presents of corn to the rich.
Birthdays were at Rome, as now, an occasion of reciprocal presents. It had been previously the custom to send birds and signet rings, sigillaria, or small images, in honor of Saturn, rings, little crescents, and like feminine ornaments, natal vestments and the like; and not only were gifts received on birthdays, but also made.

Male children were named and initiated with divers solemn rites in the temples (iusstrabantur) on the ninth day, females on the eighth day, a striking coincidence with the Hebrew custom; and on those occasions the friends and relations of the parents were invited to a banquet, where presents were made to the child or the father, as is at present the custom at christenings.

The munera nuptialitia were so much a matter of necessity, that no one could appear amongst the guests without a present for the bride and bridegroom. These are the gifts mentioned by the jurists, and were occasionally so considerable as of themselves to amount to a dos.

The same liberality was shown in making presents to strangers, termed xenia; and many instances are on record where the rich, and those who wished to obtain popular power, endeavoured to secure the support of the plebeian class by unwonted liberality, to the extent even of making up the sum sufficient to confer the knightly census.

§ 1052.

In order to restrain such extravagant gifts, Marcus Cincius Alimentus, the tribune, deemed it necessary, A.U.C. 549, to introduce the Lex Cincia before alluded to, and otherwise called muneralis, the first clause of which was directed against the gifts given for pleading causes, which, although originally honorary, and given at the Saturnalia, &c., as has been before mentioned, lapsed into claims on the part of the patricians, and thus became an intolerable burthen on the plebeians.

The Cincian law, however, was by degrees forgotten and disregarded, and the old abuses recurred, until Augustus revived the law, adding quadruple penalties on transgressors. It, however, was again disregarded; and Claudius, finding it impossible to abolish the practice altogether, modified it by decreeing that more than dena sestertium, 10,000 sesterces, should not be given for pleading a cause. Nero restored the law in its former

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1 Mart. Epig. 9, 65.
2 Mart. Epig. 9, 56.
3 Macrobr. Sat. 1, 13.
4 Plaut. Epid. 5, 1, 33.
5 Grut. Inscr. 4, 14, 2 & 57, 1.
6 Suet. Calig. 25; Pers. Sat. 2, 31;
7 Fest. v. Lustrici, 507; Macrobr. Sat. 1, 16;
10 Ter. Phor. 1, 1, 13.
11 P. 50, 16, 195; Cic. pro A. Cluentio, 6, 16; Apul. de Assino Aureo. 6; P. 27, 3, 1; Suet. Pers. Sat. 2, 19—3, 25—3, 3—1.
12 Id. 6, 31.
13 Plin. Epist. 6, 32.
14 Id. 6, 31—5, 1—1, 19—3, 21—3, 3—1, 4.
15 Plaut. ap. Fest. v. Muneralis, 33. 3
17 Tac. A. 21, 5.
ADQUISITIO PER DONATIONEM. 107

severity; but towards the end of his reign, or soon afterwards, the former edict of Claudius was renewed. Trajan caused a decree of the Senate to be passed, whereby the litigant parties were called upon to swear that they had neither given, promised, nor given security for, any sum on account of a cause to be pleaded; and after it was decided, it was unlawful for them to give more than the *dena sestertium*.

This law, too, became obsolete, and the *honorarium* of advocates obtained the unworthy appellation of *merces*; nor did the *jurisconsults* hesitate to admit an action of *locatio conductio* between advocates and clients. But this law had been hitherto frequently evaded by means of *xenia, strenae, natalatia*, testamentary deposition, the so-called *palmaria, redemptiones litium*, and other and like subterfuges, demonstrating the impossibility of checking abuses.

§ 1053.

The *Lex Cincia* contained other provisions respecting gifts, of which there exists no certain information; the learned commentator before quoted is of opinion that under the same head gifts beyond a certain sum were restrained, and an exception granted; whereby the excess above such maximum might be struck off, although the gift was valid as to the rest; exemptions were, however, it appears, allowed when the donation was public, given as a remuneration for services performed, or with the consent of certain relations.

There is sufficient evidence contained in inscriptions to show that, in the case of gifts made to certain persons, mancipation with delivery was requisite except in gifts conditional and *mortis causa*. Many decrees of the Senate, however, supervened, abrogating some and modifying other parts of this notorious law, so that a gift made between persons related to each other, accompanied by a certain verbal formula, was good, even without mancipation, which was introduced by the constitution of Pius, but up to that time relatives and the like followed the *Lex Cincia*, which had become common law in all matters of gifts; but Pius decreed, somewhat later, that no one should contract as a donor beyond the limit allowed him.

A soldier could not make a gift to his concubine (*focaria*), nor make her his heir. It is not ascertainable whether the permission to make gifts without limitation for rescuing a person from robbers

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1 P. 19, 2, 38, § 1; Brummeri Com. ad L. Cinc. 3 & 19; C. 4, 6, 9.
2 Brummerus de L. Cincia, 12; Ulp. Frag. 1, 1; P. 39, 5, 21, § 1; lb. 24; P. 44, 4, 5, § 2 & 5. These exceptions would not have been necessary if the *Lex Cincia* proprio vigore had declared the excess an invalid gift.
3 Grut. l. c.; Brum. l. c. 14.
4 Paul. R. S. 4, 1, 11.
5 C. Th. 4, de Dom.
7 P. 42, 1, 20, 28 & 41, § 2.
8 C. 5, 16, 2.
9 P. 34, 9, 14; sed vid. Grut. Inscr. 607, n. 3; P. 29, 1, 13, § 2; C. 6, 21, 5; Merill. Obs. 8, 32, p. 124.
A gift is bad, if made in terms too general.

Between father and son.

When valid.

Registration of gifts.
Constantine Chlorus.
Theodosius and Valentinianus.
Justinian.

Gifts not favored in law.
Presumption is against a gift.

§ 1054.

A gift was bad if made in words too general, as, for instance, "I give the third part of my goods;" the individual objects must be enumerated, and the same applied as between father and son: this law obtained under Diocletian.

If a father made a gift to a son who remained in the family, it was to be considered rather as expressive of his will than to be a perfect gift, in account of the unity of person; but the gift was perfect if the son had been emancipated, or if the father died persevering in the same intention; but things so given were not subject to usucapion by the son, save adjudged by a decree for dividing the inheritance, hence parents were in the habit of bequeathing those things by pre-legacy which they had given during their lifetime; but this was altered by the later law compiled under Justinian.

§ 1055.

Constantine Chlorus ordered that all deeds of gift should be in writing and registered; his son, Constantine the Great, confirmed this constitution. Theodosius and Valentinianus, however, dispensed with the former, and the latter also when the gift did not exceed two hundred aurei in amount; they are, moreover, said to have abrogated the second title of the Lex Cincia, respecting a gift of a certain sum. Justinian, however, increased the sum which required registration to three hundred aurei, and afterwards augmented it to five hundred, certain kinds of donations excepted; in the number of which, Cujacius places the remuneratory ones. Writing, nevertheless, appears to have been often used in the time even of Justin.

§ 1056.

Gifts, as they may be the means of corruption or the effects of prodigality, are not favored in law, and the intention of the owner must be shown by strict proof, for presumption will not suffice; thus, gifts to strumpets, though in fact for the use of their bodies, if proved to be gifts are not void, for an honest woman may receive a gift upon another ground, the law will not relieve the giver, for if blame attach to the receiver, it is equally so to the giver. A consti-

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1 Paul. R. S. 5, 11, 6; P. 39, 5, 34.
2 Cod. Herm. de Don. 1; Ulp. Fr. 19, 6.
3 Grat. Ins. 880, n. 3; Schult. Not. ad Cod. Hermog. p. m. 713, 59.
4 C. 8, 54, 11.
5 Paul. R. S. 5, 11, 3.
6 C. 3, 36, 18.
Donatio inter vivos, otherwise called a proper gift, then, is when one, out of mere liberality, bestows a thing upon another, there being no law to compel him to it. Donari videtur quod nullo jure cogente conceditur; he dispossesses himself of the property therein, without anticipating the recall of it dat aliquis e mund ut statim velit accipiens fieri nec ullo casu ad se reverti; the donor must, of course, have a perfect right and command of the thing in question so as to be able to sell it if he will, for cujus est donandi, eidem et vendendi, et concedendi jus est.

§ 1058.

The conditions of a gift mortis causa are, that the perfection of the gift depends upon the fact of the death, the possession being deferred till the death of the individual; in short, the gift is conditioned on an event, for if the possession be at once parted with, it becomes a donatio inter vivos; and so it is when the gift is dependent on the death of a third party.

The donatio mortis causa may be said to occupy a middle place between a contract and gift by last will: regarded as a contract, it wants consideration; regarded as a will, the death of the donor.

§ 1059.

Donatio inter vivos is either relata or simplex, that is, absoluta; and this latter may be said to be remuneratoria or modalis, sub modo, thus, what is given with reference to some service done, is called relata,—if out of pure liberality, without any reason being assigned, simplex or absoluta; but should the object be given by way of reward for service done, is called remuneratoria; lastly, if anything be given to a person with the view that he first do something that shall benefit himself alone, it is termed donatio modalis or sub modo.

By the old Roman law, gifts inter vivos gave no right of action when not accompanied by stipulation or actual delivery, so as to bring them within the definition of contracts, and by verbis solemnibus. Justinian altered this, declaring that no form of words should be necessary to give a right to the condicio; by these changes a gift became a pactum legitimum by bare consent and agreement, ex nudo pacto before delivery, to which the law in this particular case, will force the donor and his heirs, if the gift be expressed per verba de præsenti, and not de futuro, though even

1 C. 5, 16, 2.
2 P. 50, 17, 82.
3 P. 39, 5, 7, pr.
4 P. 50, 17, 163.
5 C. 8, 54, 35; § 5.
6 C. 8, 54, 57.
the donee were absent at the time of the agreement, for both parties may act by proxy or letter.\(^1\)

In fact, without delivery, it is purely a contract; and if the consent of the one party be wanting, the contract is incomplete; thus Javolenus says, *in omnibus rebus quae dominium transferrunt, concurrat oportet affectus ex utrâque parte contrabentium nam sive ea venditio sive donatio, sive conductio sive quilibet alia causâ contrahendi fuit nisi animus utriusque consentit, perduci ad effectum id, quod inchoatur non potest.*\(^8\)

§ 1060.

No one is, however, compellable to perform more than he is able,\(^3\) for *qui ex liberalitate conveniunt, in id quod facere possunt, condamnandi.*

By the canon law,\(^4\) nude agreements are valid.

Before the gift is accepted, the giver may recall it; and\(^5\) such a right vests in his heirs if the *Donor* die before acceptance, that the acceptance come too late for\(^6\) *non videntur data, quae eo tempore quo dentur, accipientis non sunt;* unless, indeed, in the case of gifts *ad pias usus.*\(^7\) But if the *Donee* die before acceptance,\(^8\) his heir cannot consent where the gift is personal, because mutuality of consent is required.

A gift is distinct from a debt; thus, a *donum* cannot be recovered as a *debitum,*\(^9\) which it is construed to be must depend on circumstances; but as the law discountenances gifts, even proximity of kindred between two persons sufficeth not to presume a gift;\(^10\) in absence of proof to the contrary therefore, it will be presumed a debt.

Delivery by mistake gives the right to recall the gift; but if wittingly done it is irrevocable, *cujus per errorem dati repetitio est, ejus consulto dati donatio est.*\(^11\)

There must be a *capacity* on the part of the *Donor* as well as on that of the *Donee* to give and receive, for old doating persons, madmen, prodigals, and minors;\(^12\) also, persons deaf and dumb by nature, not by disease or chance,\(^13\) are prohibited from making gifts, as in the case of husband and wife,\(^14\) before mentioned; from this rule, the emperor and empress are expressly excepted.\(^15\) The wife cannot dispose of her *dos,*\(^16\) even with the concurrence of her husband, except in some peculiar cases.

Criminals under sentence of death\(^17\) cannot grant away their

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1. C. 8, 54, 13 & 20; P. 44, 7, 2 § 2.
2. P. 44, 7, 55; P. 44, 7, 23.
4. C. 8, quinque 12, qu. 2, c. 1 & 2,
5. hoc Tit.
6. P. 59, 5, 2; § 6.
8. C. 1, 3, 15.
ADQUISITIO PER DONATIONEM INTER VIVOS.

estates; some are, however, of opinion that the disability dates back from the commission of the crime, which is erroneous, on the principle that the incapacity is not the crime itself, but the punishment of it, of which confiscation is a part, and which follows on conviction; but as it is not possible to execute one part of the sentence, viz., death, at the time of the commission of the crime, so it is unjust to apply the other, viz., the confiscation.

These incapacities, or capacities, apply then to the Donor; it now remains to examine what capacities or incapacities apply to the Donee.

First, no one can give to himself; for what is once mine cannot be made more so, quod proprium est alicujus amplius ei fieri non potest; nor can gifts be made to a madman; nor by a father to his son under power, for whatever the son gains accrues to the father; nay, it is even questioned whether books, which a father gives to his son as necessary to his education, belong to him after his emancipation, or at the father's death? A son so under power cannot give to his father, unless he have goods of his own distinct from his father's goods; the two being, in law, one person.

§ 1061.

Next follows the question of capacity in the thing to be given; therefore things that cease to be in nature, things sacred or appointed for public use, a freeman, and that which belongs to another, cannot be given; nor an inheritance by the heir presumptive before the testator's death, for it is as yet no inheritance; nor can "all goods present and to come" of any person be given away inter vivos, excepting in some special cases. If there be capacity in the donor, donee, and donatura, all things, corporeal or incorporeal, moveable or immoveable, may be transferred by gift; even actions may be released gratuitously, or assigned over to another, though this is not so in England. Also future actions may be transferred to friends, strangers, absentees, by proxies or by letter, or to persons unknown.

With respect to delivery, Halifax is in error when he reckons it as a necessary ingredient of donation; for, as we have seen above, a promise on one side, and acceptance on the other, is sufficient to pass the gift, be it even made by proxy, letter, or message, actual delivery is not required, for the gift passes constructively on the promise only.

Public Registration, however, is required where the gift at the time it is made exceeds in value 500 crowns, or about 2441. 10s.,
in order to prevent men parting with their property inadvisedly, or pretend gifts to defraud creditors; for if a gift be made of the whole estate, the creditors may obtain its revocation for the satisfaction of their debts. This sum must, however, be given in one gift,\(^1\) to render it necessary to be entered of record (actis insinuanda); for gifts are good without registration if they be several and made at different times, though the total amounts to more than the sum of 500 aurei. If, however, a gift be for a greater sum than 500 aurei, it may be valid\(^8\) for that sum and voidable as to the excess, by exceptio, though not publicly registered.

Gifts made to and from the emperor are\(^3\) excepted from this rule; but, by a novel constitution\(^4\) of Justinian, the gifts of the emperor to private persons ought to pass under some public instrument subscribed by the emperor and witnesses.

Gifts made for the ransom of captives,\(^5\) or those to soldiers\(^6\) by the Magister Militum for gallant exploits performed in war,\(^7\) and money collected for repairing demolished houses, need not be recorded; but this is not to extend to give a privilege to other pious causes.\(^8\)

§ 1062.

In England, gift or donation is that given without an equivalent or consideration; but if a consideration of any sort, however small, be given, the gift is converted into a grant. Blood, or natural affection, is held to be a consideration; but if it be not executed, then it is neither a gift nor a grant, but a contract: the first vests property in possession, the latter in action.

Such gifts or grants may be of things real or things personal. Among the first are included all things that savor of the realty, as leases of land for years, surrenders, assignments thereof, and the like, in short, any conveyance of an estate less than freehold or estate tail, whereas a feoffment is of an estate in fee: to such grants must be added a livery of seisin to perfect them.\(^9\)

Grants or gifts of chattels personal may be made in writing or verbally, whereby the grantor renounces, and the grantee immediately acquires, all property therein, of which possession is the best evidence. As in the civil so in the English law, gratuitous gifts are looked upon with jealousy, and a statute\(^10\) has been introduced for the protection of creditors from simulated and fraudulent gifts, and the Crown from losing the advantage of forfeitures in cases of treason and felony by deeds of gifts in trust for the use of the donor. By a later statute,\(^11\) grants or gifts of chattels, with intent to defraud, are void as against persons who

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\(^1\) C. 8, 54. 34. § 3.
\(^2\) Ibid. 4
\(^3\) Ibid. 6
\(^4\) C. 8, 54. 36.
\(^5\) C. 1, 2, 19.
\(^6\) Ibid.
\(^7\) Ibid.

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\(^1\) C. 8, 54. 34, § 3.
\(^2\) C. 8, 44. 35.
\(^3\) C. 8, 54. 34.
\(^4\) Nov. 52, 2.
\(^5\) C. 8, 54. 36. * Ibid. 7 * Ibid.
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might be prejudiced thereby, though good as against the grantor; moreover, all persons privy to such grants shall forfeit half the value of the goods to the king, and half to the party aggrieved, and suffer imprisonment for half a year.

§ 1063.

The donatio mortis causa differs from the donatio inter vivos in this, that the latter is irrevocable, except under certain circumstances; whereas, the former is revocable, if the donor do not die; something, however, depends upon the formula: thus, if a gift in contemplation of a speedy dissolution, be made with the express limitation "that it should in no case be demanded back," ut nullo casu ejus repetitio esset, that is, not even if the donor recover, it becomes a donatio inter vivos, and as such irrevocable.1

All objects could be given which were alienable, whether present or future.8 An act implying a gift, passes the object.

§ 1064.

If gifts inter vivos be once perfect, they are in their nature irrevocable,3 though the giver pretend that he has thereby defrauded his creditors, for no one shall be allowed any advantage by pleading his own crime; nor even can the rescript of the emperor void such gifts.5 Nevertheless, there are three causes for which they may be revoked.

First, where the gifts are inofficiosa,6 and so considerable that a father, son, brother, or sister is thereby deprived of such share, pars falcidia, as the law allotts him,7 it is a question whether the intention affectus, or the effect, effectus laedendi legitimam, are to be considered. Pufendorf and Walch think the latter: another question is, whether the gift be inofficious as to the whole, or only as to the excess by which the pars falcidia is invaded; the better opinion is, that the gift is bad as to the whole.

The querela inofficiosae donationis is assimilated with the querela inofficioso testamenti, in which no notice is taken of the intention of the testator.8 In a gift mortis causa, the deficiency in the pars falcidia is subtracted from the gift.9 But if the whole property be given inofficiously, the whole gift is reversible.10

1 P. 39, 6, 27; for forms vide those preserved by Brissonius de Form. 7, 690, in which much interesting matter is collected, and of inscriptions recording donations to bodies corporate, vide et Plaut. Ap. 4, 7, containing many laws and a deed of gift between a young man, his mistress, and a pimp. 2 C. 8, 54, 35, § 4—5; C. 8, 56, 8. 3 C. 8, 56, 2. 4 C. 8, 56, 4. 5 C. 8, 56, 5. 6 C. 3, 20, 1, 2, 3, 4. 7 Pur. tom. 2, Obs. 178, and tom. 3, Obs. 23. This is to be reckoned according to the amount of the property which would have constituted the inheritance if the gift had not taken place, Nov. 91, 1. 8 Pur. t. 2, obs. 178, p. 561; Walch, Diss. de Prescrip. Donat. Inofficiosæ, § 5; Id. in Contr. p. 173, ed. 3. 9 Wimbenbach ad Cod. lib. 5, tit. 29; Harprecht de Jure Deducendi Duo Quartas, n. 640, 641, 671. 10 Voet. ad Pand. tit. de m. c. Don. § 40; Strykus. Mod. cod. tit. § 4; vide et Hupfner Com. § 412, n. 2 & 3.
If gifts be made successively, the last which infringe the *pars falcidia* may be rescinded.  

§ 1065.

Ingratitude was a cause which operated in the five following instances to avoid a gift:—

1. If the receiver grievously defamed the donor (*injuriae atroces.*)
2. If he laid violent hands on him, (*si manus illiæ donatorii, or si in pias manus inferat.*)
3. If he damned his estate, (*si jacturam vel omnium vel majoris partis bonorum inferre voluerit donatoris, or si jacturæ molem ex insidiis suis ingerit, qua non levem sensum substantialii donatoris imponit.*)
4. If he laid wait to take away his life, (*si vitæ periculum, vel per se vel per alium struxerit.*)
5. If he refused to fulfil the agreements made at the time of the gift, (*si conditionibus donationi adiectis non satisficerit,) which properly does not come under the head of ingratitude, and was added by Justinian.

The whole is summed up in the following indifferent verses:—

*Restitui donata placent, si verbera primo,\[1\]

*Aut grave donanti dedecus intulerit,*

*Struxerit insidias vitæ, dederit grave damnum,*

*Aut si pactorum vult temerare fidem.*

Some would add another cause of revocation, namely, that of the receiver denying relief to the afterwards impoverished giver;\[2\] this is, however, an equitable reason, which cannot be introduced into a penal statute, the provisions of which are, moreover, explicit.

All acts which may be brought under the above heads will invalidate the gift; thus, getting the daughter of the donor with child is a species of injury, and the like. But the donor must sue before he die, for his heirs have no right of action, inasmuch as this is a personal injury which he might have forgiven; indeed, the law presumes the donee has done so, from the fact of his not having sued. Ingratitude to the heirs of the donor gives no cause of action.

In cases where the gift is recalled for ingratitude,\[3\] the mesne profits cannot be claimed except from the time of the commencement of the suit, for these may be the result of the donee's own outlay and industry. If, however, the gift be sold, or exchanged, or given away to a third party, it is irrevocable; for, otherwise, an innocent person would suffer for the crime of the donee.

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2. C. 8, 56, 10.
3. Pro, sunt Struve Ex. 39, Th. 155; Vin. ad I. 2, 7, § 2, n. 7; Walch Contr. p. 477; contra, Straus Dia. ad just. Justin Dia. 8, Th. 16; Schilt. Dia. Civ. cap. 2, § 22; Cocceii in Jur. Contr. h. t. sq. 10; Schilter Ex. 43, Th. 20, seq.; Dietmar Dia. de Don. inter viv. revoc. et m. c. irrevoc. § 16.
4. C. 8, 56, 7.
The *supervenientia liberorum,* or subsequent birth of children, was a good ground of revocation, as in the case of a will, because no one can be expected to prefer a stranger's to his own offspring, this is so far thought reasonable; and, as it were a condition implied in the gift (under the word child children are comprehended). If the giver, at the time of the gift, had, or considered, while married or unmarried, that he possibly might have had children, it is evident that he, in such case, intended to prefer a stranger's children to his own; therefore the gift ought not to be wholly revoked by such children as are born during the giver's life; it is otherwise if born after his death, except in so far as the gift might be inofficious. The law favors the children, however, as well as the father; and it may be dangerous to disturb a gift which the father had declared on oath he would not revoke in favor of children which might be subsequently born to him.

The patron has, however, the right of revoking a gift to his freedman, on the ground of subsequent issue; some think this may be extended to other donors, and it is adopted in practice. If, however, the donor have made a gift so large as to bring him to indigence if he fulfil the promise, he may take the benefit of the so-called competency, and retain sufficient to maintain him in his position. — *Iste ex causa donationis convenit in quantum facere potest condemnat.*

It is, however, to be observed, that a gift is not revocable on the ground of indigence, except in cases where the donor parts with his whole estate, or the major part thereof, as to which discretion is vested in the judge.

§ 1066.

These revocations apply merely to gifts which proceed from pure liberality, and not to those made for a good cause, or on condition, for those indeed are, properly speaking, no gifts.

If the gift be even erroneously made on account of supposed desert and merit, it is irrevocable, though it afterwards appear the giver was deceived, for it was made for a cause of which the donor might have inquired more exactly, and indeed it was in his power to make the gift without any cause at all. The gift in consideration of a public duty must not be confounded with liberality, alms, or hospitality.

It is absurd to suppose that the grantor is bound to supply a

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1 C. 8, 56, 8.
2 C. 3, 29, 5.
3 C. 8, 56, 8.

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*Diss. de Operatio Donationum ob Supervent.*

lib. revoc. § 11, seq.

*Cujac. lib. 20, obs. 5; Puf. tom. 3, obs. 157; Wernher, tom. 2, pt. 10; Struv. Ex. 40, Th. 16; Lauterbach Coll. Theor. pr. h. t. § 53.

*Paul. re Jud. P. 42, 1, 19, § 1.*

*F. 39, 5, 18, pr.*
THE ROMAN CIVIL LAW.

Donor does not guarantee title.

good title, or to warrant these sorts of gifts,\(^1\) therefore the donee may incur great expenses concerning them, and may yet be evicted; an action will, however, lie, if design or deceit be proved against the donor.

§ 1067.

The donatarius or donee, inter vivos, can institute the actio ex stipulatu, when the gift was made solemnly per stipulatam;\(^2\) but if no such solemn form were used, he must have recourse to the conditio ex lege, or remedy by statute.\(^3\)

§ 1068.

In England, gifts absolutely made are valid and binding where either actual possession has been delivered when the object is capable of delivery, or, in case of incorporeal hereditaments, and of such estate whereof actual possession cannot be had, where the gift has been ratified by deed or promissory note, which the grantee or maker thereof cannot rescind, being estopped by his own deed, it being implied by law that no man would thoughtlessly, or without due consideration, enter into so solemn an engagement, which therefore carries with it an internal evidence of a good consideration, subject to the two statutory enactments * for the protection of the Crown and of creditors.

A gift by deed cannot be rescinded by a subsequent will, for that is no deed; moreover, the property passed and vested on execution and delivery of the deed, which is the constructive delivery of the object; the possession, therefore, is lost, and could only be recovered as in any other case.

Grants, concessiones, are also the regular mode of transferring the property of incorporeal hereditaments by common law, or such things whereof no corporeal livery can be had;\(^4\) hence all corporeal hereditaments are said to lie in livery; and others, as advowsons, commons, rents, reversions, &c., to lie in grant;\(^5\) for which, Bracton\(^6\) gives the following reason,—traditio nihil aliud est quum rei corporalis de personâ in personam, de manu in manum, traditio aut in possessionem inductio; sed res incorporales, quae sunt ipsum jus rei vel corpori inhærent, traditionem non patiuntur. These, therefore, pass by mere delivery of the deed.

§ 1069.

The requisites of the donatio mortis causa, which, it has been observed, is a middle thing between a gift and a legacy, is generally regulated by the same laws as last wills; hence, whosoever would make a gift in contemplation of death, must be also capable

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\(^1\) P. 39, 5, 18, § 3.
\(^2\) C. 8, 54, 35: § 5.
\(^3\) C. ut supra.
\(^4\) 3 Hen. VII. 4; 13 Eliz. 5.
\(^5\) Co. Litt. 9.
\(^6\) Ibid.
\(^7\) Bract. I. 2, c. 18.
of making a testament; and there are persons who, although they have the free disposal of their property, have not the testamenti-factio, such as the apostates from the Christian religion, these can make no donatio mortis causa; and Ulpian says, qui habent castrense peculium, vel quasi castrense in ea conditione sunt, ut donare et mortis causae et non mortis causae possint quum testamenti factionem habeant. A deaf and dumb person may make a contract, though he cannot make a gift, mortis causa. But a filius familias cannot make a testament, though he can make such gift with his father's concurrence—tam is, qui testamentam facit, quam qui non facit mortis causa donare potest. Filias familias qui non potest facere testamentum, nec voluntate patris, tamen mortis causae donare, patre permittente potest, this applies to the peculium profectum; but it is no will because it takes effect not from its date, but from the moment of the death; but if the father die first, the son becomes sui juris, and may make a donatio m. c. or a testament without inconvenience. Sed quære, can the father revoke such a gift made with his consent?

§ 1070. Donatio m. c. must be done in the presence of five witnesses present together at the same time, as in the case of last wills, where a direct heir is not named; thus much then regards the donor. As regards the donee, none can receive a gift in contemplation of death who would not take under a will. As a testament is revocable at any moment, so is a donatio m. c.; hence man and wife can make these gifts—hence they are exempt from registration—hence a minor can effect them without the consent of his curator. The necessity of the donee surviving the donor applies in these gifts equally as in the case of testaments.

The donatio mortis causa has also some conditions common with contracts, and differs from a testament in requiring a mutuality of consent in the donor and donee; or, in other words, it must be accepted in the life of the donor. There is, however, an exception in the case of a donor making a gift, and it not being possible to prove that the donor expected or applied for his consent; the disposition will be good as a legacy of trust estate, in so far as it is in other respects legal as to the object and parties.

1 P. 39, 5, 7, § 6. 2 C. 6, 32, 10. 3 Marcius, P. 39, 6, 25; Voorda Interp. lib. 3, c. 19; but Lauterbach Diss. cit. Th. 21, 2, and Cocceii Jur. Contr. tit. de m. c. don. qu. 2, holds the testamenti factio not to be necessary; sed dubitantum est. 4 Vinn. I, 2, 12, pr. n. 3. 5 C. 8, 57, 4; Cocceii in Jur. Contr. tit. de m. c. don. qu. 4. 6 For these persons, vide those incapacitated from taking under testaments. 7 Cocceii in Jur. Contr. tit. du m. c. don. qu. 4. 8 P. 39, 6, 38; P. 30, 2, 75 & 77, § 26; C. 8, 57, 4. 9 P. ibid. & 39, 6, 28.
Gift can be made absolute by consent. Does not depend on the testament.

Requisites of a donatio mortis causa is an improper gift.

The points in which donatio mortis causa resemble legacies.

§ 1071. In case of a donatio mortis causa the intention must be expressed in the gift, or by other words, so that it may not appear an absolute and proper gift, for then he would rather live and retain it himself; as, that the donor is sick, about to travel, or engage in war, or at a time of epidemic or general pestilence, or on account of the general frailty of human nature. A gift of this description is conditional, and becomes ipso facto void; and if the donor escape the supposed danger, or if he repent of the grant, or if the donee in spe die before him, or the delivery be deferred till after the donor's death:—In other respects, this sort of gift is subject to the same rules as the donatio inter vivos; it must be made in the presence of the parties, by messengers or letters, and accepted by the donee.

Lastly, as before observed, those are also improper gifts which are made for other good causes, or upon condition, or sub modo, that is, with a certain duty annexed to them.

§ 1072. The difference between a donatio mortis causa and a legatum may be summed up as follows:—

The simularity consists chiefly in the eight following points:—
1. That to every deed, except a testament, five witnesses are required; also in donatio mortis causa.
2. That the donor can recall during life; and that it does not come into operation till after his death.
3. That it vests in the donee immediately on the death of the donor, if not before delivered.
4. That, as one person failing another can be substituted by the legatarius, can he be so by the donatarius?
5. That this gift is like a legacy restrained by the Falcidian law.
6. That it has the jus accrescendi among those joined in the same thing, takes place also in this case.

1 P. 39, 6, 2, et seq. 2 P. 39, 6, 1. 3 P. 39, 6, 29 & 30. 4 P. 39, 6, 2. 5 P. 39, 6, 27, 35 & 2. 6 P. 39, 51, 3. 7 C. 6, 36, 8, 3. 8 C. 8, 57, 4. 9 P. 39, 6, 29 & 32. 10 P. 6, 2, 2. 11 C. 8, 57, 1. 12 L. 2, 22; C. 6, 50, 1. 13 F. 30, 1, 16; C. 6, 51, 14.
7. That a wife or husband can leave or give mortis causa to a wife or husband.1
8. That in both there is no necessity for registration.

The *disimilarity* consists in the following points:—

1. That donatio mortis causa is confirmed by the death of the party, and does not, like a legacy, depend on the succession to the inheritance.
2. That a gift is extinguished by the death of the donee before that of the donor, whereas a legacy would go to the donee’s heirs.
3. That in legacies the date of the will is regarded, but in donations the period of the donor’s death.2
4. That in legacies the will of the testator suffices alone, but a gift is not perfect without acceptance.3

Upon the whole, however, we may look upon these as distinctions without practical difference.

§ 1073.

The same actions are available by a donee as by a legatee, *rei vindicatio*, *actio hypothecaria*, and *actio personalis, ex testamento*; but this latter, only in cases where the gift is also mentioned in the testament.

§ 1074.

The gift which in England the most nearly resembles the donatio mortis causa of the Romans, is when a person in his last sickness *actually delivers* to a donee who retains continuous possession any personal chattel, or in case of choses in action the instrument secures it to be kept in case of decease, and when these events take place the consent of the executor is not required; but in the latter case he must even put the security in suit for the benefit of the donee, for the gift has, in fact, been made *inter vivos conditionem mortis*, that is, a deposit till such event should take place, when it was to vest absolutely; this, however, cannot be made available against creditors, or against the donor, should he recover, being accompanied with an implied trust;4 nay, this gift may be made between married persons, though it cannot be done in the ordinary way.

§ 1075.

The institutes5 sufficiently set forth what a *donatio propter nuptias* is, and gifts between man and wife being invalid except in certain cases, such as *mortis causa* and in the manumission of slaves; which provision, Antoninus6 confirmed by his constitution, although he allowed a wife to make a gift to her husband

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1 P. 24, 1, 9.
2 P. 39, 6, 22.
3 P. 39, 6, 38.
4 M. and W. 401.
5 I. 2, 7 § 3.
6 P. 24, 1, 42.
to enable him to accept the senatorial or equestrian\(^1\) dignity from
the emperor.\(^2\)

These regulations were adopted in order to prevent married
persons ruining each other mutually, by rendering the property
of the one party only what was intended to be common,\(^3\) and
must, therefore, be understood of gifts made during coverture.

Originally, while the *conventio in manum* subsisted, there was a
unity of person between the wife and husband; hence, inasmuch as
whatever the wife had belonged to the husband, so she could make
no gift; but when this practice became obsolete, as has been before
seen, and the wife had a separate estate, these regulations became
necessary.

\section{§ 1076.}

*Donatio propter nuptias*\(^4\) was formerly called *ante nuptias*,
because it could only be made before marriage were made by
either party under the implied condition,\(^5\) that if the marriage did
not take place without the fault of the donor the gift was to
be returned.

If the death\(^6\) of either party ensued before marriage, when the
woman was the donor, the whole was to be returned; but if the
man were the donor the whole was to be returned to him or his
heir, if he had not kissed the woman; but if so, then half only,—
a kiss being looked upon as a sort of consummation, and a
woman esteemed immodest that suffered it on any other account.

*Donationes propter nuptias* were, however, irrevocable previous
to the constitution of Constantine,\(^7\) whether marriage followed or
not, as much as those proceeding from mere liberality,\(^8\) unless there
were an express condition to return them.

The gift *propter nuptias* might be made and increased during
the coverture, as the *dos* given by the father of the woman or
some in that line,\(^9\) whether *profectitia* or *adventitia*. Nor does
this interfere with the *Sctum* that forbade gifts to pass between
husband and wife: the condition annexed to this gift is, that as the
portion remains with the husband, so this gift is to remain with
the wife. She has not, however, the interest or profits thereof as
the husband has of her portion, for he alone undergoes the ex-
trordinary charge marriage involves;\(^10\) the interest of the wife,
then, in this gift is no farther than to keep it as a security, that her
portion shall be returned if the marriage be dissolved; all his
estate is, nevertheless, answerable for it; this, however, gives
additional security. If the estate of the husband consist of im-
moveables,\(^11\) it cannot be alienated or mortgaged by him even

\begin{footnotes}
1 Gaius, P. 24, 1, 42; vide ibid. 2.
2 Ulp. Frag. 8, 15; Paul. R. S. 2, 23.
3 Plut. Qu. Rom. 7.
4 I. 2, 7, 3.
5 C. 5, 3, 15.
6 C. 5, 3, 16.
7 C. 5, 3, 8, et seq.
8 C. 5, 3, 2.
9 P. 23, 3, 5, 9 & 11.
10 C. 5, 12, 29 & 30.
11 Nov. 61.
\end{footnotes}
DONATIO PROPTER NUPTIAS. 121

with his wife's consent, except in cases of necessity or exchange. This settlement, as well as the first, must in quantity and quality be equal to the portion; the portions of women being very much protected by law. in ambiguis pro dotibus respondere melius est, to encourage them to marry reipublicae interest ut mulieres dotes salvas habere propter quas nubere possunt; hence an action lies for the portion on a bare promise after solemnization.

In other words, as the wife's property is the dote, the donatio propter nuptias is the antedote in a legal, not in a medical sense.

§ 1077.

The donatio propter nuptias is sometimes termed a jointure, but it was not so in fact,—the wife brought her dos to the husband, who was under the obligation of returning it if certain occurrences took place: as security for this he made a donatio propter nuptias, or in contemplation of marriage to the wife; thus, if he was unable when the case occurred to return the dos, there was ample indemnity in the donatio propter nuptias. Before Justinian, this security was termed donatio ante nuptias, because it must be effected before marriage contracted, for the reason above assigned; but Justinian, by his constitution, enabled it to be effected also after marriage, in the manner of a post-nuptial settlement. Thus Justinian directed it to be termed donatio propter, or "on account of," which embraced both.

§ 1078.

Gifts, then, between man and wife during coverture were not entirely valid; formerly they were utterly void. Under Severus and Caracalla they were made in so far valid, that the heir of the donor could not recall them after the death of such donor who has not done so; but the gift is merely in possession during the life of the donor, although it becomes valid by his death. As long as the donee lived, he had a possession de facto; but this usucapion confers no valid title against third parties, and the donee must return the object and its accessories, except interest and fructus industriales; and if it be in existence, it can be vindicated in the hands of a third party, otherwise there is no remedy beyond a personal action, which, as a rule, only lies for the return of that whereby the possessor is enriched. The donor, however, who

1 I. 2, 8, pr. 9 P. 23, 3, 26 & 27. 10 Nov. 97.
2 P. 23, 3, 2 & 70. 11 P. 25, 3, 2. 12 C. 5, 3, 20, Anth. § 1.
3 P. 25, 3, 2 & 70. 13 P. 24, 1, 32, § 2; Richterde Ort. D.
5 P. 24, 1, 3, § 2; Richterde Ort. D. Ant. de Don. inter V. et U. confirmandis.
6 Menken de Don. Inst. V. et U. non ipso jur. nullis.
7 C. 5, 5, 1, 3, § 2; Richterde Ort. D. Ant. de Don. inter V. et U. confirmandis.
8 P. 23, 3, 16, 10; Menken de Don. Inst. V. et U. non ipso jur. nullis. 15 P. 24, 1, 5, § 18; & 37, 39, 50, § 1 & 55.
9 P. 24, 1, 5, § 18; & 6, 7, 9, pr. § 1 & 5; & 16, 29, 33, § 21 & 37, 39, 50, § 1 & 5.
obtains the return of the object, cannot demand the profits thereof; nor vindicate what has been bought with the money given, although he can, in case of bankruptcy, obtain the sev-
erance thereof, *jure separationis*, from the estate.

The new Senatus Consultum applies to gifts between married people, but putatively married persons have the same privileges. A marriage known to be null and void, but continuing, creates no greater hindrance in this respect than a real marriage or betrothal, although the Fiscus will sometimes deprive the receiver of the gift as infamous; moreover, all members of the family of the married persons connected by unity of person, are placed on an equal footing with the parties themselves.

The law applies to no other transactions than gifts, and what so serves as a cover for them.

If the transaction be mixed, the gift is void; nevertheless, the gift will stand good, if it be not severable from other transactions between the husband and wife, although it is without retrospective operation. This revival, however, only extends to precluding the heir from demanding the object back from the donee, but not to the right to receive back a gift merely promised.

But if the donor has expressly or impliedly revoked the gift by pledging or selling it, the heir can demand it back; and it must be presumed that, in case of the bankruptcy of the donor, the creditors could question the gift if the meeting took place before, but not if it took place after his death. The Fiscus cannot question an unreckoned gift of a deceased donor.

The presumption in cases of doubt is, that an object given has been donated, and according to the *praesumptio muciana*, that whatever the wife possesses procedes from the property of the husband.

\[ \text{§ 1079.} \]

The donation may become invalid by law, it depends, however, upon accident whether it become so or not; if the donee die first, it is invalid; but if the donor do not die after the donee, which, if both perish by the same accident, must be presumed,
the gift is valid up to five hundred aurei, and above if duly registered; if, on the contrary, neither of these occurrences take place, the gift can be made valid by testament.

§ 1080.

Donation between man and wife is valid when the donee is not richer thereby, as in all cases where the gift is not for the benefit of the donee, but of a third party, or where it does not absolutely increase the property of the donee, as in the case of the gift of a place of sepulture. When the donor himself profits by the gift, as in the case of anything given for the common benefit, as for the housekeeping, or for the advancement of the dignity of the husband, or where the donor is not poorer thereby, it is valid. Present in return cannot be set off the one against the other, even though they be consumed; and an exception lies against the heirs of the consumers. But the donor is not to be looked upon as poorer if he give something to his wife which belongs to another (res aliena); the usufruct will be in her, for the property was never his: when he gives away a profit which had been offered to him, as, for instance, if the husband repudiate an inheritance which will ultimately devolve upon the wife as heir, or restore by will what was given; in the first case, he was never possessed; in the second, the property is not altered.

And by analogy, when the husband pays a debt before due, or waives a pledge.

When the gift is legally necessary, as when it contributes simply to the support and comfort of the donee, as a moderate quantity of fruits, labor of slaves, &c.

When the gift consists of trifles commonly given as mere tokens of affection.

When destined to the repair of a building, or when given by the sovereign.

When the gift is remunatory, or when confirmed by oath, or when it be given mortis causa, or on the dissolution of the coverture.

§ 1081.

When the dos was deposited the day previous to the marriage ceremony in the hands of the auspices in trust to be delivered the next day to the husband, it was said to be given dari; Juvenal alludes to the datio dotis, thus:

Donation between man and wife is valid when the donee is not enriched, or when the donor is not impoverished thereby.

Other cases in which donation between man and wife is permitted.

Debt paid before due.

Necessary gifts.

Trifles.

For the repair of a building.

Remunatory gifts, and those on oath.

Mortis causa.

Original solemnities attending the dos.

Dos datur.
I24 THE ROMAN CIVIL LAW.

Dudum sedet illa parato. 
Flammeola, Tyriusque palam genialis in hortis 
Sternitur et ritu decies contena dabuntur 
Antiquo, veniet cum signatoribus auspec.1

The dos might be promised by the intervention of a stipulation, 
persona interrassaga respondet et stipulato promitteret.2

Ly.—Spondeo, ergo tuam gnatum uxorem mibi ?
CA.—Spondeo et mille auri Philippum dotis.

Ch.—Istac leges (cum ista dote) filiam tuam spondeo mibi uxorem dare ?
CA.—Spondeo. CH.—Et ego spondeo idem hoc.3

The dos was usually paid at three terms,—either annually, biennially, or triennially.4

Dictio dotis differs from datio dotis, which, although performed 
by solemn words, was performed without the interrogation, and 
without stipulation.5

CH.—
Dos, pamphili est, 
Talenta quindecim PA accipio.6

The dictio could only be performed by the woman herself, with 
the consent of her tutor,7 her debtor, her father, or any virile 
ascendent, and was termed profectitia; but the datio, by any one 
whatsoever, though not a relation,8 and was termed adventitia.

Both these came to the husband; but when the conventio in 
manum ceased to be the common practice of the Roman State, a 
distinction began to obtain; the profectitia returned to the husband 
when the wife died in coverture, whether she was a filia familias 
or sui juris,9 except the father died first, when the whole was 
acquired by the husband; but if the wife died before, the husband 
retained a fifth.10 The adventitia, however, remained the property 
of the husband; if, however, the donor had stipulated for its 
return, it was termed receptitia, and so in effect resembled the 
profectitia, except in that it came from a stranger.11

If the dos be given of free will, it is termed voluntaria; but if 
by the operation of the law, necessaria,12 and may consist in every 
sort of property;13 nay, even of the whole property of the wife,

1 Juv. Sat. 10, 333. 
2 Caius, In. 2, 9, 1. 
3 Plaut. Trinum. 5, 2, 34. 
5 Ojiac. ad Ulp. Fr. 6; Brisson. de Form. 
6, p. 543. 
7 Ter. And. 5, 4, 47; Sidon Apollin. 
Epist. 1, 11; P. 23, 3, 2; Id. 44, § 1; 
Id. 46, 1; Id. 57, 59. 
8 Cic. pro Flacc. 34-5; Ulp. Fr. 11, 50. 
9 Ulp. Fr. 6, 2; Paulus P. 23, 3, 41; 
Cic. l. c. 253; Ulp. Fr. 11, 27; Lauterbach 
Coll. l. c. 23, t. 3, § 24. 
10 Ulp. Fr. 6, 4. 
11 P. 23, 3, 5, § 11; C. 5, 13, 1, § 1; 
v. Tigerström, l. c. 1 B. S. 45-7. 
12 P. 39, 6, 3, § 2; Leyser Spec. 302, 
m. 16; Hofmann de Dot. recep. Alt. 
1718. 
13 P. 23, 3, 6, § 1; Id. 7, § 3 & 21; Id. 
34 & 42-3 pr.; Id. 66 & 81; C. 5, 12, 
12; Breuning an Ususfr. in Dot. dar. 
poss. Lips. 1771; Id. de Nom. in Dot. 
Dat.; Id. an in Dot. nomen. dar. poss.; 
Id quid interit interf. Fund. et Ususfr. 
Fund. in Dot. dat. Lips. 1774.
though only *titulo singulari*, to the extent that he who gives the *dos* has the right, or is empowered, to transfer it to another.

All property of the wife must be generally either *dos* or *paraphernalia*, which is ascertainable by circumstances only, inasmuch as every marriage supposes a *dos*; it may be settled tacitly before marriage, the marriage being the consideration for it.

§ 1082.

The meaning attached to the word *dos*, by Bracton and other English lawyers, is the reverse of the sense in which the Roman jurists used it, among whom it signified the portion brought by the *wife* to the husband; a practice founded, indeed, upon the ancient ceremony of coemption. Tacitus states that it was the custom among the Germans for the wife not to bring her husband any fortune, but for the bride to receive from her bridegroom, *dotem non uxor marito sed uxori maritus affert*, which led to the presumption that the custom of dower at common law was rather of Saxon than Roman origin, although Blackstone, quoting Wilkins, says, that dower out of lands was unknown in the ancient Saxon constitution, it being provided by the laws of King Edmond that the wife should be supported entirely out of the personal estate; neither can he trace it to the Normans, not being a part of the pure and ample law of feods, but first introduced into that system by Frederick the Second, cotemporary of Henry the Third, whence his inference is that the triens, *tertia datalitium*, or practice of granting dower out of lands, is rather of Danish origin; indeed, it is said to have been introduced into Denmark by Swein, father of Canute, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals.

One may, however, still be inclined to doubt this; for by the gavel kind tenure, which was undoubtedly of Saxon origin, and the law of the whole of England before the Norman invasion, the widow became entitled to a conditional estate in one half of the lands, provided she remained chaste and unmarried, the object being evidently the same as at present, her sustenance and the education of the younger children.

With respect to the system, as mentioned by Tacitus, of the husbands buying their wives, and the Romans originally having practised a similar system, originating, it is supposed, in the rape of the Sabines, reduced the contract of marriage to the law of other contracts, by bargain and sale, and it is curious that the supposed legality of a Smithfield marriage has been prevalent among the lower orders, and is so to this day; that is, selling a wife for a nominal sum in market.

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1 P. 23, 3, 62; C. 5, 12, 4; C. 8, 17, 9; Hase S. 379, 382; v. Tigerström Dotalr. 1, B. S. 169-71.
2 De Mor. 19.
3 75.
4 Vide 559, h. op.
How endowments were made in England by particular custom.

De la plus belle.

Ad ostium ecclesiae

Ex assensu patris.

The dosrationabilis.

§ 1083.

The manner in which a woman may be endowed at common law is fivefold:—

By particular custom, as that a wife should have half the husband's lands, in some places the whole, and in some only a quarter.

De la plus belle was abolished with military tenures.

Ad ostium ecclesiae was where the tenant in fee simple of full age, openly at the church door, where all marriages were formerly made, after affinancial made—and Sir Edward Coke adds, and troth plighted, endowed his wife specifically with the whole or such part of his lands as he pleased; the wife at her husband's death might enter on these without further ceremony.

Ex assensu patris was the same as the foregoing, made during the life, and with the consent of the father; this has been abolished by statute.

By common law, or dos rationabilis, was the third part of the lands of which the husband was seized at the time of the marriage, and of no other, except a special accord was made before the priest at the time of the marriage to endow her with future acquisitions; but if the husband at the time of the marriage had no lands, an endowment in goods, chattels, or money was a bar to any dower of lands thereafter acquired; as to this third part, it is confirmed by the Charter of 1217 and 1224. Littleton, however, laid it down in the time of Edward the Fourth, that a wife may repudiate such dower, and betake herself to her dower at common law.

§ 1084.

The most usual ways now of endowing a wife is jointure, which, strictly speaking, is a joint estate, and in so far resembles the Roman practice, as it is limited to both wife and husband, but in common acceptation extends also to a sole estate, limited to the wife only, defined by Coke as "a competent livelihood of freedom for the wife of lands and tenements, to take effect in profit or possession, presently after the death of the husband, for the life of the wife at least," a description framed on the statute of Uses, before which the greater part of the property in the country was conveyed to Uses, the estate being in one man and the profits in another; hence the husband not being seized, the wife had no claim to dower, wherefore the statute gave such use the same effect as seisin, but to prevent the wife becoming entitled to dower out of any special lands in addition to those held to the

1 Litt. § 37.
2 Litt. § 39.
3 Litt. § 40.
4 3 & 4 W. IV. 105, 13.
5 Glanvil. de Questu Suo.
6 Glanvil. 2.
7 Hen. VIII. 10.
DOWER.

husband's use, wherefore the statute provided that the making such estate in jointure to the wife before marriage should for ever bar her dower, but four requisites must be observed:—

1. That the jointure take effect immediately on the husband's death.
2. That it be for her own life at least, not pur autre vie, term of years, or other smaller estate.
3. That it be made to herself, and to no other in trust for her.
4. That it be expressed by deed to be her whole dower, and not a part only thereof.

And, in case of a bad title by fraud, she could revert to her dower at common law.

§ 1085.

The wife may be endowed of all lands, tenements, and hereditaments, of which her husband was seized in fee simple or tail at any time during the coverture, and of which any issue she might have had could by any possibility have become heir;¹ thus, a second wife may be endowed, for the issue by the first may fail; moreover, a seizin in law of the husband will be as effectual as a seizin in deed, in order to render the wife dowable.²

One exception exists to a castle maintained for the necessary defence of the realm, for that ought not to be divided, and the public ought to be preferred to private interest;³ in such case, therefore, the wife's title does not attach.

§ 1086.

With respect, then, to real property, the husband is entitled by the law of England to the profits and sole control of all freeholds of which the wife is seized at the time of her marriage, or which may subsequently accrue to her during coverture, but the freehold itself is vested in both; the continuance of the husband's interest therein, however, limits his power of conveying away or charging the same for a longer period than the duration of such interest, even with his wife's concurrence, she in law being incapable of giving consent to any such proceeding. To remedy the indirect and fictitious modes by which the rigor of the law was wont to be evaded by levying fines, &c., a statute was introduced,⁴ enabling a married woman to alien her real estate by simple deed, freely given, in which the husband, generally speaking, must concur, as though she were a feme sole.

Although the husband cannot grant leases of his wife's land, even though she be a party, binding on her and her heirs after the determination of her interest by common law, yet by statute⁵ it may be done.

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¹ Litt. 36, 37; 3 & 4 W. IV. 105, 2.
² 3 & 4 W. IV. 109, 3.
³ Co. Litt. 376.
⁴ 3 & 4 W. IV. c. 74.
⁵ 32 Hen. VIII. 28.
Presumption of ownership in favour of the husband.

Presumptio muciana. Dos differs from bona parapherna.

The dos does not lapse to a third party.

Certain persons are legally liable to grant the dos.

Exemptions in certain cases.

§ 1087.

Everything which is found in the house of the husband, or possession of the wife, by virtue of the presumptio muciana belongs to him, or is acquired by him.\(^1\)

The dos\(^2\) differs from the bona parapherna,\(^3\) but these are termed paraphernalia in the narrower sense, when the wife gives the husband rights upon them, though not for the purposes of marriage; if, however, she retains all her rights, they are bona receptitia.\(^4\) Objects which belonged to the portion in a former marriage, continue so in the second when the marriage is reconcluded between the same parties without sign of a change of intention, and the dos does not lapse to a third party,\(^5\) for otherwise the presumption\(^6\) is not in favor of the dotation, whether acquired at or after the conclusion of the marriage;\(^7\) nevertheless, no distinct mention is exactly necessary, since a dos can be tacitly made.\(^8\)

§ 1088.

A legal liability to grant a dos attaches on the legitimate father, and on the legitimate paternal male ascendants,\(^9\) be a daughter issue of the body under power or not,\(^10\) before or after the conclusion of the marriage; the father is, however, held not to be liable in cases where the daughter has deserved disinheritance,\(^11\) or marries against her father's will under circumstances which justify his withholding his consent,\(^12\) or where she has a property sufficiently considerable to make her own dos,—but in this last case, if the father grant the dos, it is presumed that he grants it out of his own property.\(^13\)

The mother, however, is only excused from granting a dos for weighty reasons,\(^14\) many of which extend to maternal ascendants.\(^15\)

1 P. 244, 1, 53; C. 5, 16, 6; Leyser de Praesump. Muciana, Vitbe. 1743; Glück. P. 26, B. S. 216-20; Eisenhard de R. I. quod in casuyb. omnia bona marit. esse presumenda sint caute adhibenda, Helmat. 1771; contra, Voet. L. 24; P. 1, § 16.


4 P. 23, 3, 9, § 3; C. 5, 14, 8, 11; Gruppen de Uxore Rom. cap. 7, § 7.

5 P. 23, 3, 13; Id. 30; Id. 40; Id. 61; Id. 69; Id. 69; P. 23, 4, 29, § 11; P. 24, 3, 26, § 5; Hasse, 452-474; contra, Schroeder de dote in secundo mat. tacite renovata, Jen. 1723.

6 C. 5, 12, 4; P. 23, 3, 9, § 2, 3; Haase, a. a. O. S. 432-52; Bauer Bona Uxor. Paraph. esse presumenda, Lipa. 1792; contra, Miester de Bon. Ux. ex J. R. presumpt. non paraph. sed dotal. Goet. 1769; Müller ad Leyser, obs. 533-3; Glück. P. 25, B. S. 203, 46.

7 Leyser Sp. 302, m. 5-6.

8 P. 23, 3, 48, § 1.

9 P. 23, 3, 19; C. 5, 11, 7; contra, Wernher, P. 5, obs. 123; Leyser Sp. 303, m. n. Müller ad Leyser, obs. 540.


11 Contra, Leyser Sp. 303, m. n.


13 L. Ul. C. Cit. Müller, obs. 540.

14 Glück. l. c. 69-76.

15 C. 5, 11, 7; Puf. T. 3, obs. 150; contra, Voet. L. 23, t. 3, § 16.

16 C. 2, 12, 14; C. 1, 5, 19, § 1.

Legitimate brothers and sisters not being *uterini*, that is, born of the same mother, are held excused.¹

According to the opinion of many, those of the well-doing wife herself,⁸ and the father of an illegitimate daughter, in case of necessity.³

In conclusion, all persons legally liable to grant the *dos* are bound to renew it, if lost without the fault of the wife.⁴ If, however, the right to insist upon the grant of a *dos* has been validly renounced, the whole liability in this respect determines.⁵

§ 1089.

The promise of the *dos* may be made to the man, to the woman, or to the attorneys of either, but the grant itself can be made to the man alone, to his attorney, or to relations in the ascendent line under whose control he is.⁶

If any regulation or contract determine the amount of the *dos*, there can be no question in that respect; but if it be not determined, and the obligation to grant it be *necessaria*, the judge will assess the amount according to the property of the obligee and the station of the married couple, which will supersede a general promise,⁷—but the father's promise is of importance in cases of bankruptcy.⁸ But if a fair and reasonable *dos* only be promised, the judge will still have to assess the amount.⁹

§ 1090.

The rights of the husband after marriage,¹⁰ and before grant of the *dos*, consist in his right to compel the grant where his claim rests on a promise or a legal right; in the former case by action, and citing the law by which the liability of the obligee is created; thus, in case he sue the father, the *condictio ex lege ult*. C. de dot promissionem¹¹ would be the proper form; and, in the case of a promise, an *actio ex stipulatu*,¹² with which can be joined the *actio hypothecaria*.¹³

As far as regards the profits and interest of the *dos* claimed, a distinction must be drawn in cases where a *dies a quo* for the settlement is fixed, and where not, for in this first case the liability of the father or a third party, when they have promised

¹ P. 26, 7, 12, § 3; Voet. l. c. § 14; contra, Hasse S. 358–62; Glück. a. a. O. S. 99–104; v. Tigerström, l. c. 1, B. S. 6, 81–2.
² Leyser Sp. 303, m. 3; Glück. l. c.; v. Tigerström, l. c. 1, B. S. 57, 64, 177–84; Hasse, 363–73; P. 12, 6, 32, § 2; exception, C. 9, 13, 1, § 1.
³ Lauterbach, l. c. § 13; sed vide Jacob’s de Dot. ante Mat. Consum. Lucr. Jen. 1679, Th. 16.
⁴ Glück. l. c. 98, 94; v. Tigerström, l. c. 2, B. S. 75 & 77; Grass. de Redot. ejusq. Jur. Tub. 1647; Lauterbach, l. c. § 17.
⁵ Bodinas de Renunciatione Dotis facta, Hal. 1709.
⁶ P. 23, 57 & 59, pr.
⁷ P. 23, 3, 60, & 69, § 4; C. 5, 11, 3.
⁸ Puf. T. 1, obs. 66.
⁹ C. 5, 11, 1 & 3; Müller ad Leyser, obs. 541; Glück. P. 25, B. S. 169–180; v. Tigerström, l. c. 1, B. S. 177–86.
¹⁰ P. 5, 14, 4, § 2; P. 23, 3, 11 & 68.
¹¹ C. 5, 11, 7.
¹² C. 5, 11, 4 & 6.
¹³ C. 5, 13, 1, pr. § 1; Hofacker Princ. t. 1, § 430.
the dos, and the question was not raised before the expiry of two years after the conclusion of the marriage, only accrues from the end of that time; but where there was no promise, the liability commences from the moment the question is raised;\(^1\) where, however, the dies a quo was fixed, the liability dates from that day.

\(\S\ 1091.\)

The husband has certain rights upon the dos, because it is property brought to him for the common use of a partnership whereof he is the head, although it is held that it is not liable for the education of children.

The husband is absolute owner, and can freely dispose of the dos when it consists of moveables, money, furniture, wearing apparel, and the like; or when it consists in quantity (capital stock), for here, too, the law imposes no limitation.\(^6\)

The moveables of the wife may be disposed of\(^3\) by the husband at his pleasure, so that, after dissolution of the marriage the portion be made good by other things of like value,—the object of this is to avoid those inconveniences which would arise from the husband being restrained from alienating moveable goods, and for the protection of those who might trade with him; thus the portion should be estimated,\(^4\) and the husband become at once proprietor of and responsible for it.

But, inasmuch as the right possessed by the husband, although complete, is revocable, the wife may vindicate the property as against his creditors,\(^5\) when she cannot obtain satisfaction otherwise.

A real sale is presumed when the dos has been sold to the husband on valuation, estimatione facta venditionis causa. He may return the object or its value; but the wife in this case, as above, retains her right of vindication. If, however, the object has been valued with the mere view of ascertaining its true worth by way of precaution, so that the wife may possess this proof of the value if the husband be called upon to return it, estimatione facta taxationis causa; no presumption, however, lies in favor of this having been the mode of valuation.\(^6\)

The liability on promissory notes depends on the danger as to how far the husband, where the wife is not the debtor, is liable.\(^7\)

\(^1\) C. 5, 12, 31, § 2; Leyser Sp. 304, m. 5, 7; somewhat otherwise, Hofacker, l. c. Müller ad Leyser, obs. 543.

\(^2\) C. 5, 8, 8; Vin. ad S. 8, 8, pr.; Coceili Jur. Con. Tit. de Fund. Dot. qu. 2.

\(^3\) P. 23, 2, 42.

\(^4\) C. 5, 12, 5.


\(^6\) C. 5, 12, 5, 10, 21; Glück. l. c. 30–33; contra, Leyser Spec. 312, m. 10; Müller ad ibid. obs. 551; Coceili, I. C. L. 19, t. 3, qu. 9; Tigerström, l. c. 1, B. S. 138, 50.

\(^7\) P. 12, 1, 35; P. 23, 3, 33, 36, 41, 3, 49, 53; P. 23, 4, 6 & 30, 92, 2; P. 24, 3, 49, pr.; Glück. P. 25, B. S. 34–39; Schermann's Handb. 2, B. S. 255–6; Haase ad Culpa, S. 555, 600; Loehr Beyträge zur Theorie der Culpa S. 207, 12; Gottschalk Disc. For. c. 2.
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§ 1092.

If the object be not fungibilis, or have not passed by bargain and sale, the husband obtains a so-called civil property therein during the coverture, the wife retaining a dormant natural right, ready to revive on dissolution of the marriage; hence the husband administers the property, nor can the wife require security,—he has the use and usufruct of the object itself and its accessions, except a treasure trove, together with the capacity of defending it by every sort of action, nay, he can even alienate without the wife’s concurrence.

In England, however, chattels personal belonging to the wife on her marriage, or subsequently accruing to her during coverture in her own right, and not as an executrix, become the absolute property of the husband. Moreover, in case of choses in action due to the wife before marriage, if the husband recover them, be they debts due on bond or otherwise, they vest in him on such recovery and possession obtained: should he, however, die before this be done, or she before possession obtained, her prior title remains unimpaired, and they form part of her estate; in the latter case he becomes, however, owner of such property on administration to her effects, which he is entitled to obtain.

§ 1093.

In respect of immoveables, the husband, like a bridegroom affianced, only has an imperfect title; and, although he derives every profit from the object, he has neither the power of pledging nor selling, under any circumstances, even if the wife consent, or repeat her consent after lapse of two years, but the husband cannot question a void sale of this description.

By the Lex Julia de adulteriis, the husband is not permitted to alienate a fundus dotalis in Italy, by or against the will of his wife; but, in the provinces, his wife’s consent enables him to alienate but not to pledge. An explanation of this paradox has been attempted, by suggesting that it would be easier to obtain the con...
sent of the wife to a mortgage than to a definite sale. Justinian abolished, however, this diversity of law, dependent on geographical position, and prohibited both the sale and mortgage, with or without consent of the wife, except in three cases,—where sold to the husband venditionis causā,—where the alienation was necessary—or where beneficial to the wife, that is to say, when the price realized by the sale of the fundus dotalis enables the acquisition of a more profitable estate, or where the wife and her children are in a state of absolute want.1

§ 1094.

The husband is bound to avoid the smallest neglect as to the objects included in the dormant right of property of the wife, although he be not absolutely owner;6 but if he prove that he has used that care which he was accustomed to take of his own property,3 slight neglect culpa levissima, in acts of omission as well as of commission, are to be passed over,4 and he is answerable for only culpa lata, or gross negligence, only when the wife (that is, he on her part) has neglected to demand the object back; he is not, however, responsible for accidents;5 at the same time, he must bear the burden attaching on the object, in return for the enjoyment of it.6

§ 1095.

The wife has few particular practical rights in respect of her dotal property during coverture,—the most important of which is, that she possesses a legal and privileged right of pledge.7 In addition to this, although she cannot demand her dotal goods from the husband, or from a third party,8 she can assert her right when the husband becomes hopelessly insolvent,9 or has given rise to a suspicion of waste,10 in which case the husband is permitted to return it voluntarily; in like case, when the wife has duties to fulfil other than the payment of her debts, or if she make there with a profitable investment in land.11 An immoveable dos exempts the wife from giving caution in suits.12

It is a question as to whether she obtains a property in objects purchased by the husband with dotal funds, si res succedit in locum pretii? If the laws of the Codex be preferred, the answer is

1 Stryk. U. M. L. 23, t. 5, § 7; contra, Lauterbach de Fund. Dot. § 27, 29; Glück. l. c. 403-4.
2 P. 24, 3, 18, § 1; Id. 24, § 51; Id. 25, § 11; Id. 66, pr.; Id. 67; P. 25, 3, 9 & 17, § 15; Id. 49, pr.; Lühr Theor. der Culpa, S. 165-7; Schoemann's Handb. 1, B. S. 336-8; Hasse v. d. Culpa S. 561-69.
4 Vide Pignus et Thiibaut, P. R. § 789-803.
5 P. 23, 3, 10, pr. i; Id. 14, 15, 16 & 42; C. 512, 30.
6 P. 25, 3, 13.
7 C. 5, 12, 30.
8 Vide difference of opinion in Savigny, Zeitschrift 5, B. 3, Hft. nr. 9; Glück. P. 27, B. S. 234-266.
9 Vide Pignus et Thibaut, P. R. § 789-803.
10 P. 23, 3, 24, pr.; C. 5, 12, 29-30; Nov. 97, c. 6.
11 Vide difference of opinion in Savigny, Zeitschrift 5, B. 3, Hft. nr. 9; Glück. P. 27, B. S. 234-266.
12 P. 23, 3, 15, § 3.
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generally negative,1 the conflict of laws upon this head being great2 if the Pandects be disregarded.

The wife has a partial legal right to pledge her paraphernalia.

§ 1096.

The husband has those rights in the paraphernalia only which the wife has conceded to him;3 he can, moreover, be obliged to give an account of it.4 Nevertheless, he is presumed to be his wife’s natural attorney in respect of such matters, and can act as such,5 and demand in case of necessity aliment thereout,6 and alienate them with consent of the wife.7

The English law of the wife’s paraphernalia8 is borrowed from the civil law, and consist in her wearing apparel and ornaments suited to her rank, even the jewels of a peeress. If the wife survive her husband, they do not pass to his personal representatives, and are protected against creditors.

§ 1097.

As the marriage still subsists in law during a suit for its dissolution—except, indeed, an interlocutory judgment of temporary separation has been obtained—all the effects of the marriage remain in full force; hence alimony is demandable pendent litem,9 and the husband, as natural and legal attorney of his wife, must advance the costs of suit. It is irreconcilable with strict rules of law,10 founded on plausible grounds,11 that the husband can refuse this during a suit of adultery.12

Everything must be restored to its original condition, so far as this is practicable,—gifts must be returned; nevertheless, the party aggrieved can insist on his claims13 on general principles. In cases of incest, however, confiscation of the whole property14 of the guilty party follows; and when anything else is done wittingly against law, the fiscus or exchequer seizes all gifts received, whether it be dos or donatio propter nuptias.15


2 P. 23, 3, 34; C. 5, 12-12.
3 P. 23, 3, 9, § 3; C. 5, 14, 8; Rütter Jur. Mar. circa Bona Paraph. ex legt Rom. et Pat. (Germ.) Illust. Goett. 1781.
4 P. 25, 2, 7, 5, 95, pr.
5 C. 2, 13, 21.
6 C. 5, 12, 29.
7 C. 8, 56, 6; Stryk. U. M. L. 23, t. 5, § 6; Höpfner Com. § 418, n. 6; the reverse opinion is not supportable.
8 Bl. Com. 302; Noy. Max. c. 49.
10 Leyser Sp. 313, m. 7; Müller, obs. 55; Thibaut P. R. § 348.
11 Stryk de Decret. Interim. c. 2, n. 21; Reinhardt. ad Christianum, vol. 5, obs. 70.
12 P. 12, 4, 8; P. 12, 7, 4, 5; P. 41-9; § 3, 4; C. 5, 17, 10; Glück. P. 37, B. S. 60-7.
13 Nov. 12, c. 1, 52.
14 P. 23, 2, 52, 58; C. 5, 5, 4, 6; v. Tigerstrom Dotal. 2, B. S. 134, 144.
The reciprocal succession of man and wife belongs under inheritances.

§ 1098.
After dissolution of marriage each party takes its own,—first of all, inasmuch as the woman's right of ownership revives at the death of the husband, she can require the restitution of the dos,¹ in person or by attorney, by an actio rei vindicationis,² actio rei uxoriae, or the general action for restitution,³ actio ex stipulatu, which replaces it where there is an entire absence of precontract. Where a person, under whose control the daughter was not, has bargained the return of the dos, he must adopt the action originating out of the promise.⁴

If the wife die before the husband, though children of their bodies be living, the portion⁵ returns in strictness to the wife's family, for it was given to support the charge of a married state, since dissolved, and not for the education of children; but by agreement,⁶ and in the marriage articles usually drawn up before or after the marriage, the parties concerned might have settled the portion of the wife in another manner, and by that means it might remain with the husband, according to the old law, though they had no children.

§ 1099.
Real property, in the English sense, was unknown to the Roman law— their real property rather resembled chattels real: these, whereof the wife is or hereafter becomes possessed during coverture, accrue to the husband on marriage; nor has he merely the profits and control, but also the actual disposition thereof,—so much so as to be liable to execution for his debts, and to become his absolutely on her decease; if the wife, however, survive him, her title thereto revives on his death, and consequently they are protected against his executors, in whom they do not vest, as he is unable to dispose of them by will, any more than he during his life has power over property vesting in the wife as an executrix of a third party.

§ 1100.
By the curtesy of England, where a man marries a woman seized of lands and tenements in fee simple or fee tail—that is, of an estate of inheritance—and has by her issue, born alive, which was capable of inheriting her estate, he holds the lands for his life, as tenent, by the curtesy of England.⁷

Some derive the term from curialis,⁸ as alluding to the lord's

² C. 5, 13, 30.
³ P. 23, 5, 6, 23, 42, 26, 2.
⁴ P. 23, 42, 1.
⁵ Litt. § 35, 52.
⁶ Crig. L. 2, t. 19, § 4.
⁷ I. 4, 6, § 29; C. 5, 13, 1, pr. 1, s.
⁸ C. l. c. § 13.
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court, there to do homage, because after the wife's decease the widower did homage alone, whereas during his wife's life they would do it jointly; but Littleton\(^1\) says, because it is used within the realm of England only, where it is said to have been introduced by Henry I.:\(^2\) this, however, does not appear to be the case, it being also existent in Scotland, and introduced in the reign of Henry III. into Ireland also. Why then the curtesy of England, in contradistinction to that of other countries?

The requisites to this tenency were,—

A legal and canonical marriage.

The actual possession or seizin of the wife, in incorporeal hereditaments quasi seizing. The king is entitled to the curtesy of idiots, who cannot take care.

The birth of the issue alive.

A child brought into the world by the Caesarean operation does not give the husband any curtesy, for the mother died before the birth. Again, if a woman be tenant in tail male, and has issue a daughter, or vice versa, the husband loses his curtesy; but he is tenant initiate on the birth of the child capable of inheritance, but consummate only on the death of the wife; nor does it matter whether the wife's seizin be before or after the death of such issue, provided it be born during coverture. One exception only exists, which is, as to gavel-kind lands, when a husband may be tenant in curtesy without having issue.\(^3\)

Blackstone thinks this curtesy is founded on the natural guardianship of the father to his child, who has the curtesy for its maintenance; consequently, the lord of the fee cannot be guardian during the life of such tenent:\(^4\) but how can this reason hold? for, as we have seen, the widower has his curtesy though the issue be dead, and cessit necessitas cessit ipsa lex?

§ 1101.

The return of the dos would be demanded in certain cases. Of the dos adventitia, when a third party was donor and so stipulated,\(^5\) can be demanded back, and thus became specially receptitia; but if this be not the case, the daughter surviving\(^6\) and emancipated from the paternal power before the claim, can demand it of her own motion, or if not emancipated, the father can do so with her consent; but should he be absent, she can do so of her own motion; but if the wife be dead, her heirs succeed to her rights.\(^7\)

With respect to the dos profectitia,—if the father, as grantor, have contracted for the return on his own behalf or on that of his

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\(^1\) Litt. § 90; Co. Litt. 50, 67.
\(^2\) Mirrion, c. 1, § 3.
\(^3\) Co. Litt. 29.
\(^4\) F. N. B. 1443.
\(^5\) P. 24, § 29; 31; P. 15, 13, 13, § 13.
\(^6\) P. 24, § 2, 3; pr. § 1, § 14; id. 3, 30, § 1, 31, § 2 & 35.
\(^7\) P. 24, § 29; § 118-42; v. Tigernstrum Dotuln. 2, B. S. 68-107.
children, or have permitted another to do so, the contract forms the rule. If, on the contrary, he have not done so, the daughter being under power, he can enforce the return of it with her concurrence; it then remains the property of the daughter, and must be again given if she remarry, vesting absolutely in her on the father's death.

The father has, however, the power of excluding his daughter for bad conduct, on the claim for the return being put in; on the other hand, the daughter alone can exclude the father and sue alone, if he be morally debased or not in a position to support the claim. After the death of the daughter, the father sues alone. If the daughter be emancipated, and living, on the dissolution of the marriage, she can sue alone; but if her death dissolve the marriage, the sole right to sue devolves on the father, even though the daughter may have left issue.

If the father be dead, and the daughter die, the dos devolves on their heirs, whether the daughter be emancipated or not.

§ 1102.

The action lies against the person who demanded the grant of the dos and his heirs; nay, even against whomsoever may be in possession of it.

§ 1103.

Dower is barred in England by divorce a vinculo matrimonii; for as Bracton expresses it, ubi nullum matrimonium ibi nulla dos, thus a divorce a mensa et thoro, for even adultery, is not sufficient. By elopement, where a woman leaves her husband and lives with an adulterer.

On marriage with an idiot, no dower can take place.

By treason or felony on the part of the husband, which is abated by statute quoad felony, but revived quoad treason.

In case of an alien married without licence.

And if the wife be under nine years of age at the husband's death.

Dower may also be barred by forms called conveyances to uses, to bar dower, being a conveyance taken by the husband of his land so framed on the statute of uses as to effect this object. Greater facilities than formerly, to the barring of dower, have been

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1 P. 24, 3, 22, pr. & 29, pr.; P. 23, 4, 23, 45; P. 5, 12, 26; C. 5, 14, 7.
2 C. 5, 13, 1, 5, 13, Others; P. 24, 3, 25, 5; 3 P. 41, 41, 31, 2, 71; P. 35, 2, 14, pr.
3 P. 243, 2, § 1; Id. 3 & 22, § 1 & 3, 6; Nov. 97, c. 5.
4 P. 24, 3, 2, § 1, 2; Id. 3, 22, § 1; Id. 34, 37.
5 P. 23, 3, 6, pr.; C. 5, 10, 4; C. 5, 13, § 11, 14; Voet. L. 14, r. 3, § 7.
7 Vide three next notes.
8 P. 24, 3, 22, § 12; Id. 3, pr.; Id. 46; C. 5, 18, 2, 9.
9 13 Edw I. 24.
10 1 Edw. VI. 12.
11 5 & 6 Edw. VI. 11, 13.
introduced by the statute of wills, by which real property is made devisible; the husband may bar his wife's dower, by devising for his wife's benefit any part of the land that had been subject to her dower, unless a contrary intention be expressed in the will, though she be not excluded; dower is also barred if the devise be of land, on which she would have no claim, or of personality, without express declaration, by introducing into the deed by which the land is conveyed to the husband, or any deed executed by him, a declaration to that effect. Or by a similar declaration introduced into his will.

§ 1104.

If the defendant be only sued for restitution as possessor, nothing further can be claimed than that which every bona or malae fidei possessor, as the case may be, is bound to give; when, on the other hand, he lies under any particular obligation, he must, if the ownership of the objects have vested in him, return the res fungibiles in like quality and quantity for others, paying the price agreed; but if he have the option of re-delivering the objects or their value, he may liberate himself by delivery of the objects, even though they may have deteriorated; and the wife, it has been seen, may vindicate from creditors on her husband's insolvency such of her property as has been purchased.

When the objects are returnable in specie, the principal thing is due with all its accessions; when it has been used up or consumed without the husband's fault, he is not compellable to pay the value. The law of the Pandects enforces this when the wife has brought clothes as her dos; a provision left unaltered by Justinian, and which is reconcilable with his regulations as to the usufruct of wearing apparel. The husband can be made answerable for every damage referable to his fault, and to pay four per cent. interest, accounting for the fruits which had accrued during marriage.

His right to the fruits determines with the marriage; on the other hand, the moment of the dos has been settled, or, when done before marriage, the moment of contracting the marriage, is the point when it accrues.

The term for the return of articles, part and parcel of the dos, varies according to their nature; corporeal immovable are due

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1 3 & 4 W. IV. 105. 2 P. 23, 3, 10, § ult.; Id. 11. 3 Vide ante, § 1091. 4 P. 23, 3, 10, § 1; C. 5, 12, 21. 5 Vide ante, § 1091. 6 P. 23, 3, 10, pr. § 1; P. 24, 3, 40, § 1. 7 P. 23, 3, 10. 8 Vide ante, § 1094. 9 P. 24, 3, 7, § 1, 2, 3; Id. 31; C. 5, 13, 1, § 9; Cajac. obs. L. 14, c. 22; Cocceii, I. C. L. 24, t 3, qu. 2. 10 P. 23, 3, 7; § 1; P. 24, 3, 7, § 1 & 11, & 13; Glück. P. as to this controversy, 27, B. 275-354; v. Tigerström Dotalir. 2, B. S. 154-178; Schneider de divisione practicu dotis, Helmst. 1805; Hasse im Rhin. Mus. 2 B. 1 Hft. § 1-11. 11
at once, but other objects in a year on security being given by the husband;¹ but it is erroneous to suppose that the wife can infringe upon the corpus for a year’s maintenance, where the interest or fruits are not sufficient for the purpose.² In order to sustain this action for return of the dos, proof of the illatio or actual payment must be given, which may be conclusively done by the husband’s deed; but Thibaut is³ correctly of opinion that this cannot be considered satisfactory proof against creditors, inasmuch as the husband, as usufructuary, is not only open to the suspicion of being his wife’s partizan, but also of a temptation to create an instrument which has the effect of protecting the dos against his creditors.⁴

§ 1106.

There are many claims which are competent to the defendant by way of set off; among which are the beneficium competentiae, and indemnity for work and labor, which latter is not admissible when it has been expended on or about fruits not returnable;⁵ when they are necessaria and expended upon the chief object itself, the husband has a claim to indemnity; and when they are considerable and⁶ extraordinary, such as costs of suit,⁷ but not when they are by the nature of the object ordinarily necessary to raise it.⁸ The defendant has two defences,—in the first case, the plea of compensation and that of retention,⁹ and his action attaches on the dos¹⁰ after delivery of it as payer of a debt not incurred on his own account, or incurred as administrator or as agent, if duly authorized as such.

Compensation can also be claimed for expenses actually incurred for the benefit of the subject-matter, provided they be moderate and not incurred by order of the wife,¹¹ whom the defendant cannot, however, annoy by exceptions, being unconditionally bound to deliver up the subject-matter, but he may then bring his action for indemnity as mandatarius or administrator.¹² No claim can be made for ornamental improvements, whether the wife concur or object to an innocuous separation, he had a right to make, or when was enabled, an opportunity having offered, to sell the object to better advantage upon such account.¹³

¹ P. 24, 3, 24, § 2; C. 5, 13, § 7; v. Tegerström, l.c. 2, B. S. 846-57.
³ P. R. § 357, ed. 8.
⁴ Ludovici de probatione illatione dotis, Hal. 1711; Glück. a. a. O. 335-51.
⁵ P. 25, 1, 3, § 1; Voet. L. 25, T. 1, § 5; Maiansius de expens. in rem. dot. fac. Disp. T. 1.
⁶ P. 25, 1, 12.
⁷ P. 25, 1, 1, § 3; Müller ad Leyser, obs. 575; Wernher, lect. c. L. 25, T. 1, § 2; contra, Leyser Sp. 321, m. 5.
⁸ P. 25, 1, 4 & 1, 5.
⁹ P. 23, 3, 5, pr. § 2 & 56, § 3; C. 5, 13, 1, § 5; Glück. a. a. O. S. 382, 146; contra, Voet. l. c. § 1; v. Tegerström, l.c. 2, B. S. 315-30.
¹⁰ P. 25, 15, § 2 & 12; P. 24, 31, 7, § 3.
¹¹ P. 25, 11, 8; P. 13, 7, 25.
¹² C. 5, 13, 1, § 5; Cocceii l. c. L. 25, T. 1; contra, as to the exceptio compensations, Lauterbach Coll. L. 25, T. 1, § 10.
¹³ P. 25, 1, 9, 10, 11; C. 5, 13, 1, § 5.
§ 1107.

In the case of other things, the usual remedies must be sought, except in cases of theft, where a particular rule applies. The *condictio furitiva* only applies before marriage; but after coverture, and in contemplation of its dissolution, the person robbed and her heirs have their *actio rerum amotarum directa*;* but if the theft took place in contemplation of death, the plaintiff may use the same action equitably (utiliter)*;* the heir, on the other hand, must content himself with the *hæreditatis peticio, actio ad exbibendum,* and *condictio ob injustam causam.* If husband and wife be guilty of theft, the *actio rerum amotarum* lies for restitution of the object and appurtenances, or their value, and they are deprived of their *beneficium competenter;* but it only extends to heirs when they have been enriched thereby.* The *actio rerum amotarum* however, presupposes that the dissolution of the marriage has followed,* except only when the action is brought for the recovery of some object the property of another, taken from one of the parties to the marriage;* for the general rule is, that during coverture an *actio in factum or rei vindications* alone will lie.*

All legal remedies are available in the case of a theft committed after dissolution of marriage.*

§ 1108.

Dissolution of marriage has the same operation as natural death *quo ad* the parties, being civil death *quo ad* the marriage; hence follow the same consequences as to property; thus, if the one party assume the veil or the cowl, his or her property falls to the issue of the marriage, if any, otherwise to the religious house; and the other party resumes its share, and can even demand what has been promised in case of the other party's death, and the quasi survivor can forthwith remarry.* In like manner, sentence of the court, which is a second species of civil death of the marriage, annuls it with its consequences as natural death, together with all the promises dependent on that state, and each party can withdraw his property; but a mere separation *a mensa et thoro* has not this effect, or indeed none whatever upon the property of the respective parties *per se.*

The woman divorced for reason of adultery forfeits her *dos* as punishment, and all her other property; and the man on his side also, under similar circumstances, is involved in the same penalty.*
Penalties attaching on divorces for other causes.

Consequences of false accusation of adultery.

Origin of usuacapion.

In jure cessio.

The origin of common recoveries in England.

The effects of the in jure cessio.

Usucapio, a mode of acquisition.

In divorces without any particular cause, or for reasons allowed on legal grounds, the woman forfeits, if she be to blame, her dos; the man, his donatio propter nuptias, or in default thereof, one-fourth of his property up to 100 pounds of gold.

If the husband falsely accuse his wife of adultery, she can demand dissolution of the marriage and one-third of the donatio propter nuptias, when there is no issue; for otherwise, the whole property of the husband devolves upon the children.

§ 1109.

Usucapion has been referred to various origins: occupation has, by some, been considered the true foundation of usucapion; but as flocks, arms, and pretiosa were not subject to this law, and as no sufficient reason is given for their being excepted, another origin must be sought. Walter thinks that the in jure cessio was originally the only mode of obtaining quiritian property; this was effected by the would-be acquirer assuming the property of the object, and bringing an action of vindication before the praetor, who adjudged the subject-matter to the plaintiff, by the default of the supposed possessor; this mode of transfer is mentioned in the Twelve Tables, but is supposed to have given way to the more convenient later form of mancipation.

We find ecclesiastical bodies in England evading the statute of Mortmain by this fiction. A collusive action was brought against the owner of the land who had received the value of it on a supposed prior title, which not being defended, the religious house obtained judgment. These actions obtained the name of common recoveries.

This in jure cessio was originally the only means of obtaining a quiritian title as between patricians and plebeians, because tradition conferred a mere inchoate right by detention or possession de facto, which required to be perfected by usucapion; indeed, originally the plebeians could hold by no better title than possession, being incapable of quiritian ownership, until Servius Tullius conferred that capacity upon them, and provided that it should be obtained by the form of mancipation.

The in jure cessio was not, however, abolished. The co-existence of the two forms is explained by tradition conferring quiritian ownership in res nec mancipi only, and by the in jure cessio being applicable to all objects whatever; while the mancipation applied to res mancipi alone.

§ 1110.

Usucapio, then, was one of the modes of acquisition invented by the civil law. This so-called usus auctoritas is said to have

1 Glück. P. l. c. 38-9.
2 Becking Inst. I. § 73; Puchta Inst. II.
3 Walter Gesch. des R. R. § 535.
4 Gaius, 2, 24; Ulp. 19, 9-10.
5 Gliick. P. 27, B. S. 96-103.
6 Nov. 117, 9; § 4.
been derived from the law of Attica, whence it is supposed to have been introduced by the decemviri into the Twelve Tables. The decemviral laws ordained a difference in the usucapion of mobiles and immobiles, that is to say, it was requisite that, to acquire an indefeasible right to moveables, they should have been in the actual bona fide possession of the claimant for an entire year; but of immoveables, for double that period, auctoritas fundi biennii casserarum rerum annuus usus esto; the reason of the distinction was, probably, founded in the exercise of acts of ownership, which were so much more evident in the case of moveables than in that of land. At the time this law was introduced, the Roman power was confined to Italy; consequently, usucapion could only apply to estates subject to the Italian law, in other words, capable of transfer by the solemn quiritian form of mancipation; immobilia nec mancipi were unknown, because, until long after that time, no private individual was capable of possessing property in the provinces, the legal estate in which, vesting in the populus, was not exposed to usucapion; it is true that such outlying lands were let out to provincial farmers or citizens at an annual rent, nevertheless, the ultimate fee, to use a modern expression, or dominium directum, was in populus or state, whence these farms were termed prædia stipendiaria and tributaria.

Immoveables, on the contrary, whether mancipi or nec mancipi, in Italy were subject to usucapion. Usucapione dominiá adipiscimur tam mancipi rerum quam nec mancipi, although, as has been before remarked, usucapion was denuded of some of the advantageous incidents of mancipation, although it was of more general application, not being, like the latter, confined to a certain category of things.

As strangers, formerly termed hostes, were devoid of civil rights, so they were incapable of acquisition by usucapion as well as by other means, until it was gradually conferred on the Junian Latins, and on such peregrini as were fortunate enough to have received the jus commerici.

The constitution of Caracalla, it will be remembered, conferred the citizenship on all the ingenui of the Roman world, and with it the rights of mancipation, legal assignment, and usucapion; and although latinity consequently fell into desuetude, yet peregrinitas remained; and upon those who were still in this category, the various advantages of the nexus, inheritance, and usucapion, was occasionally wont to be conferred.

§ 1111.

Although the law of the Twelve Tables prohibited the usucapion of things furtively obtained; this appears, however, to have been understood of the thief himself only, until the Lex Atinia.
Usucapion did not apply to cases of an adverse possession. Lex Atinia introduced. The Lexes Julia et Plautia enacted, \( ut \) quod subreptum esset, ejus aeterna esset auctoritas nisi si in ejus, cui subreptum esset, potestatem revertisset; this law is supposed to have been passed before Scævola, Brutus, and Manilius, but it is mentioned by Cicero.

Usucapion, nevertheless, did not apply to all cases in which an adverse possession of a year or two had been had; and first, the Twelve Tables prohibited the usucapion of things stolen: as this, however, only went to the actual thief, the Lex Atinia being introduced to protect the rightful title to stolen property in the hands of a third party acting in good faith, if the object had, in the interval, not passed through the power of the true owner, \( ut \) quod subreptum esset, ejus rei aeterna esset auctoritas, nisi si in ejus, cui subreptum esset, potestatem revertisset.

§ 1112. This law was followed by the Lexes Julia et Plautia (Plotia) de usucapionibus, and prohibited forcible possession from conferring a right by prescription, the question of thefts having been settled by the Lex Atinia; Cælius, Cicero and Sallust both mention a Plautian or Plotian law, which is said to have been introduced by Marcus Plautius, tribune of the people. The Julian law \( de \) vi publica et privatæ was, however, as Hottomann shews, introduced by Augustus.

The Lex Julia and the Lex Plautia on usucapions, which was consolidated with it, extended to cases of public or private violence, the principle which the Lex Atinia established as to theft, and took them out of the category of usucapion under the same condition.

§ 1113. The next law which touched upon usucapion is the Lex Scribonia, introduced by Scribonius Libo, A.U.C. 721, in order to bring services within the law of usucapion. In more remote times, services were held incapable of usucapion, for being incorporeal, they were incapable of possession, because corporeal possession could not be had of them; their usucapion was then abhorrent to the principles of law, the more so, inasmuch as in the Twelve Tables no mention was made of the usucapion of things incorporeal; moreover, usucapion was a mode of acquiring dominion, whereof services were incapable. Although all this is undeniable, yet use came to be considered by the lawyers to be a species of quasi possession.

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2 Cf. in Verr. 1, 42 ; Vin. Pighii An. T. 2, p. 255, A.U.C. 566 ; Hein. A. R. 2, 6, 1, et seq. ; Gall. N. A. 17, 7 ; P. 41, 3, 4, § 6 ; P. id. 33, pr.
3 P. 33, 2. These two are always mentioned together as the Leges Julia et Papia Poppaea, because treating on the same subject, but are of different dates. There were also two Leges Plautiae, the second, \( de \) vi aut rebus \( vi \) possessi non usucapiendi, was introduced about A.U.C. 675; the first, in A.U.C. 664, did not treat on this subject. Heinaricius A. R. confuses these, vid. edit. of that author, by Haubold, 1822, Francfort.
4 De Leg. p. 77.
5 Epist. ad Fam. 88 ; Ad Att. 4, 16 ; Pro Cacc. 26 ; Pro Milo, 13 ; Sall. de Bell. Cat. 31, A.U.C. 664.
6 P. Ibid. 33, § 2 ; 3, 6, § 2.
7 P. 41, 3, 33, § 2.
8 P. 41, 3, 25 ; P. 8, 2, 32 ; P. 41, 1, 43.
9 P. 8, 2, 14, pr.
possession, and, upon this fiction, the usucapion of rustic service
rata auctoritas barum rerum omnium a jure civilis sumitur.1 This
introduction was, however, considered so illogical and so irre-
concilable with the logical principles of the ancient lawyers, and
probably was so generally unpopular, that it was considered advisa-
able to abolish the usucapion of services by this Lex Scribonia;2 nevertheless, despite of this law, all claims to services
which had not been forcibly or clandestinely acquired, or the
exercise whereof was not precarious, obtained a remedy by the
equitable (utilis)3 prætorian action. Justinian abolished this law,
and admitted the prescription of all services and incorporeal things.4

§ 1114.
In course of time, this short term allowed for usucapion was
found to be inconvenient, and often to operate injustice and to faci-
litate fraud, and therefore gradually gave way to a more extended
period; this was termed longa possessione capio5 and longae pos-
sessionis prærogativa,6 and is laid down as regards immovable by
Paulus;7 inter præentes decennii, inter absentes vicennii spatio
continuo. There existed, nevertheless, considerable essential dif-
ference between the old usucapion and the new. The old usu-
capion was a matter of strict law; the latter was alloyed by equity.
Usucapion paid no respect to the presence or absence of the parties;
the new law admitted a difference. In cases of usucapion, the
period was always certain and fixed; not so by the new law, for
when the title could not be proved, antiquity, whereof the memory
of man runneth not to the contrary was required, qua legis vicem
sustinet.8 Lastly, the usucapion of immoveables only applied to
Italian estates; the new law extended to provincial possessions.
Justinian9 removed this distinction, probably, partly in conse-
quence of the abolition of the distinction between res mancipi and
nec mancipi, conferring, moreover, on simple tradition all the
effects of the ancient mancipation; usucapion or prescription10 was
now defined as adjectio dominii per continuationem possessionis tem-
poris lege definiti. The emperor11 extended this definitely to the
provinces, and fixed the following rule,—moveables were pre-
scribed in three years immoveables, where the parties were
present in ten years, in twenty in case of absence, that is to say,
two years were made in this case equal to one; it is, nevertheless,
no longer a matter of doubt that Justinian adopted as law those
rules which the prætorian equity had found it expedient to intro-
duce from time to time.

§ 1115.
In the case of usucapion, the acquirer is supposed to act in
good faith, believing, though erroneously, that he has acquired

1 Cic. pro A. Cæc. 26; Ulp. Fr. 10 § 1. 8 P. 41, 4, 4, et 61.
2 P. 41, 3, 4, § 8 P. 43, 19, 5.
3 P. 8, 5, 10. 7 R. S. 5, 2, 3; P. 18, 1, 76.
4 C. 7, 33; 12; Raevard, l. c.; Ant. 9 C. 7, 31, 1.
6 P. 41, 4. 6 P. 43, 19, 5.
7 C. 7, 31.
Prescription originally differed from usucapio in the respect of *bona fides* not being required; it was an *exceptio* against the true owner, but gave no right of action to recover from other parties who might subsequently have obtained the possession.

Usucapion did not apply to incorporeal, but merely to corporeal things, and in this respect differed from prescription, *quoad* the object.

With respect to time, the usucapion of moveables was formerly perfected after lapse of a year; of immovable, in two years in Italy, to avoid uncertainty. This time, Justinian enlarged to three years in the first case, and ten in the second, adding ten more in favor of parties who might be absent, extending it, moreover, to all the empire.

With respect to the effect, usucapion conferred a right of action as above observed, enabling the *bonae fidei* possessor to maintain an action as plaintiff against others; whereas, prescription merely supplied the defendant with a defence, without putting him in the position to become a plaintiff.

§ 1117.

To a fuller understanding of this subject, it may be convenient to follow it categorically through the four most marked periods or changes that took place.

The first period refers to the law of the Twelve Tables, assigning a year for moveables and two years for immovables, *usus auctoritus fundi biennium caeterarum rerum annus esto*: this must be explained as applying to incorporeal things and property in Italy, not to incorporeal rights and provincial lands; lastly, the rule applied only to Roman citizens.

The second period. Inasmuch as usucapion was confined within such narrow bounds, the prætor invented the *praescriptio longi temporis* as a supplement to the usucapion, the place of which it supplied; for instance, it applied to a *peregrinus*, giving, however, the imperfect title *retinendi et excipiendi*, which nevertheless vanished with the loss of possession; in short, it gave a holding title. The prætor, however, appears occasionally to have allowed even this, giving a *utilem rei vindicationem* against other possessors;¹ in this case, however, *bona fides* uninterrupted possession

¹ *P. 12, 2, 13, 5: 1; C. 9, 39, 8; P. 2, 15, 9; P. 46, 3, 91; P. 41, 4, 4, 5: 1 & 14.*
for ten or twenty years, and a *justus titulus* were required: it is a question whether three or the ten and twenty years were necessary in the case of immoveables.

The third period. The emperors Theodosius and Anastasius introduced the prescription of thirty and forty years to actions—that is, actions which were formerly not limited to half, one, three, five, ten, and twenty years, but were perpetual, or were prescribed in thirty or forty years. Anastasius, moreover, limited fiscal actions to forty years. This prescription, however, conferred no further right than an *exceptio* or plea, and that of bringing an *exceptio utilis*.

The fourth period was that of Justinian, during which the prescription of moveables was fixed at three, that of immoveables at ten and twenty,—in a word, he increased the period of usucapion, extended it to real property in the provinces, giving the *præscriptio longi temporis* the advantage of *rei vindicatio*, and applying it to objects without good title but possessed in good faith in the beginning; he also gave a prescriptive right after thirty or forty years, in the case of *mala fides*, but the plea of prescription endured only so long as possession was retained, but no *rei vindicatio*; he further applied the prescription of thirty years to the *res adventitiae filiorum familias*, and to things sold *bona fide* without just title.1 With respect to things belonging to the fiscus, he retained the *præscriptio longi temporis*, and introduced the hundred years prescription for ecclesiastical property.2

§ 1118.

The policy of the law of prescription was clearly to fix the right of property,3 which should be certain, for *dominia rerum non debent esse in incerto*, encourage trade, and put an end to controversy, *usuceptio constituta est ut aliquis litium finis esto*, by inflicting punishment on the negligence of a true owner who should culpably allow his right to become thus obsolete,4 upon the principle,—*videtur alienare qui patitur usucapi*. The law of nature, which directs that every man should have his due, is not, it is asserted, changed here, but merely corrected by a more important one, namely, the maintenance of public societies of men, though it be against the interest of certain private individuals; moreover, a man bringing himself within the operation of laws inflicting the penalties of prescription, may be said to consent tacitly to its consequences.

§ 1119.

The five requisites of prescription are:—*bona fides*, or good faith;—a *justus titulus*, or good title in the abstract;—uninterrupted possession for the term fixed by law;—the expiry of that term;—and

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1 Nov. 22, c. 24; Nov. 131, c. 6.
2 C. 1, 2, 23; Nov. 9.
3 P. 41, 3, 1; P. 41, 10, 5.
4 P. 50, 16, 28.
the *rei qualitas*, or capacity or liability of the object to prescription.

And, first, as regards the *bona fides*,¹ or honest design on the part of the person pretending to the prescription, the bare possession being insufficient, is requisite. This good faith and honesty will appear if possession be had from one who was esteemed the true owner by the possessor at the time of delivery, except in a case of purchase, where the *bona fides* is required at the making of the contract as well as on the delivery of the object; thus the prescription will not be interrupted, or the *bona fides* impugned, if the buyer subsequently become informed that the seller was not the true owner, but it sufficeth that there was no guilty knowledge in the beginning.³

The Canon law is more tender of the conscience, ruling that if⁴ at any time the party prescribing be conscious that he derives his possession from a wrong doer, such knowledge interrupts the prescription, which wholly militates against a maxim some interpreters would introduce into the civil law.

Secondly, a *justus titulus*, or a just, particular, and real cause or title, is required, for instance, by sale, gift, exchange, or the like,—in fact, such a cause as would entitle the receiver to the property from the true owner; for if there be no true cause, or one insufficient to transfer the property (as if the thing were only deposited for safe custody, or possessed by tenants, &c.), no prescription can follow. Here it will not suffice that I believe my title good, it really must be so, and ignorance of the fact is only excusable if it exclude the supposition of a *culpa lata*, or of *levis* only. With respect to an *error facti*, it must be one that may readily be excused; or, on a point of law, such an one as is not generally known. A simulated or revocable contract, therefore, gives no title, or a *donatio mortis causa*, i.e. a gift to take effect after death.

Thirdly, *continuous possession*⁶ is required to support the title by prescription, and such is to be presumed till the contrary appear. The possession of tenants and proxies⁷ continue the possession for the true owner, not for themselves, nor is it necessary that the possession should always reside in the same person. An honest purchaser⁸ may begin the prescription in himself, laying aside the time acquired by a dishonest vendor, because he himself fairly paid the price; but where the thing has been acquired gratuitously, as by gift,⁹ legacy, or succession, if there be fault or bad faith in the vendor, there does not seem so much reason in continuing the prescription.

Every interruption before the lapse of the period of prescription was termed *usurpatio*, and is either natural and in fact or civil, in the contemplation of the law. A natural interruption is when a moveable thing is taken from the possessor, or an immovable entered upon and seized by another, or deserted by him, or when the alienation results in a breach of trust on the part of him who was entrusted with the possession in another's name.

A civil or legal interruption may be by citation or other judicial claim, as by filing a libel or bill before a judge if the defendant abscond or become a madman, but more especially when the suit is contested, or issue is joined upon the right, and sentence delivered by the judge. This interruption includes only the parties to the suit, but *de facto* extends to all parties whatever. A prescription may also be suspended for a certain time, simply not advancing as in times of general sickness or war where the party is prevented from making his claim; but if the courts of justice remain open, there is no reason it should be so suspended.

Such total interruption is termed simply *usurpatio*; the casual interruption, *interruptio temporalis*. The Canon law will interrupt in the case of *mala fides* subsequently occurring on the principle above stated.

Fourthly, a lawful time is required to give title by prescription. This is three years for moveables, and ten for things immovable or incorporeal, if the persons assuming right inhabit the same province; but if residing in different provinces, then twenty years are required to gain a prescriptive right to an estate; the same time is also generally required to limit real actions and criminal prosecutions, for after that lapse of time circumstances may have changed so as to reduce the importance of public prosecutions.

Time is not computed from moment to moment, or from hour to hour, but from day to day. *In usucapionibus non a momento ad momentum sed totum postremum diem computamus*, says the Digest. *In omnibus temporalibus actionibus nisi novissimus totus dies compleatur non finit obligationem*; the first moment of the last day being computed as one whole day in favorable cases. And, Lastly, the thing prescribed must be capable of prescription, wherefore there is no prescription of things exempted from commerce, as of a freeman, things consecrated to God, or of things once lodged in the fiscus or exchequer.

The prince's domains possessed by him as a private man, and included in *res domanales, patrimoniales*, and *Caesaris*, as distin-

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1. P. 41, 3, 2 & 5; P. 4, 2, 2, § 36; P. 41, 3, 5; P. 44, 7, 1.
3. *C. 7, 33, 12.
5. *C. 7, 33, 12.
guished from res fiscales or state property,¹ are not liable to be
prescribed; nor the goods of churches,² cities, hospitals, or things
stolen,³ for they may be concealed till the time of prescription
come; nor the goods of infants⁴ and minors, nor of soldiers⁵ on
expeditions, or of those absent on the⁶ affairs of the common-
wealth; but the period of absence is to be deducted from the
time, for absentia ejus qui reipublicae causâ abest neque ei neque
ali damnosa esse debet,⁷ and in another place,⁸ it is called officium
publicum nulli nec damni nec compendii sit, nor the goods given as
bribes to magistrates;⁹ and lastly, things prohibited to be alienated
by last will.¹⁰ Hence it is that moveable things are seldom pre-
scribed on account of some of these incapacities.

The reason of this difference in the times of prescription is
allowed in order to give those living at a distance a longer time
to make their claims. If the parties have residences in several
provinces, they are reputed present at each; and if a man have no
dwelling-place of his own, and neglects what belongs to him, that
person may be deemed present everywhere. Such are the com-
mon prescriptions of time applicable to all things belonging to
private persons capable of prescription, and when possessed bona
fide; but there are other prescriptions of longer time, of thirty
and forty years,¹¹ by which even stolen goods and those possessed
by force may be prescribed by the civil law, without regard to the
justice or injustice of the first title, for the sake of public tran-
quillity, the only ground upon which it can be justified in con-
science.

The Canon law does not concur therein, but rules the con-
trary.¹²

§ 1120.

Personal and mixed actions continue regularly within thirty
years;¹³ and bare possession for so long a period confers the
right; and although thirty years is generally the limit, yet some-
times, by reason of privilege in the thing or person, or on some
other particular account, the time is extended to forty,¹⁴ and some-
times to one hundred years,¹⁵ as against the Roman church; nay,
sometimes time out of mind¹⁶ is required, as in the exercise of
a right not continually made use of, as right to draw water, &c.

The prescription of thirty or forty years includes soldiers¹⁷ in
actual war, women, persons absent, minors, but not infants,
though the former prescriptions could not include them.

¹ C. 7, 38, 2.
² C. 1, 3, 23.
³ I. 2, 6, 2 & 8.
⁴ C. 7, 35, 3.
⁵ C. 7, 35, 8.
⁶ C. 7, 35, 4.
⁷ P. 50, 17, 140.
⁸ P. 48, 11, 8.
⁹ P. 48, 11, 8.
¹⁰ C. 7, 30, 3, 2.
¹¹ C. 7, 39, 3 & 4.
¹² D. 3, 26, 10.
¹³ C. 7, 35, 5.
¹⁴ C. 7, 39, 4, § 9.
¹⁵ Nov. 9.
¹⁶ P. 48, 30, 3, 4; P. 8, 6, 7.
¹⁷ C. 7, 39, 3.
ADQUISITIO PER PRÆSCRIPTIONEM. 149

§ 1121.

Things belonging to the treasury (fiscus) are not subject to usucapion. Papinianus, however, ruled that in cases of bona vacantia not yet appropriated by the fiscal officers, a bona fide purchaser could gain usucapion if the thing be delivered to him, a rule confirmed by Severus and Antoninus. Hence it results that no prescription under thirty or forty years applies to things regularly acquired by the fiscus, but are, as it were, owing to it,—such, for example, as the property of persons condemned for treason; if such things, however, be neglected by the treasury, then four years are sufficient; but if not announced to the treasury si non nunciata, three years suffices for moveables, and ten for immovable.

Bona patrimonalia, or the emperor's property, as a private man, are not subject to prescription according to the argument of Vinnius; neither are bona domanalia or crown lands, of which the emperor as such has only the usufruct, the property or dominium thereof being in the state, are not liable to prescription of any length of time, for as belonging to the state, they vest in all the citizens thereof; they are, moreover, exempta commercii, for the same reason.

From the foregoing, it resulted that prescriptions up to twenty years were called præscriptiones longi temporis, and those of one hundred years, longissimi temporis; the first conferred by the old law, partly a releasing, partly an acquisitive power; the latter was introduced by the emperors, and conferred before Justinian only an extinctive right; this emperor, however, gave it also the acquisitive right. Acquisitive prescription operates to confirm the possession to a thing, or the exercise of a right already possessed; extinctive prescription to extinguish the right of another on my person or property. Savigny repudiates this distinction.

§ 1122.

To the præscriptiones longi and longissimi temporis must be added præscriptio immemorialis, a right whereof the memory of testes senes runneth not to the contrary; such senes must, it would appear, be over fifty years of age at least: this differs from the præscriptio definiti temporis in the presumptio legalis, and can only be met by the other party showing a vitiosum initium.

An action for verbal injuries is barred after one year, as also all popular actions, that is to say, those instituted for the benefit of the public. By four years' possession, the exchequer or public treasury is secure against all claims and quoad forfeited goods; and if the exchequer sell, or give to a private person, his title upon the mere delivery is unquestionable; but the aggrieved party

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1 I. 2, 6, 4.  2 C. 7, 38, 5, 2.  3 C. 7, 38, 5, 2.  4 C. 7, 38, 5, 2.  5 C. 7, 38, 5, 2.  6 Syst. des H. R. R. 2, 4, § 237, p. 266.  7 C. 9, 37, 1 & 2.  8 P. 47, 23, 8.
Res mera facultatis, or such things as may be done or left undone at pleasure, without incurring an obligation to continue the exercise of the right, as, for instance, the right to build in my yard, and shut out another's light, though I have not done so yet, and my neighbour has no jus luminum, marrying, making a will, buying or selling, carrying arms, and the like. Savigny repudiates this expression.

§ 1123.

The operation of prescription varies according to circumstances, and may be divided into that which, of necessity following the provisions of law, and from which nothing can be taken, and to which nothing can be added, is termed legalis, and that which is exposed to modifications; the first is the term assigned by law in the cases to which it is made applicable, and the latter that allowed to be established by private individuals, founded on contract or testament, and termed conventionalis or testamentaria; that prescription termed judicialis must not circumscribe or extend the legal period, except where the rights of third persons would be injured; hence the judge cannot enforce the exceptio prescriptionis by virtue of his office. The prascriptio longissimi temporis forms an exception; and this cannot be extended by the judge, but he must, nevertheless, take judicial notice thereof, virtute officii.

§ 1124.

Prascriptio is said to be extinctiva, when an object is acquired by the extinction of another's right; but when more is acquired, it is termed acquisitiva; this, again, may be translativa, when the whole right of the loser is transferred. Sometimes a right is lost by the laches of him to whom it appertains, the extinctio juris per non usum; but at other times, by the act of the acquirer, as in the case of the usucapio libertatis, generally called prascriptio extinctiva in specie.

§ 1125.

The law of the Pandects is most clear on the subject of the acquisitive prescription; nor is it now any longer a matter of importance, whether it takes its origin from the old usucapion, or from the later praetorian prescription and more recent constitutions. It is now material to consider more nearly the prascriptio longi temporis or usucapio of three, ten, and twenty years, and the prascriptio longissimi temporis.

1 C. 7, 37, 2. This resembles the Parliamentary title.
3 P. 21, 1, 31, § 22; C. 4, 54, 2; C. 7, 39, 3 & 4; Thibaut, P. R. § 1002.
4 Thibaut, P. R. § 1012.
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§ 1126.

As it is necessary for the shorter prescription that, in addition to the general requirements of prescription,¹ which do not, however, regard the titulus, the possessor prove the justness of his title,² that is, that the object has been acquired by virtue of a³ well-provided right, arising out of a lawful transaction,⁴ whether there have been one or two parties to it.⁵ The prascriptio ex titulo putativo accrues even if there be no title; but some error as to its existence,⁶ which may be justifiable, exists.⁷

The particular grounds of possession are to be sought in a title of the Pandects set aside for that subject.⁸ Those founded in law are principally the titulus pro emptore, when the property of another has been bought,⁹ even without payment of its price, in which case a justifiable error does not damage the purchaser.

The titulus pro herede is when the true heir takes for himself, on demise of the person possessed, an object free from question, believing in good faith that it belongs to the estate; or, when one who is not heir is possessed, as putative heir, of an object subject to prescription as a part of the estate.¹⁰ No usucapion will operate, however, against the true heirs;¹¹ and for the same reason, neither against sui heredes.¹²

The titulus is said to be pro donato,¹³ when a person receives an object belonging to another as a gift.

The titulus pro derelicto occurs in the case of one, who is not the owner, possessing a thing abandoned, as really so abandoned.¹⁴

The titulus pro legato applies to the taking as a legacy, an object not formally bequeathed.¹⁵

The titulus is termed pro dote, when the actual husband possesses a marriage portion or dos; but there is a conflict in the laws as to the title of the putative husband.¹⁶

The prescriptive titulus pro suo applies to the affianced bride-groom, in cases where the dos has been delivered to him without any proviso for the retention of the property, and without any valuation (stimatio) of the object.¹⁷

¹ Lühr Magaz. 4, B. 1; Hft. S. 136-7. ² C. 3, 32, 24. ³ C. 7, 34, 1. ⁴ P. 41, 6, 1, § 4; P. 41, 5, 2, § 1. ⁵ C. 7, 33, 8. ⁶ P. 41, 4, 5, 6, 7, 8, etc. ⁷ P. 41, 4, 11; P. 41, 10, 5, § 1; Unterholzer 1, B. S. 559-563. ⁸ P. 6, 3, 3. ⁹ P. 41, 4; P. 6, 2, 8; Voet. 41, 1, § 1; contra Hofacker 2, § 970. ¹⁰ P. 41, 3, 48; P. 41, 4, 2, § 6; P. 41, 10, 5, § 1; P. 46, 4, 11; Cuj. ad Afr. Tract. 7, ad cit. L. 11, in opp. T. 1, p. 1405-6. ¹¹ P. 41, 3, 33, § 1; P. 44, 3, 11; compare P. 41, 10, 5, § 1. For the opinions of others, vid. Thibaut, P. R. § 1013, n. 1. et Voet. 41, 3, § 1. ¹² Gaii Inst. 2, § 52-8; P. 41, 3, 3, § 201; Id. 29; C. 6, 30, 8; C. 73, 34, 4; contra Voet. 41, 5, § 2. ¹³ C. 7, 29, 2. There is a discrepancy in the views of this law, vid. Westphal. § 667. ¹⁴ P. 41, 6. ¹⁵ P. 41, 8. ¹⁶ P. 41, 9, 1, § 4; P. 23, 3, 67; Westphal. § 653; Voet. 41, 9, § 1; Glück, P. R. 25, B. S. 209-20. ¹⁷ P. 41, 9, 1, § 2; Id. 2; Val. Fr. § 111, v. Tigerström Dotalr. 1, B. S. 301-11; Chelsi Interpr. (in Jurispr. Rom. et Attic. T. 2), Lib. 2, Cap. 26.
Applies to all not named technically.

Exception of bona vacantia, and fiscal claims in particular.

Prescriptio longissimae temporis particularly.

Prescriptio servitutum follows that of the subject matter.

Prescription of 30, 40, or 100 years particularly.

Possessio pro suo is applicable generally to all the above, and all other tituli or species of possession; this expression is, however, more particularly used with reference to all such titles as are not particularly designated by any particular technical expression.1

§ 1127.

Moveables, it has been seen, are prescribable in three years; immovable in ten, where the parties are present; or twenty, when absent:2 by absence, without the same province being meant, but bona vacantia, or such inheritances as fall to the fiscus form an exception, and are absolutely acquirable in four years, when they have not immediately lapsed to the fiscus in consequence of a fiscal declaration, or they may follow the usual law of usucaption, when the fiscus has obtained possession of them before notification of the lapse made to the fiscal officer.3

§ 1128.

When, by any defect in the object or title, the prescription of the shorter period is not applicable; that of the longer period of thirty years,4 termed longissimi temporis, only applies, and is operative even when the possessor is proved to have no title; under this long prescription are included things belonging to the Romish Church, to render which susceptible of prescription, one hundred years must elapse.5

§ 1129.

The prescription of services may be of ten among those present, and twenty among those absent, in such cases the subject matter must be obnoxious to prescription; the prescriber must, moreover, have a just title, nor must the service have been exercised clandestinely, permissively, or by force:6 The knowledge of the owner is always requisite in cases of this short prescription, when the service has been established on the property of another by one acting in bad faith:7 when, however, the subject matter is incapable of the short prescription, the service is only acquirable in thirty, forty, or one hundred years, according as these periods were requisite for acquiring by prescription the object whereupon this service is meant to attach;8 for the service so far savors of the

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1 P. 41, 9, 1, § 2; P. 41, 10, 1.
2 Nov. 119, 8; Toullie de prescrip. et absen. mixtoq. tem. Grunling 1719 (Coll. D. 18); Hago C. M. 5, B. n. 17; Unterholzer 1, B. S. 272-5; Meister vindiciæ legalis. Just de mixto temp. comput. (op. n. 8).
3 P. 41, 3, 18; I. 2, 6, § 9; P. 44, 3, 10; P. 49, 14, 1, § 2; C. 7, 37, 1, § 1120, h. op.
4 C. 7, 39, 3, 4, 8, contra Voet de Prescrip. I. C. Acquis. Wirt. 1807.
5 Contra Kori, § 71-2; Thib. Schrift. § 34.
6 C. 7, 33, 12, m. f. comp. P. 6, 2, 11, § 1; P. 8, 5, 10; C. 3, 34, 1 & 2; Vinn. Qu. Sel. L. 3, C. 31; Walch de Pres. Serv. Constitut. Jen. 1797; Unterholzer 2, B. S. 144, 159, 189, 191; contra Hoepfner, § 352; vide et authority quoted by Thibaut, P. R. § 1017, n. § 1119, h. op.
7 Nov. 119, 7.
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realty that the same rule must be made to apply to the thing itself, and the service which must be regarded as a sort of detractive accession,—thus, if a person acquire by prescription a prædium dominans, he acquires with it the services attaching thereupon.¹

The English law appears to follow this principle,—in the case of adverse possession twenty years is required to acquire a title by prescription; be it to services (easements) or to the land itself, for a modern statute, reduced the former period to one-third of the term formerly required to that end.

The Canon law² requires the prescribing church to prove the title, as against another, to services, in the case where the prescription of forty years obtains; otherwise immemorial prescription is necessary: and witnesses must be called in respect of the term as to whether the service be continua or discontinua.³

§ 1130.

There are other rights besides those of property and services, viz., those of superficies and emphyteusis, which may be acquired by prescription on the same terms.⁴ Freedom is another right liable to acquisitive prescription among persons present in ten, or among those absent in twenty years, but otherwise in thirty.⁵ But it is an erroneous view not founded on any law that the right of property in a pledge can be acquired by prescription; although it may be held that no one capable of suing can deprive another of the possession of an advantage, when the latter has possessed it in good faith undisturbed for thirty years.⁶

§ 1131.

It is curious that the English lawyers did not, with so good a principle before them, at an earlier period adopt that of the Roman law with regard to prescriptions; and, instead of limiting actions from some fixed epoch which every hour necessarily rendered more remote, reckon the period an action should lie, backwards from the accretion of the right to sue, for the necessity of a limitation of some sort was evident as early as the reign of Henry II., when it was enacted that the demandant could not claim upon any seisin, in a writ of right, earlier than the reign of Henry I.;⁷ by the statute of Merton,⁸ earlier than the preceding reign; nor by the statute of Westminster,⁹ earlier than the reign of Richard I. These same statutes, thus enacted from time to time, re-appointed periods of limitation for many other kinds of real actions. To obviate this anomaly, the statute of limitations¹⁰ was passed which

¹ Vinn. ad I. 2, 26, § 12.
² In vi. 2, 15, 1; Gluck. P. R. 9 B. § 629; Kori, § 74-77.
³ D. 2, 26, 8; Coccei jus contr. L. 8, T. 1, Qu. 6; Müller ad Leyser, Obs. 257.
⁴ C. 11, 61, 14; Thib. l. c. § 35; contra Marvius, P. 7, Dec. 289; Unterholzner, 2, B. S. 242-260.
⁵ C. 7, 33, 2; Rave de præscr. § 57.
⁶ C. 7, 39, 3 & 4; Thib. l. c. § 37; Kori, § 74. Unterholzner, 2, B. S. 281-274; Gluck. P. R. 18, B. S. 195-7.
⁷ Com. Dig. Tempa.
⁸ 20 Hen. III. 8.
⁹ 3 Ed. I. 39.
¹⁰ 32 Hen. VIII. 2.

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adopted the Roman rule,—whoso, in a real action, claimed on his own seisin must claim within thirty years back, if on the seisin of his ancestors within sixty years; and in a possessory action within fifty. The statute of limitation of James\(^1\) restricted the writ of forsondon and the entry upon lands to twenty years, which has subsequently formed the rule in all actions of ejectment.

Actions upon the case (except slander) were limited to six years; actions of trespass, to four; and of slander, to two years, next after the accruing of the cause of action. And after reversal in error, or arrest of judgment, to within one year. Where the plaintiff lay under any disability, such as nonage, imprisonment, coverture, or absence, the statute began to run from the time such disability ceased, the principle being that there should be a party capable of suing when the statute began to run. Actions in the Court of Admiralty for seamen's wages were subsequently limited to six years,\(^2\) as well as those for not setting out tithes.\(^3\) But the last act\(^4\) passed limited actions for rent, not by specialty, to ten years after the passing of the act, or twenty from the accruing of the cause of action.

Instruments under seal are regulated by a later act,\(^5\) limiting actions thereon to twenty years, and money claimed under fierifacias to six years; the same provisions as to disabilities are contained in this act also.

Other periods were fixed after the passing of the act of William\(^6\) for other cases, until six years had elapsed, which was the future period of limitation; the same rules as to liabilities were preserved, but the statutable time might be revived by certain written acknowledgments of a cause of action, from which the statute would again commence to run.

The acknowledgments or acts which are sufficient to take cases out of the statute have since been determined by the courts.\(^7\)

There are several reasons for this limitation,—first, interestreipublicae ut sit finis litium, or for the sake of peace and quiet, and the avoidance of perjury; secondly, for the avoidance of fraud, viz., that a plaintiff should not wait until all the witnesses for the defendant were dead; thirdly, upon the principle that vigilantibus nondormientibus jura subserviunt.

The difference between the statute of James and that of William is, that the former barred the remedy, the latter extinguished the right as well.

§ 1132.

It is a principle of the extinctive prescription, that no right is lost except the law expressly impose such penalty; and in the

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\(^{1}\) 21 Jac. I. 16.
\(^{2}\) 4 & 5 Anne 16, § 173; 2 Geo. IV.;
\(^{3}\) 53 Geo. III. 127, § 5.

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\(^{4}\) 3 & 4 Will. IV. 42.
\(^{5}\) 3 & 4 Will. IV. 42; 3.
\(^{6}\) 3 & 4 Will. IV. 42.
\(^{7}\) Hart v. Prendergast, 16 M. & W.; vide 9 Geo. IV. 14, as to being in writing.
limited as well as in the long prescription, the right itself is only lost by the loss of the right of remedy; that is to say, the right to maintain the action by which such right might be recovered; and although these terms are different as to their duration, there are certain general rules which invariably apply,—thus, for instance, *pendentie lite* prescription is arrested and the right of action perpetuated. The rights of the papal chair have one hundred years to run; but those of churches, which according to common law would, under other circumstances, endure but ten, continue in that case for forty years; and all other rights, for which the acquisitive prescription fixes thirty and forty years, are extinguishable in like periods.

§ 1133.
Almost all actions are obnoxious to the extinctive prescription, and certain general rules are applicable. The codex terms those actions *perpetua*, which must be begun within thirty years, if more ancient or more recent laws have not assigned to them a longer or shorter period; in which latter case, they are termed *temporales*.

The requisites of prescription of actions are various,—first, it is necessary that the *actio* be nata or legally possible, hence the right of action on *pactum addictionis in diem* expires at the moment at which a better offer has been accepted by the vendor, and here the rule may be assumed to be, that in mutual obligations a ground of action will not arise until the execution have been actually obtained; in like manner, the *jus reluendi* of the pawnor is extinguished at the moment only at which he pays the price of redemption, and the right of re-sale according to the more general opinion, first, then, when in the absence of any other particular contract, the vendor by tendering the price has shown his readiness to redeem. *Tantum est praescriptum; quantum possessum*—is a maxim importing that whoso seeks to acquire possession by this prescription must have been in this state of possession continuously during the whole period, and he cannot prescribe beyond his

1 P. 12, 2, 9, § 4; P. 44, 4, 5, § 6; P. 44, 7, 6; C. 88, 36, 5 & 6; Comp. Nov. Val. 8; Cod. Th. 14, 1, § 1; C. 7, 39, 4 & 9; conflicting are the opinions of Weber; Arch. f. C. P. 1, B. 1, Hft. S. 70-77, vid. Nat. Bewerb.; Pfeiffer Prac. Auf. 2, B. nr. A. III.; Roehricht Zeitschr. 2, Hft. nr. 2; Büchel Civ. Recl. Erör. 1 Hft. Marb. 1832.
2 C. 1, 3; Auth. D. 2, 26, 13 & 14.
3 Thib. Zeitschr. § 41.
5 C. 7, 40, 7, § 4 & 1, § 2.
7 P. 13, 7, 9, § 3, 5, 20, 1, 13, § 4.
9 For conflicting opinions, Menken. l. c. p. 225; Hopfner Com. § 873, n. 4; Weber, in the note s to § 81-82, n. 3; Glück. P. 16, § 998; Unterholzer 2, B. S. 316-19.
10 In v. 5, 12, 8, 3.
Actio finium regundorum.

possession; hence the actio finium regundorum, as long as the confusion of boundaries endures, is not susceptible of prescription;\(^1\) this, however, will not include claims of personal indemnity.\(^2\) The right of demanding certain dues at certain terms, annua menstrua, &c., is extinguished in thirty years quoad the individual and singular dues; but the whole right is not lost unless the obligee have utterly denied the right, and the claimant has allowed the period of prescription to pass by without taking latterly any steps to enforce it.\(^3\) But it is different as to capital out at interest.\(^4\) It is, moreover, indispensable to success that the claimant should not admit the right of his opponent; hence we must understand the maxim that actions communi dividundo, finium regundorum familia hircunda, and pro socio are limited to thirty years,\(^5\) with this qualification, viz., that the one party has arrogated something exclusive to himself as against the other;\(^6\) but if the conditions of the extinctive prescription be not already due, although those of the acquisitive are so, the former will follow as a regular consequence of the latter.\(^7\)

§ 1134.

There are many exceptions to the maxim that all actions endure thirty years; for the term may be greater or less. In some cases it is extended, as in the instance of the action for the recovery of a gambling debt, which runs fifty,\(^8\) and the personal actions of the fiscus, which run forty years; other suits of the State, and those pending before a court, and many ecclesiastical suits, usually form an exception.

In other cases this term is diminished. The right to bring the real actions querela inofficiosi testamenti and the querela inofficiosae donationis endures only five years;\(^9\) but the actio suppletoria does not form an exception.\(^10\) Among the actiones personales et rei persecutoriae, the action for indemnity runs against the fiscus for things alienated, and by the fiscus against the possessor of heirless property in certain cases, four years only. The right of the wife to separate property from an inheritance, in the case of bankruptcy\(^11\) as against creditors, or the right of insisting on an examination of the status of the deceased, is limited in five years;\(^12\) and the personal action for cession of usufruct, according to the presence or absence of

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1 Hellfeld Jur. For. § 739; for other opinions vid. Fachnei contr. L. 6, c. 36; Cocceii, l. c. L. 10, T. 1, qu. 5; Müller ad Leyser, obs. 449, 601.
2 C. 7, 39, 5; C. 3, 28, 34; C. 7, 40, 1, § 4.
3 C. 7, 21-29; Gottschalk Disc. For. T. 2, nr. 6, 8, 29; contra Boehmer de prescrip. an.
4 Puf. T. 1, obs. 42.
5 Rave de prescrip. § 119; Thib. l. c. § 60; Thib. l. c. § 45.
6 P. 5, 2, 8, § 17; C. 3, 28, 34; C. 3, 29, 9.
7 Thib. 1. c. § 64-80.
8 Unterholzer 2, B. S. 66-69.
9 P. 42, 6, 1, § 13.
10 P. 40, 15; C. 7, 21.
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the parties, in ten or twenty years. On the other hand, the right of the vendor to sue on a pactum commissorium is lost, if the vendor does not declare forthwith, statim, on the commencement of the operation.

§ 1135.

The periods during which an action will lie for a restitutio in integrum are likewise various. That for civil restitution runs, as a general rule, thirty years; no law limiting it to any shorter period. The actio redhibitoria can be brought within six months; that of quanti minoris within one year, when the security has been given against possible defects; but when the action is only brought for accessions, it runs two months only; but when the delivery took place under a pactum displicentia, six months, both of which come under the head of tempora utilia; and the same applies when the action is brought on the contract for a defect.

The prætorian actions for restitution must be instituted within four years, forming a tempus continuum, as well as regards the beginning as the duration of the term; for in those admitted by the civil law, and not by analogy, an annus utilis only is allowed; hence the actio quod metus causa, if brought for the quadruple amount, must, by the Roman law, be instituted within four years; but if all other remedies are barred, it may be brought at any time within thirty.

The actio de dolo continues enforceable biennium continuum; but the actio in factum de dolo, thirty years.

Minors have four years after attainment of full age to sue for restitution, to which three years are added when the beneficium abstinendi has been granted by the praetor. If a minor obtain the venia ætatis, the limitation of the restitution will begin to run from that period, although he will be allowed his restitution in all cases until the expiry of the minority. But if one who could have claimed restitutio on the ground of his minority die as major, and a major be his heir, this latter will be allowed the time not expired; but if a minor be his heir, such heir has, in usual course, the advantages of this term, only dating from the moment of the majority, or venia ætatis. Now if he die as a minor, the heir, being major entering on the estate can claim four years, which

1 C. 3, 33, 16. § 1; Thib. l. c. § 5. 7 Unterholzner 2, B. S. 15-15; Burchardi Wiedereinsatz in d. v. S. 517-529. 2 P. 18, 3, 4, § 2. 6 C. 2, 53, 7; Koch de præscript. rest. in int. Gies. 1784; Thib. l. c. § 49; Glück, P. 20, B. S. 152-623; Kind. qu. for. T. 3, c. 40. 3 P. 21, 1, 19, § & 28-31, § 22 & 35; Hab. Ascher de præscr. redhibitionis, Goett. 1788. 4 Vid. post rest. in integrum et vid. Thib. P. R. § 684. 8 Vid. post rest. in integrum et vid. Thib. P. R. § 684.
will begin to run from the moment of administration; but being minor, from the moment of attaining full age, or venia atatis.  

Those who claim restitution as quasi minors have four years for the purpose, as a tempus ratione inittii utili, which begins to run from the moment at which they become aware of the infringement.  

The restitution ob capitis diminutionem runs thirty years, but the restitution ob absentiam four years only; the same term is applicable to the actio in factum against an alienatio judicii mutandi causa, and the actio pauliana, as far as its full force extends; although it will extend to thirty years, running from the completion of the alienation of the bankrupt estate, when instituted simply for the restitution of the excess whereby the possessor has been enriched.  

§ 1136.  

Public penal actions generally run twenty years; but the private ones, being praetorian, but one year, that is to say, whoso has recourse to the edict for obtaining a penalty must take his remedy within the annus utilis; nevertheless, the action is a perpetual one when the possessor is only sued for the excess whereby he has been enriched; hence it may be laid down as a general rule, that all interdicts founded on the praetorian edict are available quoad the capital for a year only, and afterwards only so far as the excess whereby the party is enriched.  

Individual decisions only are to be found on these points; but as they follow the above rule, the particular interdicts as to the prescription of which the laws are silent must be ruled by the same principles. The interdictum de vi, if persons belonging to an absentee are instituted, and the interdictum de precario, are, however, perpetual; but there must be some error in the general supposition that the interdictum de glande legenda runs only three days.  

The following run thirty years: — The actio furti manifesti, and the somewhat similar actio arborum furtim casarum, servi corrupti, and rationibus distrahendis. The actio de dejectis et effusis, when not brought on account of the death of a freeman.
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All penal actions arising out of civil transactions in the actio de récepto; and de deposito, on denial of the depositum miserabilis; nor are civil actions for penalties excepted; neither can the actions for injuries be limited to a year without qualification, where they depend upon the equity of the prætor.

In England, indictments and suits under penal statutes are limited in the case of the Crown to two, and in case of private informers to one year; but the Crown has the advantage of two years after the expiry of the one year of the informer, if the forfeiture be joint to the Crown and informer. But the common law recognises no limitation to criminal prosecutions by indictment.

With respect to actions at the suit of the party aggrieved, such must, as a general rule, be brought within two years, save the penal statute in question enact otherwise.

Actions against justices of the peace or other inferior officers must be brought within six calendar months; and the same applies to the custom and excise duties, the time being limited to six months, and often to a less period.

§ 1137.

The actio hypothecaria runs more or less than thirty years,—it runs forty when the debtor is in possession of the pledge; but if a third party be in possession as pawner, it runs forty years if he live so long, and thirty or forty years after his death, according as he may choose to take into account the time of possession in the life of the possessor; if, however, he possess as possessor in such a manner as to give him the right to claim the short prescription, the action expires in ten years where the parties are present, and in twenty as regards absentees, otherwise in thirty; and these terms are without qualification when the principal debt is prescribed.

§ 1138.

Cases occur, however, in which an action not per se excepted departs from the rule. The actio de peculio, for instance, is limited as against the father to one year, after expiry of the paternal power. The actio pignoratitii runs only two years, as to the redemption of a pledge adjudged to the creditor by the sovereign; and the rei vindicatio of minors five years after full age, when the curator has alienated an object without a decree.
Nevertheless, this so-called prescription is properly only to be ruled according to the maxims of \textit{ratification ex parte tutoris}.

\section*{§ 1139.}

\textit{Exceptions} are lost by prescription when they could have been made available by action, and such action is barred by prescription, but not otherwise; as a general rule to which, there are, however, certain exceptions, among which may be reckoned the \textit{excepio non numerata pecuniae et dotis} and the \textit{exceptio beneficii competentiae}, in cases where a son, emancipated from the paternal authority, is sued after many years for a debt contracted during the period he was under the power of his father.

\section*{§ 1140.}

Services are extinguished by prescription in ten years among those present, and in twenty in the case of absentees. The following qualifications must, however, be taken into consideration:—\textit{Servitutes negativa} and \textit{urbana} presuppose a \textit{usucapio libertatis} on the part of the \textit{dominus servientis}; \textit{servitutes affirmativa} and \textit{rusticae} are lost by simple non user, whence \textit{habitatio} is, however, excepted. The prescription of \textit{servitutes reales discontinua} runs twenty years, but there is no limitation to personal discontinuous ones, and the right of footway to a grave; but the \textit{actio confessoria} is lost in thirty years when the right is denied.

\section*{§ 1141.}

The paternal authority cannot be enforced when the son has been reputed free from it for thirty years; for it is not otherwise lost by extinctive prescription, although a presumption of the son's emancipation may lie in the fact of the son having lived as a \textit{pater familias} for a long time.

\section*{§ 1142.}

Privileges, except those of fairs or yearly markets, are not extinguished by the prescriptions of the shorter period, although
they, like all other things, are subject to the *prescriptio longissimi temporis* in cases where the right is opposed, or where it is allowed to fall into desuetude.

§ II43.
The right *adire bæreditatem*, or to administer to an estate, is in some cases liable to prescription. When the civil heir is called upon by those interested to declare whether he will administer or not, he must demand a *tempus deliberandi*; then, if he take no step during the period granted him, such laches is held equivalent to renunciation.

If a *bæres necessarius* wish to bring the *querela inofficiosi testamenti* against such heir, the civil heir must, if present, repudiate the inheritance within six months, or if absent, within double that period, or he will be treated as heir: but if he be not pressed he may administer when he will, without reference to the time at which he became aware of the falling in of the inheritance; this privilege may, however, be rendered futile by another having in the mean time acquired the property in the individual objects by the acquisitive prescription.

The *bonorum possessio* can be admitted or prayed within the short *tempus ratione initi et cursus utilis*. Children and parents have a year, which in the former case is extended to three, if the children, being intestate heirs, acknowledged the *bonorum possessio*; while other persons can only lay claim to one hundred days. Justinian ruled that when the civil heir is excluded from the inheritance he is not admissible as praetorian heir.

§ II44.
The extinctive prescription applies to frauds on the customs. The right of sale by the *dominus emphyteuseos* lasts two months. Whoso is called to the office of tutor must claim his exemption within thirty days, if he live within 400 miles (Roman), or 400,000 paces of the town, a day being allowed emptycuticum. for every 20,000 paces beyond that distance, and the exemption must be completed within four months.

Whoso have during some years paid too low a rate of interest in error is not obliged afterwards to pay an increased rate.
Impedimenta arrest the course of limitation.

Not in England.

Are of two descriptions.

Interruptio.

Naturalis or civilis.

Civilis.

English law, how the statute may be barred by action commenced.

How the Roman law may be barred by citation. In cases of acquisitive prescription.

§ 1145.

There are three modes by which the limitation may be arrested or avoided. The first of these is properly termed *impedimentum*, and is where the limitation has begun to run, but is arrested before its expiry.

This cannot occur in England, for where the statute has once begun to run no subsequent disability will stop it.¹

These *impedimenta* are of two sorts: in the one case the advantages of the possessor up to that time are not interfered with; and in the other, they revive when such impediment is removed, which latter is termed *prescriptio dormiens*.

An interruptio is the destruction of the advantages of the possession up to that period, and is termed naturalis² or civilis; when, however, the prescribed term has run out, but is reversed, the act is termed restitution against the prescription, which, together with the *prescriptio civilis*, will be the subject of the following paragraphs.

Civil interruption arises when the capacity of prescription is judicially annihilated, as in the case of absence, on a formal protest being lodged against it.³

The English law admits this principle in the case of absence, without the jurisdiction of the court, that is abroad,—thus, a foreigner who always resides beyond sea is not bound by the statute of limitations, nor does it begin to run against a foreigner until he comes into the country;⁴ but Scotland is for this purpose held to be a part of England.⁵ The creditor's, not the debtor's absence takes the demand out of the statute of limitations,⁶ and it will begin to run so soon as there is a party in the country capable of suing, but the presence of one of many plaintiffs suffices.⁷ The statute may be arrested by issuing a writ of summons, entering it on the roll, and keeping the statute alive by writs of alias and pluries.⁸

If, by the Roman law, the judge or arbiter issue a citation,⁹ the prescription is interrupted quoad the plaintiff,¹⁰ so that forty years must be reckoned from such citation;¹¹ and this interruption also operates in the case of the *prescriptio acquisitiva longissimi temporis*, in so far as it is chiefly founded on the prescription of the right of action.

In the cases of usucapio et longi temporis prascriptio, neither citation nor litis contestatio have the operation of the interruptio, although, when the object is prescribed after the litis contestatio, the defendant can be compelled to restitution. Prætorian actions are converted into perpetual ones when they are brought before the sovereign, who thereupon issue a rescript entered of record.

Minors and majors can obtain restitution after a prescription whereby they are damnedified. Minors, with whom all such as have obtained the venia atatis are on an equality as regards immovable, can always obtain restitution against the præscriptio conventionalis testamentaria and judicialis, although they are deprived of it in the case of the præscriptio legalis, because they do not require it, inasmuch as the prescription of thirty years does not obtain against minors; but they are not restored as against the prescription longissimi temporis.

There are, however, certain exceptions. The ordinary prescription, for instance, runs against them in the case of actiones vindictam spirantes, and they are deprived of their restitution; moreover, the shorter prescription runs against them, save their right to restitution when they have not paid legacies within the year, and have not pleaded the exceptio non numerata dotis in due time; when they have neglected to apply for the honorum possessio, and do not observe the usual chronic terms in the suit.

But prescription will always run against those who obtain restitution by the analogy of minors; they, however, have a claim to restitution against the short, but not against the long prescription, nay, even churches do not obtain it as against the latter.

Majors obtain, on the ground of absence, restitution unconditionally against the conventional, testamentary, and judicial prescription, when they have not rendered this unnecessary by protest, but against the legal only when the prescription is not longissimi temporis; and in this case, too, error is placed on an equality with fraud. The actio recissoria also applies in this place.

1 C. 7, 33, 103; Keller, litis contestatio, § 25, 26; Unterholzner, B. S. 440-1-8-50; Hufeland, Handb. of Civil Law, 1 V. § 727 (German); Bucholz, Verzeichn. nr. 8; contra, Voet, 43, 3, 625; Westphal, § 552; Thib. P. R. § 1002, n. 4, and authorities there cited.

2 P. 6, 18, 20, 21; P. 41, 4, 2; § 21; P. 41, 5, 2; C. 3, 32, 26; C. 7, 33, 1.

3 C. 1, 20, 2; Lörhr im Archiv. f.; C. P. 10, B. 1, Hft. G. 84-6.

4 P. 44, 38; ibid. 3; § 8; Boehmer de curru praescr. contra min. susp. (Exerc. T. 2); Thib. l. c. § 64-71.

5 C. 2, 41, 5.

6 C. 7, 39, 3; 4; contra, Burchardi, Wiedereinsetz. in d. v. S. p. 132-40.

7 P. 4, 37; P. 47, 10, 7; § 1; C. 2, 22, 1.

8 Nov. 1, 4, § 1; Nov. 100, 2.

9 C. 2, 40, 2.

10 C. 3, 1, 13; § 1.

11 C. 7, 39, 3; Thib. l. c. § 71.

12 Contrary on authority of Clem. 1, 11, 19; Westphal. § 558; vide et Thib. P. R. § 717 (German); Bucholz. C. 7, 39, arg. 3; § 3; Thib. l. c. § 71.

13 Contrary on authority of Clem. 1, 12; Puff. de diff. praescr. Helmst. 1800, § 29, 30; Kühn von dem. rest. in int. eccl. contra praescr. denegando, Id. 1791.

14 P. 4, 1, 7, pr.; P. 4, 6, 41, 43; P. 20, 51, 7, § 1.

15 Pfeiffer, a. a. O. G. 290-303.

16 Thib. treatise on limitations, § 75; Schmidt, posthumous treatise, ed. Taselius, 2 V. n. 64 (German).
§ 1146.

The legal essential of the immemorial prescription is that the claimant have been in the same position uninterruptedly for a period whereof the memory of man is not to the contrary, whereupon he is held to have, and is treated as having, as good a right as though he had obtained it by a valid transaction; hence it follows that all rights, even those not susceptible of the definite prescription, such as royalties, can be acquired by this mode of prescription even without a title: it would appear, however, that bona fides is necessary, if the claimant has unreservedly exercised acts of ownership with respect thereto, whereof proof must be given, and the rebutting evidence met; the claimant proving by witnesses advanced in age (by which fifty-four years of age at least has been taken to be implied), who must all establish that the then state of things ever existed within their memory, and that a contrary or different state of things was never, to the best of their belief, known to their ancestors. The claimant may, moreover, be put on his oath, and documentary evidence adduced in support of the oral testimony, or to prove negatively or affirmatively that the then asserted state of things existed or did not exist de facto in the last generation or in that before it; rebutting evidence should prove that this state of possession has not existed beyond the memory of man, or at least not uninterruptedly; and neither an interruptio civilis or a restitutio in integrum can here come under consideration.

§ 1147.

With respect to English law, custom, which is local in its nature, must not be confounded with prescription, which is persona titulus ex usu et tempore substantium capiens ab auctoritate legis; it is the custom of a manor that it descend to the youngest son; local; but a right of common of pasture, time out of mind, is personal, and therefore a prescriptive right.

By the old Roman law, we have seen, services were not...
capable of prescription, but by the English law they are. Re-
quissitive prescription presupposes a grant; but what arises from a
matter of record cannot be prescribed.\textsuperscript{1} A right of way of
ancient light, &c., may be acquired by prescription, and extin-
guished by non user, that is, the right may be negatived.

Immemorial prescription, at common law, is \textit{from time whereof
the memory of man is not to the contrary}, and such legal term still
dates from the reign of Richard I.;\textsuperscript{2} hence, if the right can be
shown to have arisen since that time, the prescription when claimed
at common law is destroyed,\textsuperscript{3} although evidence of commence-
ment before that time would be of no avail:\textsuperscript{4} this period is termed
that of legal memory; nevertheless, an enjoyment of twenty
years generally amounts, at common law, even to a presumption
of an ancient right, if no circumstance to the contrary be shown;
the evidence may be documentary or by witnesses,\textsuperscript{5} as in the
Roman law, and the whole evidence is for the jury; the inter-
vention of which has rendered the decision of the English less
certain than those of the Roman law.

\section{1148.}

Legacy was one of the modes of acquisition mentioned by
Justinian.

\textit{Legatum est donatio quaedam à desfuncto relictâ, ab hærede præ-
standâ.}\textsuperscript{6}

A legacy is one of the results of a valid will; thus, Ulpian
says,\textsuperscript{7} \textit{legatum est donatio, qua legis modo, id est, imperative, testa-
mento relinquitur; legare signifies the same as legis dicere, or, as in
Greek, \textit{vouoqereiw}; for testators, as will be subsequently seen by
the history of wills, spoke as legislators; hence \textit{legare} is to com-
mand, consequently a legacy must be left \textit{verbis directis},\textsuperscript{8} for by
the law of the Twelve Tables, precarious words invalidated the
gift, which then became optional with the heir; a \textit{fideicommissum}
was a bequest left mediately, \textit{verbis obliquis} to the legatee, but
an inheritance or legacy was left \textit{immediately}, \textit{verbis directis}.

If left \textit{verbis obliquis}, or mediately, it is implied that another
shall first have it, or that it shall be ceded to him by such other
person. But when left \textit{verbis directis}, he who takes under such
bequest may be a \textit{successor universalis}, \textit{generally} successor; or,
\textit{successor singularis}, \textit{particular} successor. The \textit{successor universalis}
takes either the whole property or a \textit{partem quotam, se partem per
divisionem determinatam cum jus accrescendi}, and must, moreover,
pay debts. Thus, if three heirs be named, each is \textit{universalis} that
is, the survivor takes the part of the deceased co-heir by the \textit{jus accrescendi} or right of survivorship; but the \textit{successor singularis}

\begin{itemize}
  \item \textsuperscript{1} Co. Litt. 114.
  \item \textsuperscript{2} Co. Litt. 115 a.
  \item \textsuperscript{3} Mayor of Hull v. Horner Cwmp. 108.
  \item \textsuperscript{4} 9 Rep. 276; Com. Dig. Prescription
Pract. lib. 2 c. 22; Stark Ev. 1205.
  \item \textsuperscript{5} Stark, l.c. 1217; Co. Litt. l.c.; Rex
v. Joliffe, 2 B. & C. 59; Hill v. Smith, 10
East 476; Daniel v. North, 11 East 372;
Chad v. Tilsed, 2; Brod v. Bing, 403.
  \item \textsuperscript{6} I. 2, 20, 1.
  \item \textsuperscript{7} Frag. 24, 1.; Nov. 22, 2.
  \item \textsuperscript{8} C. 6, 23, 2.; C. 6, 43, 15.
\end{itemize}
Not so the singular.

The legatee and heir differ from the trustee.

Gradual relaxation of the formula.

Why strict adherence to forms originally indispensably required.

Constantine M. abolishes forms.

Subjective and

has his *emolumentum singulare*, consisting of one or many individual objects, or a determined *pars quota*, or *quanta hereditatis*, whereout he pays no debts, but has no *jus accrescendi*, that is, though all the heirs die, he, nevertheless, does not become heir, such is a *legatarius*.

The *legatarius* and *hæres directus* there differ from the *fidei commissarius* or devisee, in trust, in this, that the two former take directly or immediately from the deceased, but the latter, indirectly or mediatly through one or more hands, thus the direction to restore is the sign whereby a *fidei commissum* is recognisable; but in ancient times, when so much more importance was attached to forms of words, there existed also a difference in the *formula* of bequest, *hereditates* and *legata* were left by words imperative, *verbis termed directis, civilibus, solemnibus, legitimis imperativis*; but as *hæres esto*, *hæres sit*, *hæredem esse jubeo*,¹ *F. Ca.*² by words implicative, *obliquis or inflexis*, ordinary expressions, *vulgaribus*, or prenative ones, *precativis or precariis*, or of trust, *fidei commissariis*; and although they sometimes sounded very like a command, as *volo dari, mando, injungo, exigo ut des*, yet they were not for that less or other than words of trust, and equivalent to *fidei committo, desidere, cupio, precor, deprecor*. The natural tendency of the Roman state being, however, against forms for mere form's sake, the legal intent was justly held sufficient; in less civilized times there were several reasons for strict adherence to *formulae*, — firstly, certain *formulae* had acquired an ascertained legal signification, and certainty was by such means obtained; secondly, by throwing a mystery around legal transactions, ignorant people respected the form with almost mysterious reverence, not daring to alter a word; indeed, a person ignorant of the principle ran as great a risk of altering a material as an immaterial one, of which we have abundant experience in the present day in pleadings, conveyances, and wills, when attempted by unprofessional persons; thirdly, the patricians thereby compelled their clients to consult them, obtained a certain insight into their private affairs, and kept them in a more perfect state of dependence. As, however, education extended itself, and the population and business increased, it was clear that the limited form of words could not be adhered to and all others held bad; thus the legal intent and force of a word, not usually adopted in the particular case, became a question for the court; but it was not until the time of Constantine the Great that they were formally abolished.

If the word *legatum* be used in a *subjective* sense, it imports a last will, wherein the person by imperative words is constituted *successor singularis*, or takes an *emolumentum singulare* directly from the testator, which is one and the same thing; but, when used in

¹ *Vid. Höpfner, com. § 554, id post different sorts of legacies.

² As the words *fidei commissium, fidei commissa, hæres fidei commissarius, and hæres fiduciarius*, will often occur, the contractions *F. C., F. Ca., H. F. C., and H. F.*, will be adopted for the sake of brevity.
ADQUISITIO PER LEGATUM.

an objective sense, it imports the *emolumen tum singulare* itself, left to a person by imperative words in a last will, and is properly termed *legatum*, between which and *F.C. particularibus* or *singularibus* there was a great difference by the old law. By the later law *legatum* was in fact an *ex parte* testament, whereby a person is directly made heir of a particular thing."

Another difference was, that *legata* could originally only be left by testament, or a codicil confirmed therein, while a *fidei commissum* could be left in codicils not so confirmed, or in severe illnesses by a nod or sign, *nunu*, provided the testator had already made a will by parol."

Lastly, legacies originally must be expressed in the Latin language, according to the set forms, which were interpreted according to strict law, but they could not be burdened with legacies; but bequests in trust might be in Greek, were interpreted according to equity, and could be burdened with both legacies and bequests in trust.

The following will contains the different species of heirs:—

I, Sempronius, name Titius my heir, but he shall enjoy the inheritance for life only,
And on his death it shall devolve on Mavius.

To Seius I leave my house, but he shall enjoy it for his life only,
And on his death it shall devolve on Caius.

§ 1149.

By the old law there were four species of legacies,— *vindicationis*, *damnationis*, *perceptionis*, et *sinendimodo*. The words of a legacy per *vindicationem* were do, lego, sumito, babeto, to which was added *illum rem tibi præsume vindica*. The legacy was then in the power of the legatee, who could take it as soon as the heir had administered.

A legacy per *damnationem* was bequeathed by the words,— *haeres meus damnas esto dare, dato, facito haeredem meum dare jubeo*. These were expressions similar to those used by legislators.

*Legatum per perceptionem* was expressed, according to Ulpian, according to Ulpian,

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1 Ulp. fr. 25, lb. P. 30 (1) 1, per omnia exequata sunt legata fidei commissia, said to be interpolated by Tribonian, vid. Hopfner, l.c. § 553, n. 1; Byknerboeck obs. lib. 7, c. 18; contra, Glück. Opusc. Fascic. 1, p. 300, sq.
2 Moderninus, P. 30, 2, 36, and Justinian Inst. 2, 40, pr. term it *donatio a defuncto relictæ*, which is an incorrect expression, for it is not in the nature of a contract *donatur m. c.*; P. 32, 3, 11, pr.; Bb. 2, 1, pr.; P. 30, 1, 14, § 25; P. 31, 2, 77, § 27.
3 Some assert this as to legacies. Athanas, Oteyza et Olano paralipam. et Elect. I. C. 2, 3; Meermann Theas. tom. 1, p. 429.
4 Ulp. 24, § 19, for other differences, vid. Vinn. ad I. 2, 20, § 3, n. 2, sq.
5 Caius Inst. 2, § 233-222; Ulp. frag. 24, 6; Paul, R. S. 5, 7; Mylius, l.c. cap. 1, § 9, 84; Westphal. § 21-22.
7 P. 9, 2, 2, pr. P. 9, 5, 37, 5; Paul. R. S. 1, 19, 1, and hence the *actio in duplum* for its recovery.
8 Frag. 26, 6 & 24, 11.
thus,—L. Titius illam rem præcipito, or præcipito, sumitotique
habeto, whence such legacy was called a prelegatum or præcipuum,
commonly used among co-heirs, and sometimes expressed by the
capitals P. S. T. Q. H.

Sinendi modo was another form of the legatum per damnationem,
the words being,—haeres meus damnas esto sinare L. Titium sumere
quam rem sibique habere. The heir was condemned to give, but
the legatee at the same time permitted to take.

§ 1150.

It is, however, important to observe why and how these
different modes of bequest obtained. They arose in the nature of
the things given, and of the parties to whom given.

Per vindicationem could be left, things over which the deceased
at the time of his death, and of making his will, had control jure
quiritium, which may be inferred as of course from the term
referring to the old form of manumissio per vindictam hanc ego rem
ex jure quiritium meam esse aya.

Per damnationem and sinendi modo, all things would pass, even
alienae, sufficed only they were capable of being given, which
could not be done per vindicationem or per perceptionem; and if one
thing were given conjointly to one of many persons by vindicatio,
the deficient part accrued to the other co-legatees,—but if, per
damnationem, such part remained in the power of the heir, nor
could such legacy be repudiated, which that per vindicationem
could, for the latter supposes a sale, the former a judgment.

§ 1151.

The first step towards the abolition of these distinctions was
made by the Sctum. Neronianum, which, while it did not alter the
forms, enacted that, if aught be left by another mode, it should
only be valid as if left per damnationem.

Constantine the Great made a further change by assimilating
the words but not the actions.

Lastly, Justinian abolished also this last distinction, but overlooked the insertion in the Pandects of some laws which allude to
this difference. This emperor, moreover, assimilated legacies
and trusts to each other in nearly all particulars. In earlier times,
however, the distinction was important, and a fruitful cause of
dispute among the lawyers of that day.

§ 1152.

Before dismissing the ancient forms of legacies, let it be
remarked, as far as the actions belonging to them were concerned,
that a legatee per vindicationem became from the time the heir

1 Val. Max. 7, 8, 4; Plin. Epist. 5, 7; Sidonium Epist. 6, 12; Cc. pro Mur. 12.
2 Caius Inst. 2, 5, 9; Ulp. Frag. 245, ch. 6.
3 Ulp. frag. 1. c.; Caius Inst. 2, 5, 6.
4 Mirill obs. 6, 32.
5 P. 30, 1 (1), 7-44, § 1-86, § 2.
6 Ulp. frag. 24, 2.
7 C. 6, 23, 15; C. 6, 37, 21.
8 C. 6, 23, 1.
administered a *dominus quiritarus*, and was consequently entitled to a real action on the legacy; whereas, if by *damnatio* or *sinendi modus*, he had only his personal action against the heir founded on the will, but by *perceptio* a right *actionis familae herciscundae* was given to the heir against the other co-heirs for this legacy.¹

The new law now abolished the difference between *legatis* and *fidei commissis singularibus*; theoretically, indeed, they are different, and cases arise in which the question of whether a bequest be one or the other becomes very important; of which Puffendorf gives an example.² A testator, who was a good lawyer, left 1000 aurei in words as follow:—

"If my heir die without children, 1,000 aurei shall *revert* to my next of kin, the brothers," &c. The word "revert" made this a *fidei comissum*. The testator then made a new disposition, and revoked all legacies: these 1,000 aurei were held not revoked. The distinction between the four old modes also have only practical utility³ when a *genus* is bequeathed; and if the question as to who has the choice arise, it must be decided by reference to the form of words used by the testator,⁴ otherwise the rights and effects of legacies and trusts are similar.⁵

§ 1153.

Legacies, bequests in trust, and inheritances concur in this, that whosoever can make a will, can bequeath a *legatum*, or erect a *F. C.*⁶ and on the contrary, whoso is under disability to make a will can direct neither the one nor the other.⁷ The same rule applies to acquisition,—thus, whoso are incapable of being heirs are likewise under disability to take a *legatum* or *F. C.*;⁸ the only exception is that of necessary alimony,⁹ which may be left to an apostate. A legacy left to uncertain persons becomes good, if it can be made certain; likewise the poor, municipalities, *collegia licita*, and a *posthumus alienus*,¹⁰ are capable of legacies. But a legacy to the testator’s slave lapses to his heir, except it be left of his manumission. Bad are legacies left to the universal heir, for as he takes all without that, it is supererogatory to leave such expressly.

§ 1154.

Nevertheless, when many heirs are appointed, and an additional legacy be left to one in particular, the legacy is good as a *prelegatum*. Thus, if the whole estate left to A, B, and C, amount to 9,000 aurei, and A has a prelegacy of 600, B and C take each 3,000 — 200 = 2,800; A, 2,800 + 600 = 3,400; that is,

[1] Merill, obs. lib. 6, c. 32; Mylius, *hist. leg.* c. 1, § 9, seq. ⁶ *Vinn. 2, 20, n. 45.; C. 6, 43, 2.*

² Puf. obs. tomo. 4, obs. 9. ⁷ *P. 30, 1, 2; ibid. 114.*

³ Ulp. Frag. 24, 11; C. 6, 37, 21; C. 6, 43, 7; Schlütting ad Ulp. l. c.; Jan a Conta ad l. c., 20, § 2. ⁸ *Vind. 2, 20, n. 45.; C. 6, 43, 2.*

⁴ Merill, obs. l. 2, c. 33; *Vinn. 2, 20, § 22, n. 6; Stryk. int. contr. jur. c. 9, § 20.*

⁵ *P. 34, 1, 11.* ⁹ *By the old Roman law this was not so.*

⁶ *Thib. P. R. § 792-6.*

⁷ *By the old Roman law this was not so.*
THE ROMAN CIVIL LAW.

B and C pay him as prelegatee, and as it would be absurd that he should pay himself the remaining 200 aurei as a *legatum harredi a se ipso relictum*, he retains it as heir; so when he has no co-heir; otherwise, it lapses to his co-heir without regard as to whether the prelegacy was left with the formula, *præcipito*, or otherwise: it is even so when a prelegacy is given to many co-heirs conjointly, in which case the portion which the co-heir should pay himself, in proportion to the amount of his share or interest, lapses as void to the co-heir. But if the prelegatee renounce as heir, the whole prelegacy assumes usually, quoad him, the nature of a legacy; but if he be involuntarily excluded, it only remains a legacy in so far as he would not have become his own debtor on his renunciation—that is to say, he loses all he would have taken as heir, although he gets the whole prelegacy as legatee when another heir is joined with him. A and B are joint-heirs, and it is directed that A give 100 aurei of his share up to B.

§ 1155.

Whoso receives out of the estate of a deceased person can also be burdened with legacies and bequests in trust—not the heir alone, but also the *F. Cius.* and *legatearius.*

An estate is left to A, but he must pay the widow 1,000 aurei, *speciei legatur cum onere quantitas*; or 4,000 aurei is left to A, but he must give the widow his house, *quantitas legatur cum onere speciei*; A is left 1,000 aurei, but must give the widow one hundred measures of corn, *quantitas legatur cum onere quantitatis*. Now if this quantity or species directed to be paid exceed what is left, he may repudiate it; but if he accept it, he must pay the sum, though he be a loser thereby: if, on the contrary, he be directed to pay it out of the quantity or species left, seem he is a *F. Cius.* so far as the sum paid over extends, and a *legatearius* as to the share which remains to him after such payment. This was certainly the case by the old law.

A legacy may be imposed on many as well as on one person; when there is no provision respecting this arrangement, all the heirs are bound to contribute in proportion to their respective interests, and are responsible in *solidum* if the testator have so directed; or, where the object is indivisible, if he upon whom

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1 Voorda, interp. cap. 28.
3 For exceptions vid. P. 36, 1, 55, § 3; P. 44, 41, 79, § 3.
4 P. 20, 4, 82, § 2; P. 30, 1, 17, § 2; C. 6, 37, 12.
5 P. 31, 1, 75, § 1; Voorda, interp. c. 27; Averan, id. L. 4, c. 5; contra, v. d. Pfördten, l. c. p. 52-5.
6 Thib. P. R. § 748, § 890; P. 30, 1, 17, § 2; ibid. 92, § 2; P. 34, 9, 18, § 2; v. d. Pfördten de præleg. Erlang, 1832; Pfeiffer de eod. Marb. 1798; Nieto de eod. 7 P. 35, 23, 75, § 2; Pfeiffer, § 819.
8 P. 31, 2, 70, § 2; P. 30, 10, 114, § 3, 4; Westphal. § 37-140.
9 P. 31, 2, 70, § 1.
10 Vid. § 1148, h. op.
11 P. 31, 2, 33, pr.
12 P. 30, 1, 8, § 1; P. 32, 3, 11, § 23; ibid. 25.
the legacy is imposed fail, the heirs who succede into his place, and other subsidiary persons, are bound to pay the legacy.

§ 1156.

The next question relates to the things capable of legation, which may be in esse or in posse, corporeal or incorporeal, individual—belonging to the testator or a third party, but not to the legatee himself, for in that case the legacy is bad.

Things in esse or posse, corporeal or incorporeal, can be acquired by legacy, as the right of chase, right of tithes, a sum of money, debts due, and all other incorporeal things; the object must, however, be in commercio, quoad the legator, that is, he must himself possess the right of acquisition and of disposition over them; thus, a sepulchral monument being altogether extra commercium cannot be left, nor can the legatee demand its value; but four cases may arise,—either the object may not be in commercio at all—or not in that of the legator—or not of the testator—or not of the heir. The first is the case of res sacra or religiosa,—whereupon Ulpian¹ says, nam furiosi est, talia legata testamento adscribere; the second case applies to the capacity of the legatee to acquire, as of a foreigner to receive quiritian property; many think² that the legatee cannot in this case demand the value, but the more cogent arguments oppose this opinion;³ in the third and fourth cases, if neither the testator nor the heir can possess the thing in property, but the legatee can, it appears that the legacy is valid.⁴

If A hire a house, and B subsequently buy it without knowledge of the legatee, who directs his heir to buy it for A, A cannot demand the value, quia quod proprium est legatariam plus be'holes'to'ejusjacit non potest;⁵ now, suppose A sell that house before the legacy become due, still the legacy does not revive, for the Catonian rule decides, that a legacy not valid at the beginning can never become so; but the heir can be directed, "that if A by reason of debt sell his house, he do buy it and return it to him," for the Catonian rule does not affect conditional legacies.⁶

Things in futuro, wine, corn, the product of a mine, or of a slave, a child not born, or future product of all kinds, may be legated. If a crop not gathered in be left limited on a particular estate, and the crop fall short of the legacy, it is a question as to the construction of the will, for the estate may be mentioned taxationis causae as a measure of value, in which case property may be taken aliunde, up to the amount usually so produced to make up the deficiency; not so, when mentioned demonstrationis causae, whereby the legacy is limited to a particular estate pointed out.

¹ P. 30, 2 (1) 309.  
³ Beautin, disp. ad P. 30, 1, 40; Branchu, obs. adj. p. 179; Püttermann, adver. 1, 3; P. 30, 1 (1), 114, § 5 & 40 (1).  
⁴ P. 31, 1 (2) 49-5.  
⁵ I. 2, 20, 10.  
⁶ P. 34, 7, 1, § 2; I. 2, 20, § 10; Vinn. et Otto ad id, if the testator leave the legatee a thing erroneously believing it belongs to him already, the legacy is good, I. 2, 20, § 11.
Not only the legatee's own property, but that belonging to another could be left: If it appear the testator erroneously thought it belonged to himself,\(^1\) the legacy is bad, for he would, it may be implied, not have so disposed of it had he been aware of the true state of the case;\(^2\) but if he did know it, then his intention was that the heir should purchase it and deliver it to the legatee; in the first case, that of error, the testator cannot be supposed to have intended to burden his heir with the purchase of a thing from another; in the latter case, it is clear he did: now, if the object cannot be bought up,\(^3\) or only at an extravagant price, then the legatee has a claim to the fair value, and it may have belonged to the testator jointly with another; but if it be\(^4\) doubtful whether the testator was, or was not aware of the true state of the fact, then the \textit{onus probandi} lies on the legatee.\(^5\) Now, let the legatee be supposed to have had the object given to him, \textit{titulo lucrativo}, in the lifetime or after the death of the testator, the legatee then has no claim, for the object aimed at by the testator, viz., that the legatee should get it for nothing, has been attained, and \textit{duae causae lucrativae in eundem hominem et rem concurrere non possunt};\(^6\) on the contrary, if the legatee shall have bought it, \textit{titulo oneroso adquisivit}, then he can claim the value, for the intention of the testator was that he should have it, \textit{titulo lucrativo}, without charge.\(^7\)

In the case of a thing pawned left as a legacy, if no mention or proof of the knowledge thereof on the part of the testator can be given by the legatee,\(^8\) he must himself redeem it; on the contrary, being proved by him, the heir is bound thereto; and generally, if the object of a legacy be lost, or perish without fault of the heir,\(^9\) the legatee bears the loss; if, on the contrary, the heir be to blame that the loss occurred, then he must indemnify the legatee.

§ 1157.

We now pass to the different modes in which, and circumstances under which, a legacy may be left. These may be distributed under the following heads:—

\begin{align*}
\text{Legata} \ldots \ldots & \{ \text{\textit{Liberationis.}} \\
\text{Praelegatum} \ldots \ldots & \{ \text{\textit{Nominis.}} \\
\text{Debti.} & \\
\text{Dosis.} &
\end{align*}

\(^1\) P. 51, 1 (2) 67, 8; Gottschalk, de leg. rei alienae.
\(^2\) X. 12, 20, 4; C. 6, 37, 10.
\(^3\) X. 11, 5.
\(^4\) P. 50, 1 (1), 30, 4 (3), 68; P. 32, 1.
\(^5\) P. 22, 3, 21; I. 2, 20, 4.
\(^6\) P. 44, 4, 17; Maianius, disp. de prohib. con. lucrativ. caus.
\(^7\) P. 30, 1 (1), 82; P. 59, 16, 88.
\(^8\) P. 30, 1 (1) 57; H. Donell. com. jur. civ. 8, 19; vid. Vinn. et Heinec. ad I. 2, 20, § 5.
\(^9\) I. 2, 20, § 16.
ADQUISITIO PER LEGATUM.

The first three apply to incorporeal things. If the right to a debt due be left, it may be active or passive. An active debt is one to be received; a passive debt, one to be paid. In the first case, that is left which the legatee or the testator's heir has to receive,—this is termed legatum liberationis; but if it be the sum due from a third, it is called legatum nominis. Thus, in the first case, A leaves B a debt which B owes to A; in the second case, A leaves B a debt which C owes to A.

A passive debt is one due from the testator to a party. For A to leave B the debt A owes to C is absurd, but the legacy to a man of the amount of a debt owing to himself is a legatum debiti.

§ 1158.

The operation of the legatum liberationis is, that the heir must return the legatee his acknowledgment; but if the heir do not so, but sue him, the legatee defends himself by an exceptio doli.

Temporary exemption will only protect for a period fixed, stopping the interest in the mean time; a correus or co-defendant, however, derives no advantage from the legacies. But if, in the case of the legata nominis or liberationis, there exist in fact no claim, both are inoperative when no particular sum is mentioned; if otherwise, the legatum nominis is void, although the legatum liberationis is good, but bad when a non petere only is imposed upon the heir. Other rights can be legated, such as an usufruct even of the whole estate. This, however, gives the legatee no right on the substance of the object, save when a contrary intention...
of the testator is evident, as when he has legated an object to be used.\(^1\) It is curious that when the object is left to one, and the usufruct to another, both divide the usufruct in case of doubt.\(^2\)

\[\text{§ 1159.}\]

The *legatum nominis* gives the legatee a right of action against the debtor of the testator by a species of power of attorney, for by the old law the action was not maintainable by the legatee until he had obtained a cession of right of action from the heir, who was supposed to be one person with the testator; but by the new law the legatee had a right of suing *utiliter*.\(^3\)

Now, if active debt left as a legacy be paid to the testator before his death, either when debtor is the same person with the legatee or when he is a third party, the legacy is tacitly illuminated; in the first case, if the testator had given the debtor notice to pay from necessity, as if he doubted his solvency or the like; on the contrary, it is not lost if the notice be given not from necessity, for it is presumed that such notice from necessity was given with the intention of revoking the legacy, *animi adimendi legatum*.\(^4\)

\[\text{§ 1160.}\]

A debt can also be left; this is called *legatum debiti*, and in order that the legacy may be effective the legatee must derive advantage therefrom, *plus sit in legato quam in debito*. It may be a debt due to the legatee by the heir or by a third party; such legacy is valid in case that it does not come under the exception of the penalty attaching to a neglected inventory, and that he upon whom it is imposed have something left him.\(^5\) For if A leave B the debt he owes him, he has no greater advantage than he would have as a creditor of the estate; but if the testator owed the legatee a debt *sub conditio* or *ex die*, and leave it him *pure*, he gains an advantage by the obliteration of the condition or period of payment. In this case the real thing left is the remission of the existing condition or term; of course the debt must be a legal one, not arising out of a gambling transaction or excessive usury.\(^6\)

The advantage may consist in the security, for the legatee may then obtain a hypothec, whereas as creditor he had a mere right of personal action against the testator and his heir, which is thus changed into a real action available against the possessor, whoever he may be.

Another advantage lies in the facility of proof which may be

\(^1\) Lauterbach, coll. L. 33, T. 3, § 41; Leyser, sp. 384, m. 1; Voet. 7, 1, § 9–13.

\(^2\) Leyser, l. c. m. 3; Müller, obs. 603; contra, Voet. l. c. § 8, 17; Francke, obs. de jur. leg. et F. C. sect. 1, Jen. 1832, p. 10–16; Knaeßacker, de usus hodi. L. 19, de us et usufr. et red. Lips. 1793.

\(^3\) C. G. Haubold (Res. Laurent.) de legat. nom. i. 2, 20, § 21; P. 30, 1, 44, § 6; ibid. 75, § 2; C. 6, 37, 18.

\(^4\) I. 2, 20, 21; P. 34, 3, 21, pr.; F. 32, 1 (3) 11, 13; I. 2, 21, 23.

\(^5\) I. 2, 20, 14.

\(^6\) P. 33, § 3, 6; P. 30, 1 (2), 55.
thus derived from the will, and that, even though the sum left be greater than what is due, for such was the will of the testator; but, to gain this last advantage, a fixed sum must have been mentioned in the will;¹ but if this have not been done, it does not operate even to allow the legatee to be admitted to oath.²

If a testator legate a sum never so great to his creditor, without specifying it to be a legatum debiti, it is not so, and the legatee receives his legacy without being excluded from the right of proving his debt against the estate as well.³ An exception lies when the claim of the legatee has for object to invalidate the act of the testator. Is this so, he must forego it so far as the legacy indemnifies him.⁴

§ 1161.

Praelectatum dotis is a legacy to a wife of the dower she brought,⁵ and is a species of legatio debiti: the advantage of this legacy⁶ is, first, that the widow can demand the sum at once, for which she would otherwise have to wait a year, if the dower consisted of furniture, ready money,⁷ &c.; secondly, that the expense incurred on the dotal object by the testator, necessary ones excepted,⁸ as repair of buildings and the like, cannot be charged⁹ to the widow; thirdly, that when a fixed sum is mentioned as the amount of the dower, the widow receives such sum though it exceed the sum she actually brought, nay even although she should have brought nothing. This legacy also is a sufficient proof to the heir of the actual sum she brought, though it is not so as against creditors.¹⁰

§ 1162.

Legatum dotis differs from the above; for it is the appointing a dower by way of legacy to a third party,¹¹ or the legacy of a thing as a future dower; it is otherwise called dos relegata, and is also a species of legatio debiti, but it must in doubtful cases be considered as a conditional legacy, when it is not determined that it can be given at once, and that it is only applicable to the end of marriage, for dos non intelligitur sine nuptiis.¹²

§ 1163.

The same signification is attached to species by lawyers, as to Legatum speciei individuum by philosophers, that of a fully determined existing object.

¹ Vinn. ad 2, 20, 14. ⁻ I. 2, 20, § 15. .AppCompatActivity. 3 P. 37, 7, 4; C. 5, 13, 1, § 3. ⁴ P. 24, 3, 22, § 3; Alf. de leg. cum deb. non compen. Heidelb. 1751; Hellfeld, jur. for. § 1453; Bauer, an leg. a deb. compensat. præsumt. indicat. Lips. 1762.
⁵ P. 33, 4; Martena de præleg. dot Franc. 1731; v. Tigerström, dotarl. 1 B. p. 311-27. ⁶ P. 33, 4, 1, § 1, 5, 6, 7. ⁷ Ibid. 1, § 2. ⁸ Ibid. 1, § 4; Glück. P. 27, B. p. 422-26. ⁹ Vid. § 1105, h. op. ¹⁰ P. 33, 4, 1, § 10; Ibid. 7, pr. & 11. ¹¹ P. 2, 14, 4, § 2; P. 23, 3, 33; Fachinei, contr. 5, 48; Stryk. cant. test. 20, 35; Lauterbach, coll. th. pr. th. de dote præm. 53; Voet. ib. n. 33; Thib. P. R. § 907, n. 1.
The Pandects contain a series of titles of individual things which can be legated, but they are for the most part of an etymological character, as follow:—De servitutio legato;¹ De tritico, vino, et oleo legato;² De instructo vel instrumento legato;³ De peculio legato;⁴ De penu legata;⁵ De supellectile legata;⁶ De auro, argento, mundo, ornamentiis, unquentis, vestimentiis, et status legatis.⁷

If such species be lost by the slightest degree of fault on the part of the heir, he is answerable; thus, Ulpian⁸ says, culpa autem qualiter ut aestimanda videamus. An solum ea, quæ dolo proxima, verum etiam ea quæ levis sit; but if the house be burned down, or the animal die, it is an actus Dei, nor is the heir responsible if he have delivered the object within the proper term; but if not, si in morà sit, he is liable: thus, Ulpian continues, an numquid et diligentia quoque exigenda est ab hærede, quod verius est?⁹

If two distinct things be left, and one be lost, the remaining one can be claimed. And if one be accessory to the other, and such accessory be lost, as the saddle of a horse, the horse may be claimed; but if the horse, as principal, be lost, the saddle follows him.

A collective thing, such as a swarm of bees or herd of cattle, called universitates, may be left; if such universitas increase in the testator’s lifetime, the legatee certainly has the benefit of it, for the legatee obtains a vested interest first on the testator’s death; but if this increase take place subsequently but before administration, it may arise either from internal circumstances, as by breeding, in which case the legatee has the benefit,—not so, if it be an addition, that is, arise from external circumstances, as by an accession through a slave, for this accrues to the heir;¹⁰ but if the herd be reduced to one, the legatee must take it as he finds it, for it is still a herd although reduced to one, for si ad unum redigatur stat nomem universitatis; besides, to him to whom the universitas is left, is left also each individual constituent part thereof.¹¹ But can any change after the testator’s death alter the case? the legacy vests in the legatee, such as it is, at the moment the testator dies; thus, there is no time for any change to take place.

§ 1164.

Legatum partitionis is where a pars quota of the inheritance or property partem hereditates sive bonorum,¹² and such a legatee is called partiarium, such legatees have much similarity with heirs, but are not so, for they have not the jus accrescendi; if a co-heir

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¹ P. 33, 3.
² P. 33, 6; Roth de vini novi legato, Jena, 1676; Gruner de camo sibi sive cerviviae leg. vet. spec. ad dig. loc. dub. Jen. 1805.
³ P. 33, 7; Westph. § 374-388.
⁴ P. 33, 8.
⁵ P. 33, 9; Westph. § 647-69.
⁶ P. 33, 10.
⁷ P. 34, 10; Westph. § 524-623.
⁸ P. 30, 1 (1), 47, 5.
⁹ Voet. ad Pan. tit. de leg. n. 50; Cocceii, jur. contr. ed. tit. qu. 35.
¹⁰ I. 2, 20, 20.
¹¹ I. 2, 20, 18, 19, 20; P. 30, 1 (1) 22.
¹² Voords & Westfall.
fail, or if only one heir be instituted and fail, so that the testament is *destitutum*, the *legatarius partiarius* gets nothing; he is not a *successor juris*, with right of hereditary actions, or liable thereto. Inasmuch as the amount of his share, however, depends upon the payment and receipt of debts, the *legatarius partiarius* and heir give caution called *stipulaciones partis et pro parte* to each other reciprocally: the heir, that the legatee shall have his share of active debts collected; the legatee, that he will pay his share of passive debts, should such be discovered.1

This legacy took its origin in the obligation of the heir to keep up the private sacred rights of the family he represented; to avoid which burden, instead of naming the party heir, he was named partitiary legatee, *ne sacris allegaretur.* 3

The introduction of Christianity naturally rendered this fiction unnecessary. D’Arnaud’s conjecture is, however, that this legacy was intended to evade the *lex voconia*, which prohibited women to be instituted heirs; this species of legacy was, however, never formally abolished.5

If a testator express himself thus,—“I leave one-third of my property to A”—is he an heir or a legatee? Stryk thinks the latter.6 Can there exist a reasonable doubt of it, the question is, however, moot.7

§ 1165.

*Legatum generis* differs from the *legatum speciei*, as *genus*, which is the *similitudo individuorum*, differs from *species*; this legacy has no force, and is useless where the genus is too general, called by moderns, *genus summum*, as in case of a “beast” being left; but if it be further restricted, it may be good, termed *genus infinitium*, as when an ox, cow, or saddle-horse is left, for these, however bad, have yet at least some worth; if the designation be “one of my horses,” the legatee can demand one of such and receive none other; but if there be none among the deceased’s goods the heir chooses, but must not give the worst of the description specified;8 but if there be many such horses, and the heir has an express power to assign, he may assign the worst;9 the reverse if liberty of choice be left to the legatee, who may choose the best; but if it be left open, “to A I leave one of my saddle-horses or books,” then it appears that a middle course will be taken, and the best

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1 Ulp. Fr. 24, § 25; 25, § 15; I. 2, 23, § 5; Theophilus, paraphr. ibid. 23, 26, § 25; P. 30, 1, 27 & 104, § ult.; P. 28, 6, 39, pr.; P. 36, 1, 22, § ult. Conflicting opinions, Arnaud conj. 1, 1, 2; Voorda, de leg. part. Conradi Disp. sup. leg. part. Lips. 1756; Lühr. Mag. 4, B. 1, S. 93.

2 Schwarz, diss. de sacr. detestatione, § 6, sq. (in dissert. num. 11).

3 Cic. de leg. 1, 20.

4 Var. conj. 2, 7 & 2; Contius, lect. VOL. II.


6 Cant. test. 16, 16.


8 P. 30, 1 (1), 7, pr. & 110.

9 P. 33, 6, 3; Gebauer, diss. de op. leg. 3, in opusc. tom. 5, p. 424.
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must not be (if there be two similar) taken by the legatee who has the choice,¹ but an average one.

A legacy of incorporeal things may be of those general or special, and may be of one or more individual things of a genus, which is good, if not bad, for too great generality, or where an equitable interpretation can be laid on the legacy;² thus, a legatum dotis, as of the expense of study, is good.³ Under this head may also be placed a legatum partitionis, or of an imaginary part of the whole estate, in which case the rights of the testator, quoad a certain part, pass to the legatee free from the debts.

§ 1166.

Legatum optionis is where the legatee has the right of choice, otherwise termed electionis,⁴ which occurs in cases of general and alternative legacies. In cases of doubt the legatee and his heirs have the choice, without reference to whom the words are directed, or as to whether the objects be in the estate or not;⁵ the legatee is in cases of doubt, however, not permitted to choose the best,⁶ which he is in the case of an alternative legacy.⁷ If, therefore, the testator have allowed the right of option or election, it holds good, and the legatee or his heir⁸ can in such case choose the best,⁹ but he must do so in person and not by attorney,¹⁰ within the term allowed by the testator, or assigned by the judge for such purpose;¹¹ consequently, if he die before choice made, the legacy lapses. Justinian extended this to the heir of the legatee, but the choice once made, such election could not afterwards be disturbed by his heirs.¹² If a third party have the power of election for the legatee, but who cannot or will not elect, the legatee steps into his place, but is not in such case permitted to choose the best;¹³ the same when the heir is appointed to elect, but does not decide within the given term,—he must not, however, choose the worst,¹⁴ and lot rules the division when many appointed to elect cannot agree.¹⁵ If a legacy be indeterminate of many objects, the worst only can be assigned to the legatee.¹⁶ When many things of a genus are legated but

¹ P. 30, x (1), 37, pr.; Vian. ad I. 2, 20, 22, n. 1, 2, 3.
² I. 2, 20, § 22; P. 30, 1, 17; P. 33, 6, 3; Avem., int. 4, 14; Thomasius, de prom. rei insert. § 35; Gebauer, de op. leg. cap. 3; Biedermann, de leg. ger. sec. jus, com. et borus. Brand. Hal. 1794.
³ Leyser, Sp. 386; Müller, obs. 604; Thib. I. c. § 904 & 912.
⁴ Gebauer, de opt. est elect. leg. (op. T. 1); Westphal. ad individual legacies, § 1-18 (German).
⁵ I. 2, 20, § 2 & 22; Thib. Versuche, 1 B. p. 16, 27, contra, Höpfner, l. c. § 569; Gebauer, l. c. § 2, 3, on P. 30, 1, 20, 22, n. 1, 2, 3; Avem., int. 4, 14; Thomasius, de prom. rei insert. § 35; Gebauer, de op. leg. cap. 3; Biedermann, de leg. ger. sec. jus, com. et borus. Brand. Hal. 1794.
⁶ I. 2, 20, § 22; P. 30, 1, 17; P. 33, 6, 3; Avem., int. 4, 14; Thomasius, de prom. rei insert. § 35; Gebauer, de op. leg. cap. 3; Biedermann, de leg. ger. sec. jus, com. et borus. Brand. Hal. 1794.
⁷ P. 30, 1, 37.
⁸ P. 30, 1, 34, § 14; P. 31, 23, 23.
⁹ I. 2, 20, § 23; C. 6, 43, 3.
¹⁰ P. 30, 1, 34, § 14; P. 31, 23, 23.
¹¹ P. 30, 1, 34, § 14; P. 31, 23, 23.
¹² P. 30, 1, 34, § 14; P. 31, 23, 23.
¹³ P. 30, 1, 34, § 14; P. 31, 23, 23.
¹⁴ P. 30, 1, 34, § 14; P. 31, 23, 23.
¹⁵ P. 30, 1, 34, § 14; P. 31, 23, 23.
¹⁶ P. 30, 1, 34, § 14; P. 31, 23, 23.
¹⁷ P. 30, 1, 34, § 14; P. 31, 23, 23.
indeterminately, the legatee may demand three. And it is
Generally a rule, that when the heir has the choice in the case of
a genus, he cannot assign to the legatee any object which the latter
has acquired by other means, and has subsequently alienated.

§ 1167.

_**Legatum quantitatis,** as far as its abstracted sense is concerned,
resembles _generis_, _quia genus et quantitas non pereunt_, in which
respect it is more valuable than the legacy _generis_; for if _the_ bushel
of corn be specifically left, and the barn be burned, the legacy is
lost,—not so if _a_ bushel of corn be left, generally _quantitate et genere._

§ 1168.

_**Legatum facti,** a _factum_, may be left as well as a thing, if not
morally or physically impossible, for then the heir is excused; for
instance, a testator may command his heir to teach a certain
person some science of which the heir is cognisant.

§ 1169.

A legacy may be left purely and unconditionally, or _conditionata_,
otherwise _legatum conditionale_, conditionally, or under a condition,
which may allude to time, description, cause, or manner.

A conditional legacy differs from a conditional institution of an
heir,—in this, that the praetor will in certain cases of _conditionis
pendentis_ grant such heir administration, but the legatee has no
claim for his legacy, but must bide the event, with the exception
that if it be likely the condition may or must last all his life,
he may obtain the legacy on offering the Mucian caution; for
instance, _A_ leaves _B_ a house, on condition he live all his life at
Rome. Resolutive conditions, although without force in insti-
tutions of heirs, are not so in cases of legacies.

§ 1170.

A legacy may also be left _in diem,—that is, to receive weekly,
monthly, or daily, during a certain period, termed also _annua_; here, the sums due on the first term are considered as uncon-
ditional, those due on the following terms as conditional. But if an
integer be bequeathed, and the terms of payment only deferred,
the legacy is unconditional.

§ 1171.

_Ex die_ is such legacy as is to take effect _after_ the lapse of a
given time, and is equivalent to an unconditional one, and the
right accrues when the day arrives.

§ 1172.

_**Legatum sub demonstratione** consists in a description applying
_legatum sub-
demonstratione._

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1. P. 33, 5, 1.
5. P. 35, 1, 107; P. 36, 2, 6.
6. P. 33, 1, 4.
7. P. 33, 1, 5; P. 36, 2, 12, § 4, ld. 205.
8. P. 36, 2, 5, § 1, ld. 21; P. 35, 7, 75.
9. Gottschalk, disc. forens. I. 3, nr. 3; P. 36, 1, 46; Westphal. l. c. 2, V. § 1851.
to the thing left; should, however, such description be defective, but the identity of the object proved, this defect is not material, nor even in that of the legatee, on due proof of the identity of person.

§ 1173.

*Legatum sub causa* is where a cause is stated by the testator wherefore he leaves the legatee the legacy; nor will the fact of such cause proving false vitiate it, for a will is a law, and a law is not the less binding so long as it remains unrepealed, because founded on a false basis. It is, however, open to the heir to prove that the testator left the legacy for the cause stated, that he believed such cause to be true, and that, had he not done so, he would not have left it to the legatee; if he succede in such proof, he may plead the *exceptionem doli* as an answer to the demand of the legatee for payment, *falsam causam legattonon obesse, verius est, quia ratio legandi legatd non cohæret*; sed plerumque doli exceptio locus habebit, si probetur alias legatusus non fuisse."¹

§ 1174.

*Legatum sub modo,*—this is otherwise called *modale,* and very similar to a conditional legacy, from which it, however, differs, inasmuch as a conditional legacy requires the performance of a condition precedent, a modal legacy of a succedent. *Ex gr.*:—

"A leaves B 1,000 aurei if he buy C.’s house,"—here he must buy the house before he can touch the legacy; but if the condition run, "A leaves B 1,000 aurei to buy C.’s house," it is a modal legacy; and this has a further effect, for, as the conditional legacy supposes a condition precedent, no right is transmitted to heirs till such condition be fulfilled, which is not the case in the modal legacy, for there the performance of the condition depends on the receipt of the legacy: it is true, such legatee is liable to subsequent forfeiture on refusal to perform such subsequent condition."²

Now, none can force the fulfilment of the *modus,* if he have not a vested interest:³ if one leave a sum of money *sub modo* of purchasing a house in which a third person is to have free lodging, such party can compel the fulfilment of the *modus.*

§ 1175.

*Legata captatoria, or captatoria dispositiones,* were invalid. They consisted in a reciprocal agreement between two parties to institute each other heirs or legatees.⁴ This arose from their

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¹ P. 35, 1, 72, § 6 ; C. 6, 24, 4 ; C. 6, 44. ² Greg. Maiansius in diss. de hic quae sui mod. relinq. 9, in coll. diss. tom. 2, n. 41 ; Lewen, sp. 399. ³ P. 32, 1 (3), 19 ; P. 35, 1, 71, pr. ; P. 40, 4, 44. ⁴ Thomasii, de capt. inst. coll. diss. tom. 2, diss. 32 ; Bynkershoek, de capt. inst. c. 10, in opusc. Halen, vol. 2, p. 2, 34, seq. ; Thibaut, Vernouche, i B. l. 4. ⁵ P. 28, 5, 70-71, pr. § 1 ; ibid. 81, § 1 ; P. 28, 7, 20, § 2 ; Thib. P. R. § 954, n. 2.
being in Rome a class of swindlers called *haeredepetae*, or "inheritance cadgers," who, having concluded such reciprocal condition, either subsequently altered their will, superseded it by a later one, or made away with the other party; for this all such dispositions, applying either to heirs or legatees, were declared void. Some difficult points, however, arose on this head; but these must not be confounded with *testamenta reciproca.* Nevertheless, if the legatee commit any infringement, it by no means involves avoidance, if it be not captatorial, or originate in an excusable misconception of the law.

§ 1176.

The *legatum paene nomine relictum* were invalid, as depending upon the caprice of the heir, a *conferri in arbitrium haeredis,* which, as the testament was a law, was not legal; but Justinian decreed such legacies should be binding if the condition were legal, invalid if not so. As, "My heir shall beat A, or pay a given sum to the poor,"—here the heir would neither pay nor administer the beating to A; otherwise, if he be commanded to marry,—here the heir must pay the penalty of marriage, or forfeit.

§ 1177.

The *jus accrescendi,* or right of survivorship, is equally applicable to legacies, which are particular successions, as to wills, which are universal successions, the legatee taking the share of the *collegatarii conjuncti,* which such co-legatee had then not acquired; the main difference in the operation of the *jus accrescendi* in wills and legacies is, that in the first case the testator has no power of direction in this respect, in the latter he has; for if he choose to forbid the action to the co-legatee, it does not injure the inheritance, nor make the testator part testate and part intestate, for such share, if it go not to the co-legatee, devolves *de jure* on the heir.

To make the *jus accrescendi* in legacies available, there must exist co-legatees for the same thing, which is not really divided; one of the co-legatees must fall away, and such co-legatee have not acquired his share at the time; now the testator is held to have made a division, if he can distinguish and at once separate such part without further ado, either in word or in deed, as leaving one-third to one and two-thirds to the other, and this will not vitiate the conjunction; but if there be no conjunction, there is no legatarycretion.

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1 Bynkershoek & Thomasius, Leyser, 376, 20; Müller ad Leyser, tom. 4, Tit. 1, obs. 582; Nov. Theo. et Val. tit. 4.
2 P. 28, 5, 70-71; P. 29, 6, 3.
3 P. 30, 1 (1), 43; Theoph. et Vinn. ad I. 2, 20, 36.
4 Bynkershoek, Beckmann, diss. de leg. paene nomine relict. § 26; Sammeh, ibid. in opusc. p. 41, seq.
5 Vinn. I. 2, 20, 8, n. 15; Donell. com. 7, 15 & 8, 21; Script. Gentilia de jur. accr. 6; P. 32, 1 (3), 89; P. 50, 16, 144; Cocceii, jur. contr. tit. de legat. sect. de jur. accr. 94; Bach. de jur. accr. 14, in opusc. p. 35, & l. c. § 18.
§ 1178.

A legatee *deficit* falls away, that is, the legacy is lapsed when the legatee cannot or will not accept the legacy; for instance, if he die before the testator, or before the making of the testament, a legacy accrues to him when he refuses to accept it, or when at the time the legacy was left him, or subsequently, he have lost his faculty of inheriting; in short, when the legacy has been declared *pro non scripto, caducum, or quasi caducum*; when a legatee capable of the legacy outlives the testator, but dies after the *cessio diei* (of which hereafter), the co-legatee has no creation, for the deceased had come into possession of his share which then passes to his heir.¹

§ 1179.

And now it remains to consider two important questions with respect to the vesting and possession of legacies,—firstly, from what period a *right* to the legacy accrues to the legatee? and secondly, at what period he can demand its *delivery*? and thirdly, from what time the *right of possession* accrues? The Roman lawyers expressed the first position by *quando dies legati cedit et venit; dies cessit* signifies that the legatee has acquired a right so perfect as to be transmissible to his heirs; *dies venit* that he can exercise such right; now, if a legacy have been made payable two years after the decease, *dies cedit* on the death of the testator, *sed non dum venit*.

To ascertain when these two events happen, the following rules have been laid down:—

A legacy left unconditionally, *pure et sine die relictum*, vests upon the death of the testator, because the heir might delay to administer; for Justinian⁵ reformed the old rule, that the right vested upon the administration of the heir; the Pappian Poppean law, however, provided that *legata per vindicationem* should vest on the opening of the will,³ and in those *per damnationem, perceptionem*, and *sinendi modo*, later still, viz., on the acceptance and administration of the heir;⁴ moreover, if a legatee died between the making of the will and its opening, or before administration, the legacy fell to the fiscus; this Justinian altered likewise, as above. Hence it suffices that the legatee outlive the testator for ever so short a time, in order to transmit the right to his heirs and gain a claim of interest and product from the date of the testator’s death.⁵

Exceptions exist in the cases of a slave freed, *legatum libertatis*, and of personal services, as *usufructus, usus; habitationis*, where the vesting of the legacy dates from the administration of the heir; because, in the first case, the slave having become free on the death of the testator, and the heir subsequently declining the

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¹ C. 6, 51, 1.  
² C. 6, 51, 1; Boehmer, dim. de diff. leg. pur. et non pur. 6, seq. ex ad Pand. tom. 5, p. 166, seq.  
⁴ Heinec. ad Jul. 3, 7, 4.  
⁵ C. 6, 47, 1 & 4; Leyser, med. ad Pand. spec. 382; 1 H. Luis, de nat. leg. gen. et in spec. quo temp. deb. fruct. et usur. Goett. 1786.
inheritance, a free man must have been reduced anew to slavery; with regard to the three latter exceptions, Ulpian says, 1 nam cum ad hæredem non transferatur, frustra est si ante (ante aditam hæreditatem) quis diem ejus cedere dixerit, for a personal service cannot, from its nature, devolve upon heirs.

This, then, is the rule of cessio dies in cases of legacies unconditional and not fixed to a day: the payment or delivery of which can be required as soon as the heir has administered, except in the case of a legacy sub modo, in which case the legatee must first give the necessary security.

In conditional legacies, the vesting and transmission to heirs depends wholly on the previous fulfilment of the condition imposed.

Legacies for a period, follow the rule of pure legacies. In legatis ex die, dies cedit ut in legatis puris, venit autem tempore lapso; if the legatee die before the day, the right devolves upon his heirs, who, however, can only demand delivery after three years without interest.

If the time be utterly uncertain, the same rule applies as in conditional legacies.

The same rule applies also where it is doubtful if the condition will ever be fulfilled, as, A is my heir, having a life interest, on whose death B is legatee for 100 aurei; hence this is conditionatum. 2

§ 1180.

When the legatee has possession already, he must have acquired the right; the legatum may then be of a genus or of a species. In the first case, the legatee is owner on delivery of an individuum appertaining to that genus: In the case of a species, if the object be bought by the heir, as soon as this latter makes the delivery the ownership commences; but if it were in the testator's own possession, then the legatee is, juris intellectu, the inchoate owner on death of the testator, as far as transmission to heirs is concerned, but not for the purpose of demand, for if the heir refuse the inheritance (si hæres deficit) the legacy is utterly lost; but if, on the contrary, the heir accept, the legatee acquires but a resoluble ownership, for he may refuse it: when, however, he has declared his acceptance thereof, he has the irrevocable ownership; thus, Papinian says, 3 legatum ita dominium rei legatarii facit, ut hæreditatis hæreditas res singulas. Quod eo pertinet, ut, si pure res relicta sit et legatarius non repudiatus defuncti voluntatem, rectâ viâ dominium, quod hæreditatis fuit ad legatarium transit, nunquam factum hæredis.

§ 1181.

The law of the Twelve Tables set no limit to legacies, pater familias uti legasset, ita jus esto, as has been before quoted, in consequence, however, of the ill effects produced by the unlimited

1 P. 36, 2, 3.
2 P. 35, 1, 1, § 1, 2, & 79, § 1.
3 P. 31, 1 (2) 80.
 nature of this privilege, many wills became destitute, the heir refusing to accept administration on account of the estate being exhausted by legacies; to remedy this evil, the lex furia testamentaria was introduced by the tribune Caius Furius, restricting legacies and gifts, mortis causa, to 1,000 asses, an exception being made in favor of relations and certain other persons, as, for instance, the cognati manumissorum;¹ the punishment on others for receiving a legacy contrary to law was a fine of four times the amount of such legacy, which must be admitted to be severe. Roman cunning, however, soon found a way to evade this imperfect law—more than 1,000 asses were never left in one legacy it is true, but legacies to that amount were so multiplied that the same end was attained as before; this gave rise to the

§ 1182.

Lex Voconia, introduced by Q. Voconius Saxa, A. u. c. 594, which forbade any Roman citizen (census) from receiving a legacy to a greater amount than the sum left to the heir; legacies to women were also particularly restricted by this law, of which Montesquieu affirms the primary object to have been to prevent women from attaining too great wealth; hence we find women excluded only from succession to those whose property was included in the census.

The Pappian law, enacted on a dearth of citizens to encourage marriage, appears to have taken certain cases out of the Voconian law, allowing women to succeed to their husbands by will, especially if they had children, or even to strangers; the husband, according to the Pappian law, could succeed to a stranger by will if he had one child, but a woman must have three children; nay, the mother was by the old law incapacitated from succeeding to her children, which the Voconian law confirmed, but Claudius allowed it as a consolation for their loss; and Hadrianus to those who had, if ingenuous, three children, or four if manumitted, which may be considered as an extension of the lex Pappia, which was again an extension of the Voconian law; and lastly, Justinian conferred this right upon women independently of the number of their children.

The Voconian law was, however, found also insufficient to effect the purpose it intended; for those citizens who had been accidentally omitted in the census claimed exemption from its operation on this plea.² Others left many small legacies, none of which were greater than the heir's share, and thus evaded the law.

§ 1183.

P. Falcidius, tribune under the triumvirate of Lepidus Octavianus, and Antonius, A. u. c. 714, brought in a plebiscitum,

¹ Ulp. Frag. 28, 7.
² Bach, diss. de his quae imputantur in quartam Falcidiam, § 2, opusc. p. 435.
under the consulship of Cn. Domitius, M. F. Calvinus, and
C. Asinius Pollio, which was more effective; according to this
none could leave in legacy more than three-fourths, reserving one-
fourth for the heir, who was empowered to reduce the legacies
_ pro rata_, should less than one-fourth have been left to him.

The words of this famous law are as follows:—

1. _Qui cives romani sunt, qui eorum post hanc legem rogatam
testamentum facere volet, ut eam pecuniam easque res quibusque dare
dare legare volet, jus potestasque esto, ut hac lege sequente licebit._

2. _Quicumque cives romanus post hanc legem rogatam testamentum
faciet, is quantam cuique cives romano pecuniam jure publico dare
dare legare volet, jus potestasque esto dum ita detur legatum, ne minus,
quam partem quartam hereditatis ex eo testamento heredes capiant.
Eis, quibus quid ita datum legatum esse, eam pecuniam sine fraude
sua capere licet, isque haeres, qui eam pecuniam dare jus sus damnat-
bus erit, eam pecuniam debito dare, quam damnatus est._

According, then, to the provisions of the Falcidianlaw, every
-testamentary heir, and by a later provision also every intestate
heir has a claim to his share, called the _Quarta Falcidia_, free; a
provision subsequently again modified. In examining this subject,
five general questions present themselves, and first,

Who can deduct the Falcidian portion?
From whom?
In what exceptional cases it cannot be deducted?
How it is to be calculated?
How deducted?

§ 1184.

The Falcidian rule is, that only _direct_ heirs should have their
share free and unencumbered, consequently they alone have this
privilege of deduction; and what applies to heirs applies to all
such as succeede in their place. Legates and fideicommissaries
are generally not so empowered, except,—

When they have themselves suffered such deduction, in
which case they may make a proportionate deduction from
those to whom they pay legacies, save it be in the category of
those exceptional cases where the heir himself is precluded from
deducting, and where the legatee is not compelled to pay an-
nuities, anna _legata._

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1 P. 35, 2, 1. Paulus lib. sing. ad Leg. Falc. The conciseness of this law might
well form a precedent for modern lay legislatures inducti.

2 F. Husmann, parad. ad L. Fal. (Otto
Theis. T. 4) A. O. Olono, parap. jur. civil. 1. 4, c. 1, seq.; Voorda, comad L. Tal.;
Westphal. von Vermächt, 2 B. § 1132-37.

3 P. 35, 2, 18. 4 P. 35, 2, 18.
5 P. 35, 2, 77; Voorda, 1, c. 5; v. Bern-

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2. If the heir make them the grace of not deducting anything, such part comes to the legatees as a gift.1

Now, many portions may fall to an heir, or his portion be subdivided among many parties, in which case,

1. If any one have received many portions as institutus directus,2 or as institutus and vulgariter substitutus,3 or as pupilariter substitutus of many children, such various portions are reckoned as one.4

2. If the heir be the heir of a co-heir, his own portion is to be distinguished from the inherited portion.5

3. If many substitutes or remainder men succeed in the place of one, every substitute can require to have his portion free.6

4. If a portion fall to an heir by right of cretion, both portions are separated if the cretive part be greater; but combined, if less.7

5. These distinctions hold if a father and son be named heirs, and the latter succeed into the place of the former.8

6. Also, if any one inherit as instituted and substituted heir, institutus and pupilariter substitutus; for then he is not required to supply the deficit9 of the pupillary portion with the excess of his own portion,10 but must include the excess thereof into his own surcharged portion.11 Now, if an instituted heir be substituted for a disinherited child, the two are separated,12 though one, who is at the same time instituted and pupillary substituted heir, must combine his own portion with that he receives as substitutus in case the legacies be imposed upon him in that capacity.13

§ 1185.

The pars Falcidia can be deducted from all kinds of separable or inseparable things14 left as legacies, bequests in trust of separate things, or of the whole property,15 left as a donatio mortis causa. The following cases, however, form exceptions:—

1. Legacies left in a military testament,16 or

2. To charitable institutions,17 and forsooth unconditionally.18

3. In case of a legatum debiti, the deduction cannot be carried

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1 P. 36, 1, § 19, arg.
2 P. 35, 2, 11, § 5 & 87, § 3.
3 P. 35, 2, 1, § 13 & 87, § 4.
4 P. 32, 2, 14, § 2.
5 P. 35, 2, 1, § 15.
6 P. 35, 2, 80, pr.
7 P. 35, 2, 78 & 87, § 14; Kapff, de destruct. Fal. part. grav. vel non grav. cohaerenti accresc. Tab. 1786.
8 P. 35, 2, 25, pr.
10 P. 35, 2, 25.
11 P. 35, 2, 87, § 5, 8.
12 P. 35, 2, 25.
13 P. 35, 2, 1, § 12; ibid. 31, § 5; ibid. 31; ibid. 79; ibid. 80.
14 P. 35, 2, 1, § 6, 7, 10; ibid. 19; ibid. 30, § 1.
15 P. 35, 2, 1, pr. § 13; ibid. 18; C. 6, 50, 5, 11; C. 8, 57, 2; Lauterbach, coll. L. 35, T. 2, § 13; Madhun Miscell. 1, p. 143; C. 5, 16, 25, does not apply.
16 P. 35, 2, 17, 92 & 96; C. 6, 50, 73; Kapff, de L. Fal. in mil. test. ex prohib. cessante, Tab. 1787.
17 C. 1, 3, 49; Nov. 191, 12.
so far as to trench upon the sum really due, nevertheless, on account of the privilege of prepayment in such cases, the heir may calculate _inter usurium_, deducting the Falcidia therefrom; but it does not hence follow that the creditor must submit to any diminution, because the testator has represented the debt as greater than the truth.

4. The testator can indirectly forbid the deduction by a proviso against sale of the object.

5. No deduction can, as a matter of course, be made in the _legatum libertatis_. The slave freed cannot be charged with a fourth of his value.

6. Nor where the legacies are to be reckoned into the legal share, or

7. Be without worth to the payer.

8. When the heir has endeavoured to suppress a legacy, or promised secretly (_tacitum_) to give it to an incapacitated person in an illegal manner, the legacy or _pars Falcidia_ is forfeited to the treasury.

9. In cases where the heir has studiously avoided making an inventory.

10. In cases where the heir has forgone his right; such is the case when the heir has omitted in a legacy, or indeed in any legacy, wittingly or from an error as to the law, to make the legal deduction.

11. The legatees can dispute the deductions of the purchaser of the inheritance (_emptor familiae_), in cases in which he promised the seller to pay all legacies in full (this resolves itself rather into a case of contract).

12. Lastly, no deduction can be made from legacies given by the heir for the fulfilment of a condition, and which, in truth and in fact, are not legacies at all, but are in the similitude of a consideration.

§ 1186.

The calculation of the Falcidian portion is estimated by certain fixed rules, and may be divided into four categories, as follow:

First, all debts on the inheritance are to be deducted; long cause necessary; Wernher, lect. com. 35, T. 2, § 14.

1. P. 35, 2, 1, § 10; P. 33, 4, 1, § 12; Buchholz, juris Abhandlung, nr. 8; P. 15, 19.


4. N. 119, c. 11; Voet. 35, 2, § 2.

5. P. 35, 2, 33, 34.

6. P. 31, 1 (2), 87, § 3.

7. C. 6, 50, 15.

8. F. 35, 2, 13; ibid. 24, pr. 68, § 1.


10. P. 35, 2, 46, 71; C. 6, 50, 18.

11. C. 8, 50, 9; N. 1, 3; P. 35, 2, 15, § 2; ibid. 16.


13. P. 35, 2, 1, § 8; ibid. 44; C. 6, 50, 18, makes this doubtful; sed vide N. 1, 2, § 3, which appears to clear it up.

14. P. 35, 2, 66, § 1; ibid. 69; C. 6, 50, 6, 24; Eator Proc. 3 B. § 132, seq. as to the mode of estimation; Thibaut, 1. c. § 918.
Secondly, Those legacies which, by their similarity to debts, suffer no deduction;¹
Thirdly, The legal share of such necessary heirs who are burdened with a legacy;²
Fourthly, All burial charges;³
Fifthly, All expenses attendant upon regulating the gross estate;⁴ and,
Sixthly, The value of all slaves⁵ manumitted by will.

When the available value of the estate has been thus settled, The second category contains seven positions.

The heir can require that a clear fourth part be reserved for him, clear as his hereditary portion, after including,—
1. All pre-legacies payable by himself to himself;
2. All legacies payable to him;
3. All things given to him as part of the inheritance in the lifetime of the testator;⁶
4. All reciprocal legacies of co-heirs⁷ are reckoned thereto as surrogata;
5. Everything which may be directed to be paid by the legatee, though not in the form of a conditional legacy, so as to be looked upon as the price of a purchase to be made by him;⁸
6. He does not reckon on what comes to him by a singular title,⁹ nor
7. The value which a rash speculator may have paid him for an insolvent inheritance.¹⁰

The third category contains the estimation of profit and loss.

The available value of the property is to be calculated at its actual market value at the time of the testator's death,—what may accrue afterwards the heir is not obliged to bring into account; on the other hand, he must bear the depreciation of the inheritance,¹¹ when such loss does not arise on the species or genus left in legacy.¹²

The heir, however, must include in the computation of the three-fourths all emblements ripe at the testator's death, though husbanded and gathered in afterwards;¹³ and all emblements due on all legacies conditional or deferred without the proper fault of the legatee,¹⁴ (sub conditione and ex die), which have gathered.

The fourth category contains the mode of deduction.

² Faber, err. prag. D. 11, E. 6; Thib. l. c. § 929.
³ P. 35, 2, 1, § 19.
⁴ P. 35, 2, 72; C. 6, 30, 22, § 9.
⁵ P. 35, 2, 56, § 2.
⁶ P. 35, 3, 13, pr.; ibid. 50; ibid. 53; ibid. 76, § 1; Cuj. ad Paul. R. S. 8, 3, § 3; Westphal. Vermächtn. l. c. § 1372 & 1341.
⁷ P. 35, 2, 22, pr.; ibid. 94.
⁸ P. 35, 2, 19; ibid. 30, § 7; ibid. 76, pr.; P. 35, 1, 109.
⁹ P. 35, 5, 15, § 7; ibid. 29; ibid. 74.
¹⁰ P. 35, 2, 3, pr.
¹¹ P. 3, 22, § 2; P. 35, 2, 30, pr.; ibid.
¹² P. 35, 2, 30, § 3, 4; Voet. 8, 28, § 22, goes still farther.
¹³ P. 35, 3, 9; ibid. 88, § 3.
¹⁴ P. 35, 2, 1, § 12; ibid. 16; ibid. 15, § 6; ibid. 24, § 1, pr.; ibid. 45, pr. § 1; ibid. 77, § 2 & 4.
1. The Falcidian deduction is made *pro rata* from the legatees.
2. What is given to one must not be burthened on the rest.¹
3. If the thing left be indivisible, the legatee must indemnify the heir in money in respect of his share, according to a valuation.²
4. A usufruct may be divided and retained, or
5. One of several things be kept back in satisfaction of the Falcidian fourth.³
6. If they be many, the law furnishes many different ways of calculating the value of a legacy so dependent on future contingencies.⁴

§ 1187.

Now the Falcidian fourth is deducted by the heir when charged with inordinate legacies; and although by the Falcidian law the testamentary heir alone has this privilege, yet it was afterwards allowed to the intestate heir so administering codicils in like case. Now every co-heir must have the fourth clear, which he would get if no legacies were imposed upon him. Let A B C be co-heirs.

The heir must first pay all charges; now, let it be supposed that

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>The estate to amount to</td>
<td>20,400</td>
</tr>
<tr>
<td>The debts to</td>
<td>7,500</td>
</tr>
<tr>
<td>Funeral expenses to</td>
<td>300</td>
</tr>
<tr>
<td>Sealing the inventory to</td>
<td>600</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>8,400</strong></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Available assets</strong></td>
<td>12,000</td>
</tr>
</tbody>
</table>

Upon which he may take his Falcidian fourth. To calculate this, that only must be taken into account which he gets as heir, not that which he gets under another title as legacy, &c. Now A and B are heirs,— to A 2,000 are prelegated: the estate amounts to 10,000.

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>A gets a prelegacy of</td>
<td>2,000</td>
</tr>
<tr>
<td>Then, as heir, he receives</td>
<td>4,000</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>6,000</strong></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Three-fourths amount to</td>
<td>4,500</td>
</tr>
<tr>
<td>He pays legacies of</td>
<td>4,000</td>
</tr>
</tbody>
</table>

Here he gets more than a fourth, and can therefore make no deduction from the legatees. But the laws determine that the prelegacy shall not be all taken into account, but only a part.

¹ Nov. 1, 3;
² P. 35, 2, 7, & 80, § 1;
³ P. 35, 2, 9, § 9; ibid. 23; ibid. 81, pr.
⁴ P. 35, 2, 3, § 16; ibid. 3, § 2; ibid. 47, pr. 1; ibid. 55; ibid. 68, pr. 3; Westphal;
⁵ Verm. 2, § 1310; Gastering Nachf. 1 B. 364-69; Schmelzer, com. de prob. vel. ejusq. usu forens. Goett. 1780, § 3 Thib. l. c. § 918, in fin.
thereof, viz., the 1,000 which A got as heir, which he pays bim-
self; the other part, viz. 1,000 which his co-heir pays him, is not
taken into account.

Thus A receives as co-heir the one-half 4,000
On account of prelegacy 1,000

Three-fourths or doderans 5,000
The legacies amount to 3,750

Ergo, A has not his clear fourth.

The estate amounts to 12,000
Three-fourths of the whole amounts to 9,000
And one-fourth of the whole amounts to 3,000

A must pay legacies to the amount of 3,500
B 2,000
C 1,500

Total of legacies 7,000
Residue 5,000

Now, as the total of the legacies does not amount to one-
fourth of the whole, it might be assumed that in such cases the
quarta Falcidia could not be deducted, but the law declares each
co-heir shall have his fourth clear. Thus,—

B inherits 4,000 C inherits 4,000 A inherits 4,000
B his fourth, 1,000 C his fourth, 1,000 A his fourth, 1,000
B legs. paid, 2,000 C legs. paid, 1,500 A legs. paid, 3,500
B residue, 2,000 C residue, 2,500 A residue, 500

Hence A can deduct the Falcidian fourth from his legatee; not
so B and C, who have their respective fourths clear without.

Aurei.
State of the inheritance on testator’s death 12,000
The legacies amount to 10,000
The heir, having his fourth free, can deduct
from the legatees pro rata 1,000

After the testator’s death he wins 3,000 aurei by a lottery
ticket purchased from the deceased, nevertheless he can still
deduct the 1,000; his total profit, therefore, amounts to 5,000.
On the other hand,—

Aurei.
The estate amounts to 12,000
The legacies to 9,000
The heir’s fourth clear 3,000
And he can deduct nothing from the legatee; but, in the mean time, a house belonging to the estate, worth 2,000 aurei, is burned down.

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>The estate is now</td>
<td>10,000</td>
</tr>
<tr>
<td>The legacies</td>
<td>9,000</td>
</tr>
<tr>
<td>The heir does not get his fourth clear, but only</td>
<td>1,000</td>
</tr>
</tbody>
</table>

§ 1188.

The French law, as consolidated under Napoleon, limits the pars quota of the estate desponible by testators to half, if the testator leave one legitimate child, to a third if he leave two, and to a fourth if he leave more than that number—the term enfans including all descendents without reference to degree, immediate children inheriting in capita, and their representatives in stirpes.

With respect to ascendants the desponible portion is limited to half the estate where ascendants are left in one line only; and to three-fourths if in both lines.

Collaterals have no legal claim except in cases of intestacy.

This is a modification of the Falcidian principle.

§ 1189.

The Moohummedan law contains a provision resembling those of the pars Falcidia of the Roman law. It protects the interests of heirs against the gratuitous acts of the testator on his deathbed, as well as against his bequests beyond a third of the clear residue of his estate after payment of debts; consequently, gifts made under these circumstances must not exceed the third, unless confirmed by the heirs after, not before, the donor or testator's death. Neither are gifts in a last sickness, nor legacies, valid to any extent unless so confirmed, where the person in whose favor they are made is also an heir. In like manner, the law is so jealous of the partiality of the deceased for any particular heir, that acknowledgments of debt made on the deathbed in favor of an heir are utterly void, unless afterwards assented to by the other heirs. As the law has placed no control over a husband's power of divorce, he might, by exercising it in his last moments, deprive a wife who had incurred his displeasure of her right of inheritance, but that is obviated by a provision,—that a divorced wife shall retain her right of inheritance, unless her husband survives the completion of her iddut, or the period during which it is unlawful for her to enter into another marriage. There is

1 Code, liv. 3, Tit. 2, ch. 3, § 1 & seq.
3 Hidaya in eodem. Because the right has not accurred, and the assent may be annulled upon the death of the testator—Hamilton's Hidaya, vol. iv. p. 470.
4 This is three months, if not pregnant; if pregnant, it is accomplished on her delivery, Id. vol. i. p. 359-60.
one way, however, in which a husband can, even upon deathbed, materially reduce the share of the inheritance to which his wife would be entitled,—that is, by marrying or acknowledging a marriage with another woman, by which means the widow's share would be divided among both equally. The wife newly married, or acknowledged, would also be entitled to a reasonable dower; but that, as a debt, would fall on the general estate.¹

§ 1190.

The heir has various modes of satisfying his Falcidian share.

1. If in possession of the legacy, by actual deduction² or caution.³

2. If, on the contrary, it be in the possession of the legatee by illegal usurpation, the heir attacks him by appropriate interdicts;⁴ but if the heir by an error in fact have given up too great a part of the legacy, he can reclaim the excess condicione indebiti⁵ by an action in debt. On the other hand, if the legatee have got too much by other means, still, without force, the heir's remedy will be by actio in factum, or action on the case ad exhibendum, a sort of distinguitas to compel production, or rei vindicatio,⁶ action of detenue, or bill for specific recovery.

§ 1191.

Justinian⁷ tells us that any legacy left before the institution of the heir was by the old law ineffectual, because that was the very soul of the testament; hence a slave could not be manumitted by will, if an heir had not previously been instituted. But the emperor, conceiving it unjust to allow a mere formality to supersede the will of the testator, permitted a legacy to be left before the institution, or in the period between two institutions, more especially when it was a question of liberty.

§ 1192.

The title of the Institutes⁸ de Ademtione Legatorum treats of invalid legacies, and these may be so, Ademptione vel Translacione. Ademption, in its generate sense, is the revocation of a legacy,⁹ but in its particular sense it means the revocation of a legacy without the substitution of another in its place; whereas translatio is the altering a legacy already given, or the exchange of it for another.

This former may be by words, deeds, or implied by law. Heineccius, indeed, divides them somewhat differently, ipso jure and ope exceptionis.

¹ Hamilton's Hidaya, No. 12, Trans. vol. iii. p. 163.
² P. 35, 2, 13, $ 1; ibid. 93; Kahle, de rem. jur. hered. ad conseq. quart. Falc. compel. Goett. 1803.
³ Thib. 1 c. $ 940.
⁴ Thib. 1 c. $ 895.
⁵ Thib. 1 c. $ 940.
⁶ P. 10, 4, 5, $ 1; P. 31, 1 (2), 77, $ 2; P. 35, 3, 26, pr.
⁷ I. 2, 20, 34.
⁸ I. 2, 21.
§ 1193.

Ademption is said to be by words when the testator declares in his will or codicil, executed before five witnesses, whether confirmed or not in the will, a former legacy to be void. Justinian says eodem testamento,—that is, what was done at the beginning can be undone at the end, for a new will would revoke the former one, legacies and all; even so a later clause a former one. It is contended how far a legator can revoke a legacy, before one, two, three, or four witnesses, or in writing without any witnesses.

By deed a legacy may be recalled, as by the testator cancelling his will, by his destroying the thing left, or changing its form so that it cannot again be reduced to its former shape, but if it can the legacy stands good. When the testator without necessity sells the thing he has left, or gives it away; and lastly, when he collects the outstanding debts without absolute necessity, the legacy is adempted.

Ademption is presumed by law when a deadly enmity has arisen between the testator and legatee before the former's death, and no reconciliation taken place; but a slight difference of opinion is not sufficient to invalidate the legacy.

It has been a question why this cause should invalidate a legacy, and not the institution of an heir? a much more important matter. The answer is plain,—that, in case of an heir, the circumstance of the entire inheritance being entrusted to a party could not escape the memory of the testator, but an incident to such will might.

§ 1194.

When a legacy is doubtfully given or taken from two persons, it is often difficult to decide to whom the legacy belongs. On this subject the following two passages, to be found in Ulpian's fragments, have been fertile causes of debate:—

Si duabus filiis separatim legaverit nec uni ademerit, nec a depraeat, cui ademptum sit, neutri (Flor. utrique) legatum debetur quemadmodum et in dando, si non adpreeat cui datum sit dicemus neutri legatum. The other passage is,—Sed et si duabus hominibus ejusdem nominis fuerit legatum, puta Semproniis. mox Sempronio ademption sit, nec adpareat cui ademption sit? utrum datio in utriusque persona infringitur, an ademption nulla est, quàri potest; item si ex pluribus servis ejusdem nominis uni vel quibusdam libertas

1 I. 2, 21.  2 Vinn. ad I. 2, 21, pr.  3 C. 6, 42, 27; pro Harprecht, ad § 1, I. 2, 21; Styrex. can. test. 23, 30; Cocceii, jur. con. 2, 21, qu. 1; Wernher, P. obs. 300; Crell. diss. ad D. 34, 4, 3; 13; Puffendorf, tom. 2, obs. 110; contra, Lauterbach, coll. I. 2, 21, § 5; Berger, O. I. p. 305.

1 I. 2, 21.  2 Vinn. ad I. 2, 21, pr.  3 C. 6, 42, 27; pro Harprecht, ad § 1, I. 2, 21; Styrex. can. test. 23, 30; Cocceii, jur. con. 2, 21, qu. 1; Wernher, P. obs. 300; Crell. diss. ad D. 34, 4, 3; 13; Puffendorf, tom. 2, obs. 110; contra, Lauterbach, coll. I. 2, 21, § 5; Berger, O. I. p. 305.

1 I. 2, 21.  2 Vinn. ad I. 2, 20, 19.  3 I. 2, 21; Styrex. can. test. 23, 30; Cocceii, jur. con. 2, 21, qu. 1; Wernher, P. obs. 300; Crell. diss. ad D. 34, 4, 3; 13; Puffendorf, tom. 2, obs. 110; contra, Lauterbach, coll. I. 2, 21, § 5; Berger, O. I. p. 305.

1 J. 2, 21.  2 Vinn. ad I. 2, 21, pr.  3 C. 6, 42, 27; pro Harprecht, ad § 1, I. 2, 21; Styrex. can. test. 23, 30; Cocceii, jur. con. 2, 21, qu. 1; Wernher, P. obs. 300; Crell. diss. ad D. 34, 4, 3; 13; Puffendorf, tom. 2, obs. 110; contra, Lauterbach, coll. I. 2, 21, § 5; Berger, O. I. p. 305.
§ 1195. Translatio

Translatio changes:

The person of the legatee, —

The person of the co-heir who is to pay the legacy, —

The thing left, or, —

The mode of leaving it, as by making an unconditional legacy conditional, or vice versa.

In transferring a legacy from one person to another, it is not sufficient to say who shall now have it, it must also be said that the former shall now not have it, for otherwise the two would become co-legatees. This change must be performed in the second as in the first instance, either in the will, codicil, or by verbal order to the heir; for if this be not observed, the declaration will be looked upon as an ademption, not as a translation, for if not done in due form \textit{recte ademptum est legatum sed non recte translatum}.

§ 1196. Legati extinctio.

\textit{Extinctum} is said of a legacy when it was good at the beginning, but becomes invalidated afterwards: thus,

A legatee may die before the testator without having a co-legatee joined with him, who would take it \textit{jure accrescendi}, and save its extinguishment;

He may not outlive the fulfilment of the condition;

The testator may leave the legatee a thing not belonging to him, which this latter subsequently acquired gratis before the testator's death;

The thing left may be destroyed without the heir's fault; or, lastly,

The condition of the legacy may not come to pass.

§ 1197. Legata nulla.

\textit{Nulla} are legacies from a fault in the will, as when it is \textit{nullum ruptum irritum destitutum}, or when the codicil containing them is invalid. But legacies are not affected by wills declared null in the 115 Novella, or generally upset as inofficious \textit{si recissa sunt}.

§ 1198. Legata pro non scripta habita. \textit{Pro non scriptis habita legata} are such as are invalid from the beginning, although contained in a valid instrument: thus,

When a legatee writes the will, even \textit{dictante vel imperante}
testator, who does not with his own hand note such to have been the case; the legacy is void;
When the testator leaves a legacy to one incapable of taking it;
When the legatee was dead at the time it was given; or,
When so darkly expressed as to be incomprehensible.

§ 1199.

Legata ereptitia are such of which the legatee is deprived on account of unworthy conduct, as,
When the legatee has by will or neglect caused the testator’s death;
If the legatee impeach the will without ground as false, institutes the querela inofficiosi, or demands bonorum possessionem as regards the will;
When he has robbed the inheritance;
When he or she has committed adultery with the testator or testatrix;
Slandered the testator after his death; or,
Hidden the testament.
In the four first instances the legacy lapses to the exchequer; in the two latter, to the heir.

§ 1200.

We have seen how a fidei commissum differs from the hæredis institutio directa, and from a legacy; let us now observe that a fidei commissum is either universale or particulare, otherwise singular, which latter belong in this place.

Bequests in trust arose in the circumstance of there being many persons who, by the Roman law, were incapable of being named heirs or legatees, but to whom the testator wished to leave something: such were women incapacitated by the Voconian law, still the testator might wish to bequeath property to his widow or female relations; others had not the testamenti factio, and in regard of such persons, the only means were to request the heir-at-law to make over a certain sum to them. Again, respect due to the heir sometimes forbade the testator from imposing a command on him; lastly, it has been seen that an heir could not be instituted for a fixed period, as for instance, for life, wherefore the heir was requested to cede the heritage after a certain period to a person designated; hence such bequests were called fidei commissa, because entrusted to the honor of the heir, who might or might not comply with the wish of the testator; but under Augustus, fidei commissa obtained

P. 34, 8, 1; P. 48, 16, 6; ibid. 14, § 1; ibid. 18; ibid. 22, § 6; ibid. 29; ibid. 40, 10, 15, pr.; C. 9, 23, 1; ibid. 3 & l. pen.; ibid. 43, 10, 1, § 8; 1b. Jac. Mascov. Diss. de his qui sibi adscr. in test. ad capt. sectm. Neronianum; J. W. Marckart, diss. de his, &c. n. 3; Stryk. de cant. test. n. 10; Westphal. v. Fest. § 812; Paul reapt. R. S. 3, 6, 14; Vide Westphal. Vermächt, und Fidei com.

Made under Augustus.
a binding power of fulfilment on the heir, with the restriction, however, that none who could not inherit could be the object of a *fidei commissum*, neither could any one receive such bequest who was not capable of making a will;¹ hence the *fidei commissa* lost their first and second objects, but retained the third and fourth, which were indeed the most important; henceforth, then, the *fidei commissa* were no longer framed precatively, but imperatively; but the terms of institution still materially differed from those of *fidei commissum*, the first being framed as before observed. But when the difference between both kinds of expressions was abolished, the only distinction which remained was, that the heir inherited immediately the fidei committee mediate through another. The Emperor Claudius invested the jurisdiction over fidei commissa in two praetors ad hoc, whom Titus reduced to one.

§ 1201.

*Universale* was when the testator ordained the whole inheritance to be delivered to the heir, *particulare* when a *pars quota* only; some distinguish between this and *singulare*, by which they understand a certain specific thing only, calling it otherwise *speciale*; but it is considered more in accordance with the Roman idiom that universale should apply to the whole or a *pars quota*, and particulare or singulare to specific things.

A universal *fidei commissum* is a disposition by which the heir is bound to cede the whole or a *pars quota* of the inheritance to another, and has three requirements,—an heir to be commanded,—that he be commanded, and that he be so commanded that the fidei committee succede as heir *titulee universali*; the term *successor universalis* then applies to such person, that of successor *singularis* to the particular heir, who is in this case indeed no heir at all.

The rights of a direct heir and trustee, or fidei committee, differ widely, for the first can seize the *possessio vacua* if not opposed, while the fidei committee must wait till the direct heir takes possession and delivers him up the inheritance; the former has an active, the latter a merely passive power: a direct heir can only be named in the testament a fidei committee in three ways,—by testament, codicil, or viva voce, even without witnesses;² the direct heir obtains the inheritance on entry only, but a fidei committee transmits the inheritance to his heirs though he die without declaration that he will be heir at trust, *fidei commissum licet non agnitum ad heredes transmittitur*.³ The fidei committee obtains, indeed, no real right on the inheritance, but still a right of personal action to compel the fiduciary heir to deliver up the inheritance.⁴

¹ Heinec. ad L. Jul. et Papp. Popp. 1. 2, c. 6, § 1, 1. 3, c. 9, § 7.
² C. 6, 42, 32; 1. 2, 23, 12.
³ P. 36, 1, 35; 36, 1, 46; C. 6, 42, 3; C. 51, 1, 7.
⁴ P. 5, 6, 1; P. 36, 1, 63.
ACQUISITIO PER FIDEI COMMISSA SINGULARIA.

The testator is termed *fidei committens*, the fiduciary heir *hares fiduciarius*, and the recipient *hares fidei commissarius*; moreover, the *hares fiduciarius* still remains heir after he has delivered up the inheritance, for once he ever heir; *hares fiduciarius manet hares etiam facta restitutione*; in consequence, then, of the fiduciary heir being liable for debts, and deriving no personal benefit from the trust, many wills became *destituta*.

§ 1202.

Fidei commissa may be either express or implied; *expressa* by distinct words addressed to the fiduciary heir *ut restituat hæreditatem*, or by an order implying the restitution, as “A is my heir, but I will make no testament till he shall have issue;” or, “A is my heir, but I will that he name B his heir,” which implies that A has only a life interest.

Justinian limited fidei commissa to four degrees by the 115 Nov. C, limited by Justinian.

(1) A shall be my heir and restore the inheritance to B, (2) B to C, (3) C to D, (4) D to E, and here it stopped.

In Germany this is not observed, for fidei commissa there, are a means of entailing property, and lasts as long as any member of the family can be found.

A direct heir may also be an heir in trust; this is not so by the old Roman law, the *fidei commissarius* being one who could not inherit directly.

Not only testamentary heirs, but also heirs at law can be required to restore the inheritance, because the testator might have superseded the heirs at law altogether; the legal portion, however, forms an exception, it must be left *sine ullo gravamine*.

§ 1203.

A *fidei commissum* may be made unconditionally, as A is my heir, but he shall immediately deliver half the inheritance to B; or, conditionally, as A is my heir, but if he leave no legal issue it shall revert to B; or, from a certain time, as A is my heir for the term of his natural life, after which it shall pass to B; this, we know, could not be done in the case of *institutio directa*.

§ 1204.

In consequence of the fiduciary heir being liable for debts, and deriving no advantage from the trust, the Senatus Consultum Trebellianum was promulgated under Nero, transferring the action of the creditors to the *hares fidei commissarius*; notwithstanding, the Senatus Consultum Trebellianum transfers actions.

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1 Rittershus, ad Nov. 159; Fachinei, lib. 4, c. 10; Struv. ex. 36, th. 20; Knipscheld, de fid. com. fem. c. 9, n. 404, seq.
2 Ulp. 25, 25.
3 P. 36, 1, 6, 1; C. 6, 49, 5.
4 This question will be fully investigated under fidei commissia universalia post quod vide.
fiduciary heir still continued so, and if he retained a part of the inheritance, delivering up the remainder, the actio hæreditaria was split, pro rata, between both parties; in fact, the right of recovery was made to attach to the property, not the person.

§ 1205.

Although the fiduciary heir was thus protected from all risk, yet he still had no advantage from his heirship in cases where he had to restore the entire inheritance; hence the second Sctum. on this subject, called Pegasianum, passed under Vespasian, enacting that a fiduciary heir should never be obliged to restore more than three-fourths of the inheritance, and empowering him to retain one-fourth despite the provision of the will; but, on the other hand, should he, notwithstanding these advantages, refuse to accept the inheritance, he was compellable thereto, and furthermore punishable by the loss of his fourth, and obliged to hand over the entire inheritance to the fideicommissarius; this fourth was the pars Falcidia, for in fact the Sctum. Pegasianum did no more than extend the Falcidian law to fideicommisa.

The debts were paid pro rata; hence the fiduciary heir entered into a contract, stipulatio partis et pro parte, with the fideicommissarius to pay an aliquot part of the debts, and this was required to prevent the actiones hæreditariae, which had not been again alluded to in the Sctum. Pegasianum, from passing, for otherwise the fidei commissary heir, whom the creditors could always sue, would have no power of forcing contribution from the fiduciary heir for his portion. 1

Justinian confirmed the above two Scta., with certain modifications.

That every heir commissioned to administer to a part or the entire inheritance, should be empowered to keep back his fourth.

That if he administered willingly, and restored the whole estate, all actions by heirs should pass to the fideicommissary heir.

That when he was only required to resign a portion, or retained his legal fourth part, the actiones hæreditariae should pass pro rata; hence the stipulaciones partis et pro parte become unnecessary.

That the fiduciary heir was compellable to administer, losing his fourth, but all actiones hæreditariae pass to the fidei commissary heir.

Lastly, that all these provisions were to be considered as if inserted in the Sctum. Trebellianum.

§ 1206.

With reference to the restoration, if a fiduciary heir deliver three-fourths, believing erroneously that his own one-fourth will

1 Vinn. ad I. 2, 23, § 5 & 7.
be free, but finds it falls short, he may require restitution of the deficiency; but legacies and donations in contemplation of death, in short, everything the heir had received from the testator, including mean profits, was counted as a part of the *quarta Trebelliana*, as it was called in the case of *fidei commissis*, better to distinguish it from the *quarta Falcidia*, properly so called.

But the case now arises in which the estate passes through many trusts, as above alluded to. In this case the fiduciary heir A deducts his one-fourth, and delivers to B, B to C, however without further deduction, and so on through the four degrees: the reason of this is clear, the Trebellian fourth was introduced to prevent the testament being destitute, and this end once attained, it ceased with the necessity for it.

With respect to legacies, if the fiduciary heir has more than his fourth he pays the legacies; if more, yet not enough to do so entirely, he pays them pro rata with the *fidei commissarius*, but when the fiduciary heir is to restore the estate to a certain sum or certain thing, he is to be considered as a legatee, and pays no legacies.

### § 1207.

The twenty-fourth title of the Institutes treats *de singulis rebus per fidei commissum relictis*. How the universal differs from the particular generally, we have already seen. Legacies were also by Justinian assimilated to *fidei commissa*.

The only remaining distinction was with respect to a slave declared free by way of legacy, in which case the heir lost his *jus patronatus*, and the slave was termed *orcinnus quia patronus in orco est*; but when the slave is freed by *fidei commissum*, the heir retains the *jus patronatus*. Many insist on another difference, viz., that a legacy can only be left in testaments and codicils, but *fidei commissus* be left viva voce and without witnesses; but, inasmuch as Justinian has assimilated the two, this ground falls away, in addition to which the expression *ne depererat ultima voluntas testatoris fidei commissa* is general.

There are two other asserted differences, which, however, are not sustainable, and which, to avoid confusion, are omitted.

### § 1208.

Ownership is the right of free disposal of an object, and includes the right of alienation *in re* or *ad rem*; and, although it might be presumed that no one can transfer this right of ownership to whom it does not belong, yet there are cases in which the legal owner is estopped from alienating the object, but where he

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1. Cuj. ad Pap. resp. l. 2, p. m. 82; Val- lius, ad L. 91; D. ad Leg. fal. in Thea- us. Off tom. i. p. 437.
2. Vinn. ad I. 2, 24, § 2.
3. Franzk, ad § fin de fid. com.; Sande, l. 4, c. 5, def. 18; Faber, de error pragm. dec. 67, error 7; Huber, prælect, ht. n. 3.
4. l. 2, 23, § 12.
who is not such legal owner may do so, and vice versa. The explanation of the above apparent paradox is the object of these following paragraphs.

The Lex Julia prohibited a husband to alienate his wife's portion, although given him dotis causâ without her consent. This Justinian modified to a certain extent, as may be seen in a former paragraph;¹ for instance, the fundus dotalis in Italy could not be alienated by the husband against the wife's consent, nor could those lying in the provinces be even mortgaged, lest the woman should be induced to do, by reason of her natural weakness, what was against her real interest.

A creditor could alienate a pledge, because the contract is that the creditor should make the security available in default of the payment of the sum advanced; but, in order to prevent abuse on either part in the distrainment of pledges, particular constitutions regulated the formalities to be observed.

The owner cannot alienate if he be a pupil or minor, for, although the legal estate vests in such, they are to sue out administration; and it has already been seen that they cannot grant a loan, or effect a payment.²

The minor cannot grant a loan, because he thereby alienates part of his property; but if he have done so, and the object be still in existence, his tutor or curator may vindicate it; but if it be consumed, he must institute a personal action against the receiver for an object of like quantity and quality: for here various cases may arise,—the object may have been absolutely consumed, as when wine has been drunk, or its form so changed that it is not possible to restore it to its original condition, or so mixed as not to be severable,³ in which two last cases it is as much consumed in the eye of the law as in the first. When the consumption took place bona fide, that is, the borrower was ignorant of the incapacity of the lender, condicio sine causa but not condicio ex mutuo will lie; but where mala fides exists, condicio sine causa or ad exhibendum are the proper forms of action; the latter is, however, more advantageous to the actor or plaintiff than the former, because the juramentum ad litem being admissible, he can tax his damage on oath.⁴

§ 1209.

It is clear that women, in more ancient times at least, were incapacitated from testation for several reasons,—being incapable of participating in the comitia, they were consequently excluded from those solemnities by which wills were made; they were not, moreover, sui juris, or their own masters, but under a perpetual

¹ § 1095, h. op. ² Vid. § 750, p. 589, h. op. ³ P. 46, 3, 78; Vinn. ad I. 2, 8, § 2, n. 2. ⁴ P. 10, 4, 3, § 2.
disability, arising either from the actual paternal power, the paternal power in its fictitious form of coverture, or under that of curatela or wardship. At a later period, however, when women, not certainly for the general benefit of Roman morality, became emancipated; when the form of marriage implying the marital power was abandoned; when, in short, a married woman remained non obstante, her coverture, de facto, though not de jure, a feme sole, she was permitted to make her will with the consent of her tutor, auctore tutore;¹ hence their testaments could not be made clandestinely, and these testatrices were exposed, it would appear, to considerable risk.²

The old rule, however, continued to apply to such women as were in manu, capite deminuta, or in the place of filiae familias.

¹ Ulp. Fr. 20, 15; Cic. pro Cæc. 6.
² P. 31, 27, 77, § 24; Merill. obs. 2, 1, p. 69 & 47, 39, p. 55. It is an error to presume that women could only make nuncupative wills, for see Val. Max. 7, 8, 2; Suet. Galb. 5; Plin. Ep. 2, 20, and where they wrote the heir's name. P. 5, 2, 19; P. 33, 37, § 6; P. 38, 6, 33; C. 3, 28; 3; Heinec. com. in L. P. Jul. et P. P. 2, 11, p. 240, seq.; Aur. Galvan. de usufr. 9, ult. et V. C. Schult. ad Ulp. p. 602; contra, Cuj. obs. 7, 11, ad Ulp. et Alexander ad Gaius, Inst. 2, 2, 1.
MODI ADQUIRENDI UNIVERSALES—DEFINITIO SUCCESSIONIS ET H Aereditatis—Succes- 
Sio per Testamentum—Origin of Testaments—Genera Testamentorum—In Pace—In Procinctu— 
Per Aes et Libram—Chirographa et Holographa—Prætoria—Solennia—Nuncupativa— 
Insolennia—Privilegiata—Militaria—Principi vel Judici Oblata—Parentum inter 
Liberos—Rusticorum—Tempore Morbi Facta—In Favorem Hæredum Intestatorum— 
In Fias usus—Quibus competit Testamenti Factio—De Testibus—De Hæredibus 
Instituendis—Divisio Hæreditatis—De Hæredum Qualitate et Differentia.

§ 1210.

It has been seen that the modi adquirendi civilis are singulares 
and universales,—the former consisting in donatio, usucapio, lega-
tum, and fidei commissum, has already been discussed; the latter 
or universal modes of acquisition, on the other hand, are the 
adquisitio hæreditatis (hæreditas) or successio hæreditaria, for 
whoso deduces a right from another is a successor, in the general 
acceptation of the term.

§ 1211.

Hæreditas, in its sensu objectivo, comprehends the entire estate 
left by the deceased, or complexus bonorum defuncti; sensu sub-
jectivo, it is the jus hæreditarium, or right attaching thereupon.

This jus hæreditarium consists partly in the right of appro-
priating an inheritance to the exclusion of others, partly in the 
right accruing to the individual in one already acquired. An 
hæreditas is termed delata when there exists a titulus only, that is, 
the right or capacity to acquire; this arises when the testator has 
nominated an heir and has died, in which case the right of inheri-
tance is a mere jus in rem (scilicet), in hæreditatem jacentem; but 
the hæreditas is said to be adquisita when it has been administered 
to, and taken possession of, or where the law vests it without 
such administration, and such acquisition is termed successio hære-
ditaria, or successio sensu stricto.

1 P. 50, 17, 6, § 2.
2 The Germans have very appropriate 
words for this expression—Vernachlässen-
schaft, Verlassenschaft, Nachlass—a inade-
quately conveyed by the English terms 
estate,” or “goods,” to which, moreover, 
must be added, of the deceased, to avoid 
misconception. The word relicta used as 
a generate term, would include the entire 
estate of a deceased, whether consisting of 
moveables, immovable, or of both to- 
gether.
The *titulus* to an inheritance may be *ex testamento* when the inheritance is taken under a will, and is then termed *testamentaria*; and the deceased die *testate*; or *ex lege*, by the mere operation of the general law, and is then termed *legitima, sive ab intestato*; for a testament, it will be seen, may be termed a particular law, or made under a particular law *in hanc finem*, and is a privilege, since the general law designates the degrees of relationship by which the property in an inheritance is to be ruled as well as the amounts of respective interests, whereas a testament possesses greater latitude, and especially supersedes the general law; but a testament, considered as a contract, is *ex parte*, for there is a power given to accept, which the heir does not do till *after* the testator's death; for if he did so *before* that event, it would be a *haereditas pactitia*, and void, for that reason, by the Roman law: 1 nevertheless, inasmuch as the heir may or may not accept the inheritance, there is some resemblance between a contract and a will; hence, there is some similitude in the laws by which both are ruled.

Lastly, *successio* may be, in virtue of the *bonorum possessio*, granted by the praetor in the exercise of his equitable jurisdiction, whereby the informality of a testament was cured or the want of it supplied.

§ 1212.

The right recognised by civilized societies, which empowers a man to regulate the disposition after his decease, of property acquired during his lifetime, is a restriction of the general and natural law of occupancy, for although a man by industry may gain an exclusive right to any given thing so long as he can make use of it, and maintain himself in the possession of it against others, yet, so soon as death shall have removed him, his property remerges into the common stock, and becomes again subject by the law of nature to the title by occupancy. In civilized society, however, this title would evidently create eternal confusion, strife, and internal broils, the strongest ultimately obtaining possession of the property of the deceased, and so on, on his decease, and that of those who had subsequently gained the possession by the same violent means. On the other hand, if the absolute right to regulate the disposition of property after death be admitted, it may be a question as to whether there should not exist an equal right of determining the succession to it arbitrarily for an indefinite period. At the same time, then, that this power is admitted by the municipal laws of all civilized nations, it has been found convenient and politic to limit it by positive laws, allowing the deceased to dispose of his property after death to a certain extent; and, "if he neglect to do so, or be not permitted to

1 The Germans admit this third species of mode of acquisition, the heir being termed *haeres pactitus*, whereof hereafter. The Mahommans likewise.—Baillie, Mochummudan Law of Inheritance, p. 17; Com. on the Sirajyjah, by Sir W. Jones, 4th ed. vol. iii. p. 558.
make any disposition at all, the municipal law of the country," says Blackstone, "then steps in and declares who shall be the successor, representative, or heir of the deceased, that is, who alone shall have the right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion."

The civil law has endeavoured to remedy the anomaly of inheritance, by the fiction of considering the father and son to be the same person, and that the inheritance does not in fact descend, but continues in the hands of the survivor. *In suis bæreditibus evidentius apparat continuationem dominii eo rem perducere, ut nulla videatur bæreditas fuisse, quasi olim hi domini essent, qui etiam vivo patre quodammodo domini existimantur unde etiam filius familias appellabatur sicut paterfamilias.* The rule that *bona vacantia* escheat to the Crown is founded on the natural law of occupancy, for when no disposition of property has been made by the deceased, and none such heirs as the municipal laws require exist, the property lapses to the sovereign of the state, who, as representative of the nation, takes such *bona vacantia* into possession, and administers them for the good of the nation at large, of which every member is supposed to have his proportion of benefit.

Although it may be presumed that wills were unknown among half-civilized nations, yet in some cases it would appear that a legal succession was acknowledged. Thus, Tacitus asserts that the Germans made no wills, but that the children succeeded as a matter of course to the heritage of the father; not, it is presumed, on so subtle a fiction as that of the civil law, but rather upon the more practical principle of their being the first occupants on the father’s death, and having the best claim to the benefits of the industry of their deceased parent, whom they had probably assisted in his labours during his life. The known rule of the Jewish law favours this view, for we find Abraham expressly declaring that, "since God had given him no seed, his steward Eliezer, one born in his house, was his heir," being in the place of a son, and who had assisted him in word and deed during his lifetime. From this state of things the transition to formal testaments may easily be conceived, towards which a declaration on the deathbed would be the first step. This would in time be followed by an earlier declaration and understanding with the children, as we find a son claiming, during his father’s lifetime, the portion he would receive at his father’s death. For greater certainty, this oral declaration would be superseded by reducing the same to writing, when habit and civilization had rendered the practice of writing more easy and usual. To this step we may readily conceive that formalities and other improvements would be added with a view to prevent fraud. This system, more or less perfected, and varying according to local customs, has rendered a system of complete testation

1 P. 28, 2, 11.  
2 De mor. Germ. c. 20.  
3 Gen. xv. 3.
universal,—the origin of which few scrutinize, satisfied with the fact, the more or less so as they happen to be benefited by it, or the reverse.

§ 1213.

The first nation who reduced the law of succession and testament into any fixed and systematic form appears to have been the Greek, into which Solon introduced it, and whence the Romans borrowed this, as well as their other laws, and so improved it that it has remained the foundation of the system of all nations down to the present time.

Roman testaments were ancienely of two descriptions, those made in pace, and those made in procinctu, and both are referable to the highest antiquity, so much so as to have become obsolete even before the age of the Twelve Tables. Plutarch mentions the latter having been made under M. Carisolanus, who lived before the Decemvirs, but the same author mentions testaments in pace having been made under the kings, for Tarrutius, who lived under Ancus Marcus, is said to have left Lawrentia, the prostitute, his heiress by his last will; it is therefore an error to suppose that these species of testaments were incorporated into the Twelve Tables in imitation of the law of Attica.

A testament, according to the Roman law, is defined by Modestinus to be the legal declaration of our will concerning that which every one desires to be done after his death. Testamentum est voluntatis nostra justa sententia de eo quod quis post mortem suam fieri velit, it is testamentum, and not derived, as is vulgarly supposed, from the witnesses; thus, testari means to leave by will. Testaments are, therefore, not founded on natural, but on civil law; for justa, in this sense, means legalis.

§ 1214.

Testaments were originally considered of a nature so important as to require an express law in every particular case to render them legal, in the same way as in England, at the present day, the legislature reserves to itself the power of passing a particular law in each individual case to dissolve the otherwise perpetual contract of marriage; in like manner, testaments in pace were made in the comitiis calatis (convocatis), which probably proceeded on the idea that, on the death of the party, the property he left entered again into the common stock, and that its disposition could therefore only be directed and alienated from the public by

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1 Plato, de leg. 11, 679; Plut. Solon, 90.; Dem. Orat. in Shept. 2, 983.
2 The Gloss mentions endo procinctu; Justinian calls them testamentia procincta.
3 Carisolanus.
4 La vit. Romuli, 5.
6 P. 28, i, 1. Some consider this rather a definition of testament generally than of a testament, because it applies equally to a codicil or legacy, whereas a testament must contain the direct appointment of an heir.
7 J. 2, 20, § 34.
8 J. 2, 10, pr.
its consent, which may, indeed, be deduced from the form of words used, velitis jubeatis Quirites uti, L. Valerius and Titio tam jure legque filius sibi siet, quam si ex eo patre matreque familiis ejus natura esset, utique ei vita necisque in eum potestas siet, uti patri endo filio, est hae ista uti dixi, ista vos quirites rogo; the votes in such cases were probably given by silence, that is, by no one opposing the measure, as it is morally impossible that formal votes could have been collected in each case, though indeed it is probable, that more successions were by law than testament. These comitia, termed from the Greek καλέω, or possibly from the kindred Pelasgic word of like import, to convok, and hence termed also convocata, were assembled by the lictors, curiatim, or in curias, and the centuriata, by the sound of a trumpet, for the institution of a member of the college of the pontifices, or for the purpose of inaugurating the rex sacrorum or flamen, the principle being that inasmuch as a law can only be superseded by a law, on which ground many suppose that pacta successionia were void, because privatorum cautio legum auctoritatem non censebantur, and jus publicum privatorum pactis mutari non poterat; moreover, nothing could be changed in the sacra privata without the intervention of the pontifices in whose province such matters lay, and in this case the estate was passed to the heir; in like manner, the pontifices were to be consulted in cases of adrogation, this, then, is probably the better reason.

§ 1215. As the Romans at an early period were almost constantly concerned in war, and as persons about to enter into battle felt, more than any others, the necessity of making their wills, a field testament called in procinctu was, ex necessitate rei, considered of equal validity with that made in time of peace or at home in the comitia calata. At this period of the Roman history, the army, too, was composed of persons of a better class than in later times,—in short, of those belonging to the National Assembly, who, standing in procinctu, before the army arrayed, or cinctu gabinus,—hence the term, with their shields on their arms and cloaks wrapped round their shoulders, saga adcingentes, named their heirs in the hearing of three or four persons, attested by the then customary auspices and religious observances, which was the origin of the privileged will of military men, which will be noticed later in its individual bearings and effects.

1 Aul. Gell. N. A. 5, 19; Id. 15, 27.
2 Thomasius, Diss. de princ. init. succ. test: § 12.
3 Bynkershoek, obs. 2, 2, p. 113.
4 P. 38, 16, 16.
5 P. 2, 14, 38; Theophil. ad I. 2, io, § 1.
6 Cic. pro domo 13, vide et § 704, h. op.
7 Serv. ad Virgil. Æn. 7, 612; Vell. Patern. 2, 5, as to the emperors using this gabinus cinctus, Liv. 8, 9, 10 & 10, 7, 28, 29 & 26, 11.
8 Gaius, 2, 101; Theophil. 2, 10, § 1; Festus v. procinctu.
9 Plut. in Carol. 9, τρίτων καὶ πέτρας, it is doubted whether this should be και or ἤ, whether either may not be con- or dis-junctive in point of fact, if seven witnesses were not required.
An interesting fragment still exists in which the ceremony is described:—(Ut) in exercitu... m imp... umque erat in tabernaculo in sella... ensa auspicebatur coram exercitu pullis e cavea libertatis... circa sellam suam... obnuntiato a... (p)ullum... mum quisquis... tripudi... ntia. Silentio deinde facto, residebat et dicebat. Equites et pedites nomenque Latinum... le(s) cincti armati paludati... estis secuti... dum sinistrum solistimum quisquis vestrum viderit... Deinde... obnuntiato dicebat... uti placet legionibus invocarentur faciantque quod (ipse) sperabir... e(imp)... fidemque m... ducat salutareque. Si et viro suo capraelium... ineant. Deinde exercitu in aciem educto iterum... tur. Interim ea mora utebantur qui testamenta in procinctu facere volebant.


If the witnesses were then really seven, the sacred rites were duly observed. There appears no material difference between this testament and that made in time of peace; there were repre-

1 Sabidius com. xii. salior. vid. Scholiastis on Virgil, published by Angelo Majo.
2 The Codex, according to Mai, seemed to have libertatis.
3 Tripudiantia is not the MS. reading, as Mai observes, there being a space for about four letters.
4 So in the MS. Mai.
5 Which may be rendered as follows:—According as his jurisdiction and command over the army authorized him, he used to sit in a seat in his tent, and to take the auspices in the presence of the army, the fowls being liberated from the cage into the space around his chair. An adverse augury not having been announced anywhere, he said,—“Whosoever has seen a fowl feeding greedily, so that the corn falls and rebounds from the ground, announce it!” A sacred silence having then ensued, he sat down again, and said,—“Cavalry and infantry, and ye of the Latin nation whosoever being armed, and clothed in your military garments, are here present, if any of you shall have seen an auspicious rebounding of corn from the ground, announce it!” Thereupon, the omen being nowhere announced to be adverse, he said,—“Let the Gods, if it please you, be invoked by the legions, and let them do whatever may be commanded them, as may be most conducive and salutary to the public weal and credit. Call the men, let them draw up in battle-array.” Whereupon, the army being drawn out in line, he again takes the auspices. In the mean time, those who wished to make testaments, in contemplation of battle, profited by this delay.

* The lacunae have been supplied by the Rev. Churchill Babington, M.A., Fellow of St. John’s College, Cambridge, the learned commentator on the mutilated Oration of Hyperides, lately discovered by Mr. Harris of Alexandria, published at the University Press, Cambridge, 1849.
sentatives from all the curiae, who were necessarily present, and the only difference was in the place and the fact of the imperator exercitus performing the religious ceremonies instead of the Flamen.

These wills made in procinctu were presumed valid by the tacit consent of the populus as νόμος δυραφος, in the same way as those regularly made in the comitia obtained validity as νόμος δυραφος.

This testament was only used in times of danger; although, in later times, we find the rule relaxed.1

As to the duration of the validity of these testaments, it is probable that they were only available pro re nata,—i. e., if the testator died through the impending danger, but not otherwise; and, in this respect, may be compared to the donatio mortis causae.

§ 1216.

Before the introduction of the Twelve Tables, it appears that the practice of making testaments in the comitium had become obsolete, and it was then enacted,—Pater familias uti legasset super familiae pecuniae tutelae suae rei ita jus esto,3 giving a general power of testation, and dispensing with the former troublesome solemnities, but prescribing no particular form, which it left to the ingenuity of the patricians, then the lawyers of the time, who, assimilating this to other transfers of property or family, introduced the form per æs et libram, or the fictitious sale before so often alluded to, at the same time it is supposed, as the legis actiones were promulgated by Flavius and Aelius in this mode, so things were done familia mancipatio and mancipatio testamenti; in this there were present the familia emptor, the libripens, and quinque testes, Roman citizens of full age, in whose presence a fictitious sale of the inheritance was effected;4 indeed, some suppose this form to have existed in the Twelve Tables, qui si sinit testatur libripensve fuerit, ni testimonium fariatur improbus intestabilique esto,5 but it is agreed that it did not allude to wills, but to those admitted as witnesses, or libripendentes; and, again, qui nexum faciet mancipiumque, ut lingua nuncupassit, ita jus esto, but this does not refer to wills, but to mancipationes in general. To return to the form of testation, the testator holding the tablets said,—Uti in bis tabulis cerisve scripta sunt, ita do, ita lego, ita testor, ita que vos Quirites testimonium prabitote6 cera, alluding to the wax with which the tablet was covered and not the seal; the last words contained the testing clause, whereupon the testator touched the ears of the witnesses,7 in token that they should hear and bear witness to

1 Cesar de Bell. Gall. 1, 39; Flor. 3, 10.
2 Cic. de Orat. 1, 55; Paterc. 1. c.
3 Ulp. Fr. 11, 14; P. 50, 26, 53, pr.; I. 2, 22, pr.; Nov. 28, 2; Cic. de Juv. 2, 50; Auct. ad Herenn. 1, 13.
4 Quinct. Decl. 308.
5 Ulp. Fr. 20, 9; Isidorus, Orig. 4, 24.
6 Zeux [sic] ðròv ðòv òphòiì, kai τοῖς ὀργανοῖς, Clem. Alex. Strom. 5, p. 574.
his deed, nor were they called upon to subscribe their names, till this was in later times required by the praetor,\(^1\) probably with a view that they might subsequently be found and known if required.

The Mahommedan will\(^2\) required two credible witnesses of the Mussulman faith, if such could be had, but otherwise when travelling of a different tribe or faith. They may be required to make oath not to betray their trust; and if they be suspected of having done so, other witnesses may be adduced to contradict them.

The English law now requires, by the last Will Act,\(^3\) that there should be two witnesses, present together at the same time to render a will valid, who shall see and attest the signature of the testator, or his acknowledgment thereof in writing, otherwise the act is void, and the estate passes to the heirs at law.

\(\$\) 1217.

When the testaments came to be reduced to writing, they were sometimes written by the testator himself, and then called chirographa or holographa—sometimes by friends, slaves, or freedmen, and then it was called allographa, though often drawn up by legal men, but not by the heir; although there is a middle age adage little flattering to the profession, a testamento dolus malus et jurisconsultus abesto, which certainly places us in no very creditable company.

The testament must be written in clear legible characters,\(^5\) que in testamento ita scripta sunt, ut intelligi non possunt, perinde sunt ut si scripta non essent, and formerly the Latin language was invariably to be used; although, according to Ulpian,\(^6\) fidei commissum would be good if written in Greek. Many tablets might be used as duplicates,\(^7\) thus, a duplicate might be deposited with friends or in the temple of Vesta, which appears to have been considered by Julius and Augustus Caesar\(^8\) as a sort of prerogative office. In England, a will may be recorded and registered at Doctors Commons during the testator's lifetime.\(^9\)

\(\$\) 1218.

The praetors, by their edict, introduced amended forms of testation, called the testamentum pratorium, which superseded the system of mancipation by fictitious sale.

The praetorian testament was, nevertheless, of great antiquity; for we find an edict of Verres, as praetor, si de hereditate ambigatur et tabulæ testamenti non minus multis signis, quam ex lege

\(^1\) I. 2, 10, § 2.
\(^2\) Al Koran Sura 5, intituled “The Table.” Sale's translation, p. 89, vide et Al Beidawi.
\(^3\) 1 Vic. 26, 1838, does not apply to wills made before 1838.
\(^4\) P. 28, 1, 28.
\(^5\) P. 50, 17, 73, § 3.
\(^6\) Frag. 25, 9.
\(^7\) I. 210, § 13; P. 28, § 1, 24; P. 37, 11, 1, § 5.
\(^9\) Swinb. Pt. 6, § 13, pl. 1. As the will does not take effect till after death, the probate is not issued, for the testator may still alter it. Voluntas testatoris ambulatoria est usque ad mortem.
Formalities.

Component parts of this testament.

Solemn, insolemn, privileged, and oral testaments.

The solemn private testament must be formal.

§ 1219.

By the civil law, a testament is either privatum or publicum; it might be solenne, and common to all the citizens of Rome, or insolene, or privilegiatum, attaching to one class only; it might be scriptum or nuncupativum, and the solemnities or forms attending it might be of an external or internal nature; these particular details are here considered in their order:—

§ 1220.

A testamentum solenne privatum requires many formalities, a strict observance of which was essential to the validity of the testament; the burden of proof of their omission, however, lay upon him who would impugn the will, for the presumption of law is, that all formalities have been observed until the reverse is proved.

Some lawyers draw a distinction between a trifling and a serious omission, but where is the line to be drawn? It must therefore be assumed that there cannot be in the eye of the law a signet ring; suppose it be sealed with a coin? semble, it is void. Leysor sp. 3 med. 6, spec. 355, med. 5, et in suppl. ad spec. 351, vol. 2, p. 209, Decis. Cassell. 2, dec. ult., P. 50, 17, 183, does not apply to a testament.

* As, for instance, the heir being one of the witnesses.

1 Cic. in Verr. 1, 45. 2 I. 2, 10, § 2. 3 I. 2, 10, § 3. 4 C. 6, 23, 28, § 1. 5 Nov. 119, 9. 6 I. 2, 10, § 14. 7 Puf. 2, obs. 1444, p. 498; Strube 5, B. S. 46. 8 A testament must be sealed, annulo, with
any distinction between the most trifling and the most serious informality, neither can the law recognize degrees in correctness. This testament requires the following formalities:

1. That it be duly engrossed.
2. That it be duly subscribed by the testator.
3. That it be attested by competent witnesses.
4. That the attestation take place in conspectu testatoris.
5. That they be duly summoned.
6. That there be a unity of time and act.
7. That it be duly superscribed and sealed by the witnesses.

§ 1221.

As regards a testamentum solenne, it was necessary,—

1. That the testator write his own will, or dictate the same to another to be written; but the heir or legatee is punishable if either of them presume to write it.

By the law, as reformed by Justinian, it is not imperative on the testator to use any particular language, but it must be written with letters, not unusual characters, notis, and be clear and precise in its meaning. It is not prohibited to write numbers with figures.

The testament may be written on any substance: the Romans used white tablets covered with black wax, which, when scratched off by the style, left the writing white. Ulpian says a testament could be written upon charta deletitia: it appears this can be written on both sides, ὀπισθόγραφος. There has been much dispute about this word: some think it was paper with a former writing erased; others that with foreign written matter on the back,—but there can be no doubt that charta, ὀπισθόγραφος, be it papyrus, paper, or parchment, was a substance which would bear writing on both sides.

2. That the testator subscribe his testament, unless he write the whole himself, in which case it is called holographum (ὅλογραφον) or chirographum (χειρόγραφον); but if he cannot write, he could get a person to write and sign for him, and the circumstance must be evident upon the face of the instrument as C. Titius nomine testatoris.

3. That not less than seven witnesses, male citizens of Rome, then fourteen years of age at least, qualified to be present at a solemn act, themselves capable of testation, attest the signature of the testator; thus it is not sufficient that they be merely credible witnesses, and hence the exclusion of certain persons, as follows:

1 Westphal. in Koppen's Archiv. Jurisprud. 2, B. 293; P. 4, 1, 7.
2 I. 2, 10, § 4 & § 12.
3 C. 9, 23, 3.
4 P. 37, 17, 4; Leyser Sp. 273, med. 2; Textor diss. de opisthographo, pt. 1, p. 426, sq.
5 de Colquhoun.
6 C. 6, 23, 28.
7 I. 2, 10, § 3 & § 6, 7, 8, 9, 10; X. 3, 26, 10.
8 Martucius, var. expl. I. C. lib. 1, c. 38; Vinn. ad I. 3, 10, § 6, n. 2, gives other reasons, but this is evidently the more logical.—de Colquhoun.
Disqualified are

(a) Women not being permitted to be present at the Roman assemblies, were necessarily excluded from the solemnities which accompanied the act of making a will.\(^1\)

Impubes,

(\(\beta\)) An impubes is disqualified for the same reason,—and because he is under the control of another, without whose co-operation he can do no act, even where he alone is concerned.

Furiosi,

(y) Madmen, furiosi, for neither is such an one capable of knowing what he does, or of bearing credible testimony to it afterwards; moreover, his free will is vested in another, his curator.\(^2\)

Prodigi,

(\(\delta\)) Prodigals judicially declared to be so, because in the eye of the law they are quasi furiosi.\(^3\)

Servi,

(\(\epsilon\)) Slaves,\(^4\) for they are not recognised as persons in law.

Peregrini,

(\(\zeta\)) Strangers, peregrini, are excluded for the like reason.

Improbis,

(\(\eta\)) Improbis, or criminous persons who have been condemned for a public offence.\(^5\) By the imperial constitutions, apostates and heretics are brought under this denomination.\(^6\)

Muti et surdi,

(\(\theta\)) Deaf and dumb persons, surdi et muti.\(^7\) The first are incapable of hearing the words of mancipation, or, if it be an oral will, of hearing the contents; the latter, because they are incapable of giving testimony when the will is opened. These reasons apply more forcibly to such as are both deaf and dumb; and whoso is born deaf must necessarily be also dumb.\(^8\)

Cecis,

(\(\iota\)) Blind persons, ceci, are not absolutely excluded.\(^9\) Now, it would appear a blind man can certainly not be a witness to a written will, but can he to a nuncupative one?\(^10\) In the first case, he can recognise neither the signature of the testator nor his own seal and signature, nor supply by his evidence the testimony of deceased witnesses; in the second, the only objection appears to be that he cannot see the testator,\(^11\) and this objection appears fatal from the incertitudo voluntatis et persona. In a written will, if transported after signature, it might be falsified; therefore the witness must see the testator sign. But the law speaks only of written wills; this, therefore, forms no ground in the case of an oral one, and the disqualification must be argued upon the basis of uncertainty as to the person of the testator, and of the fact requiring vision.

Heres,

(\(\kappa\)) The heir himself is disqualified because he is a successor juris, representing the testator, and being the familia emptor, and interested in the will, and cannot therefore be a witness in his own

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1 P. 2, 10, 6, § 1.
2 Vid. § 772 et 775. h. op.
3 Vid. § 775 et 772, h. op.; P. 27, 10, 3; P. 26, 5, 12; P. 50, 17, 40.
4 P. 26, 1, 20, § 10; P. 22, 5, 1, 3, § 2.
5 P. 47, 10, 5; P. 28, 1, 18, § 1 et 26.
6 C. 1, 7, 3, ch. 4; C. 1, 5, 44. Manichaeans and kindred sects are utterly excluded; all other heretics as against orthodox Christians, but their testimony is valid among each other.
7 P. 2, 10, 6, § 1.
8 P. 47, 10, 5; P. 26, 5, 12.
9 Laurich de caco idoneo in testat. teste; Koch Progr. de con. spectu testatoris.
10 Vin. ad I. 2, 10.
11 Wahl. diss. de justa liberos heredibus instit. forma, p. 36; C. 6, 23, 9.
cause totum negotium, quod agitur testamenti ordinandi gratid, creditur inter testatorem, et heredem agi; haeres sibi testamonium praestaret, there being a fictitious unity of person between the testator and the heir.

(λ) The paternal power will also constitute an impediment Patria potestas, under certain circumstances:—

a. The father cannot use his own filii familias as witnesses, by reason of unity of person; and,

b. E converso, the testator must not be under the paternal power of the witness, for it has been seen that a filius familias can dispose by will of his peculium castrense or quasi castrense.

c. The heir and the witness must not be under the same paternal power; a filius familias cannot be instituted heir, and his pater familias be one of the witnesses, on account of the unity of person; but mere consanguinity is no impediment,—thus, sons who have passed from under the paternal power of the testator can be witnesses, or the sons of an emancipated son, or a son who is not instituted heir can witness the will of his mother or his maternal grandfather. Even so little is the connexion of witnesses among themselves an impediment,—thus, a pater and filii familias can witness the testament of a third person, nor would a pater and his six filii familias be considered to be one person, and legatarii or fidei commissarii singulares are good witness to written or oral testaments, for they are not juris successores. Mistakes, however, as to the person or their quality have been held not to invalidate the act, thus a man bond, but reputed free, or a woman in man’s clothes supposed to be a man, would not invalidate the testament which they signed as witnesses.

4. The testament must be signed in sight of the witnesses, in conspectu testatoris testimoniorum officio fungii. The signification of the word conspectus has been disputed,—some supposing it to be the mere presence, others the actual sight, for it may be dark, or the will executed behind a curtain; again, it is doubted whether the testator and witnesses must reciprocally see each other. Now, if the word conspectus rather imports actual view than mere presence, which would be devoid of sufficient certainty, the object is proof of a fact after death, therefore it must be immaterial whether the testator see his witnesses or not, so long as they see him perform the act of signing, so as to be able to bear testimony thereto; hence it follows that there must be sufficient light in the room, and that the witnesses may look through the bed-curtain to see the testator sign without being seen; as regards the testator, then, it suffices that conspectus be construed presence, but as regards the witnesses, it must be construed view.
5. The witnesses must have been summoned specially for the purpose, *specialiter rogati*, because the fact of a special summons impresses the circumstances on the mind; hence, if they were fortuitously together, they must be then especially requested to act as witnesses; the origin of this *rogatio* is to be sought in the quiritian transfer by sale often before alluded to. On one Domitianus Labeo asking Juvenius Celsus—*An testium numero habendus sit is, qui cum rogatus esset ad testamentum scribendum, idem quoque cum tabulas scripsisset, signaverit?* Celsus answered,—*Aut non intelligo, quid sit, de quo me consuleris, aut valde stulta est consultatio tua.* Plus enim quam ridiculum est, dubitare, an aliquis jure testis adhibitus sit, quoniam idem et tabulas testamenti scripsit;¹ hence silly questions are, in jurisprudence, termed *questions domitiana*, and coarse answers *responsiones celsina*.

6. The *unitas temporis et actus*, otherwise called *unus contextus*, was another indispensable requisite. The *unitas temporis* applied not to the writing of the testament, but to its external formalities, for the testator might be as long as he pleased composing it; but no business of a description foreign to the object for which the party was assembled must intervene, such as a bargain or the like, for hereby the *unitas actus testandi* is interrupted, and it is necessary the witnesses and testators should remain together until all is finished.

In a nuncupative will, the *actus* began when the testator called upon the witnesses to give ear, and ended when he had finished his declaration.

In a written will, it began when the testator called for the attention of the witnesses, and ended when the last had signed.*

Adsignatio.

7. The testator and witnesses must seal and sign after the testator. The first must be done with a signet, whereupon there is some device, so that it may readily be recognised, but all might use the same, a signet ring being *symbolon* or type of stability;² but a notary must use his own seal,³ for that is of public authority: these seals were exterior upon the linen in which the tablets were enveloped to prevent their being opened and the contents divulged, lest the heir should be induced to hasten the falling in of the inheritance by undue means.

It is a matter of doubt whether the witnesses were required *subscribere* or *superscribere*, that is, whether they wrote on the tablet after the testator, or outside opposite to their respective seals, or both.

The word *adsignare* is used in the Pandects, but *subscribere* in the Institutes. *Superscriptio* might be alone sufficient, but *subscriptio* would evidently not be so; for if the witnesses signed at the foot or end, and not outside, it would be impossible to ascertain who the witnesses are to summon them for the verification of their seals, until the testament had been opened.

¹ P. 28, 1, 27. ² C. 6, 23, 21. ³ P. 28, 1, 22, § 5. ⁴ Nov. 73, 5 & 6.
It is possible that, in Justinian's age, testaments were not so carefully sealed up under cover; hence the word adsignare gave place to subscribere, for they must write on the will itself if not enclosed; and adsignare, to affix a signature, is nearer to subscription than to subscription.1

§ 1222.

It may easily happen that some of the witnesses may be absent on the opening of the will; this, however, will not invalidate the will, for they may be made to come and verify their seals by the prætor; and if the major part of them be found, the testament may be resigned and recited, or the tablets may be sent to them to be so acknowledged, to avoid inconvenience and damage to their affairs. Tabulae testamenti aperiuntur hoc modo, ut testes, vel maxima pars eorum, adhibeantur, qui signaverunt testamentum, ita ut, agnitis signis, rupto lino aperiatur et recitatur.

§ 1223.

The capacity of the witnesses is to be regarded, not at the time of the testator's death, but at the time they bore witness; a testament will not, therefore, be invalidated by any subsequent change in the civil condition of the witness; thus a witness may have undergone a capitis diminutio subsequently, been taken captive, &c., nor for any incapacity at the time itself; thus, if the witness were supposed to be of full age, whereas he was not, or supposed free when he was in fact bond, yet, if generally reputed of full age or free, he will be adjudged a valid witness.

It has been observed, that though the heir and his family are excluded on account of the unity of person, yet legatees were admissible as good witnesses; also a fidei commissarius particularis, because he cannot be juris successor; not so a fidei commissarius universalis, who could be so.

If any of these solemnities were omitted the testament was invalidated, nor could it be supported as a nuncupative will, if it can be reasonably presumed that the testator had the intention of expressing himself in writing.

Wood, in his Institute of the Civil Law,3 observes upon this passage, "Hence hath arose a question in conscience and natural reason, whether advantage may be taken against a testament for want of a solemnity required by law, when it plainly appears to be the testator's mind that the estate should pass according to the declaration therein mentioned? Those that deny it proceed upon the supposition that testaments are the effect of a natural right; others that maintain the affirmative insist, that for prevention of

1 P. 28, 1, 22, § 4; I. 2, 10, § 3.
2 P. 29, 3, 4, § 6 & 7; Paulus R. S. 4, 6, 1; P. 28, 1, 22, § 4; P. 28, 1, 30.
3 L. 2, c. 4, p. 178.
4 Which, it has been seen, is clearly not the case.
frauds in testaments, it is necessary to keep up the strict solemnities prescribed by law. But if an heir has entered upon an estate by virtue of some testament defective in the solemnity, if he is satisfied that such was the intent of the testator, he is not bound to relinquish the estate, if the heir-at-law, out of a generosity of mind, or through negligence, will not make any claim to it."

§ 1224.

Independently of the advantages of proof supplied by a written will, there is the advantage which the testator has of concealing till his death the name of his heir, and the other dispositions contained in it from the witnesses; neither can the heir be obligated to open the testament until the ninth day after the decease of the testator, after which it may be opened by him, or by any who may have an interest to see or hear it; the facility, too, with which duplicates may be made materially enhances the advantages of the written testament.

§ 1225.

Nuncupative testaments are such as at the time of the making were not committed to writing,—for if this be done afterwards, pro memoriar and proof, it is still no written will, but a nuncupative one; they were made by declaration of will before seven witnesses,—thus they differ in nothing from written wills in respect of solemnities, except that they need not be reduced to writing, and that the witnesses neither seal nor superscribe them, it being sufficient that they hear them read, see the testator, and understand whom he appoints his heir; their efficacy is equal to that of a written testament, their antiquity greater, they having been probably in use before the invention of letters, at the same time, their certainty is naturally much less.

§ 1226.

Other persons, by a parity of circumstances, were also entitled to restricted military privileges,—viz., all civilians attached to the army, chirurgeons, the members of the commissariat, field preachers, bakers, accountants, and the like,—nay, even camp followers, soldiers' wives, volunteers, and the like. Such persons enjoyed this privilege only in impending danger, si in hostico loco deprehenduntur; hence the army must be in battle-array—the fight imminent—after it is in retreat, or in a besieged place, and the testator must die on that occasion.

Before the age of Ulpian deaf and dumb civilians could not

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1 C. 6, 23, 21.
2 Nov. 113, § 5.
3 I. 2, 10, § 13, so termed quid haereditem nuncupavit.
4 I. 2, 10, § 13.
5 C. 6, 23, 26.
6 C. 6, 23, 26.
7 Ulpian, I. 29, 7, 44; C. 6, 21, 16; Westphal. Test. § 729.
testate; but a soldier who, in Ulpian's age, had become deaf and
dumb from wounds, and had not obtained his discharge, *mutus et
surdus nondum missus* (for such person could hardly be available
for military purposes), might do so in virtue of his military
privilege. Now Justinian gave civilians this privilege, and
Höpfner\(^1\) thinks that Tribonian copied the passage of Ulpian
into the Institutes,\(^2\) *quin etiam mutus et surdus miles testamentum
facere potest*, without reflecting that the general law covered them.
But here the difficulty may perhaps be also explained by supposing
not merely that they could testate, but could do so militarily;
or it may relate to the former sentence, where the words *ita
locutus est* are used referring to the testator, and *audisse* to the
witnesses, for it is a question of an oral will; and, inasmuch as
the deaf and dumb soldier could not speak, he may have been
allowed to designate his heir by intelligible signs without writing.\(^3\)

\section{§ 1227.}

A testamentum, *minus solenne scriptum*, was one which might
be valid notwithstanding the omission of all or some of the above
solemnities; the most highly privileged of this class was the
testamentum militare, on account of the unsettled life, constant
dangers, and unskilfulness in letters of the soldier, this privilege
existed before the Twelve Tables; this testament was then made
in the manner described, more particularly where the *testamentum
in procinctu factum* is treated of.\(^4\) *Unitas actus* is indispensable.

In Cicero's time it had ceased to exist; but Julius Caesar, Titus,
Domitian, Nerva, and Trajan revived this privilege, and Ulpian\(^5\)
tells us that it was founded in the constitutions of the emperors.

Before Justinian's time it was clear that the soldier might use
his privilege at any time, whether he were about to go into battle
or not, indeed, so long as he was a soldier; but after that period
it was limited to his being *in expeditione*, upon which term the
question rests: some maintain this to signify that he must either
be in camp\(^6\) or garrison on the frontier, while others extend it to
those in winter quarters or inland garrison upon duty, because
they may be called upon to march on sudden expedition; but
the most general opinion is, that the privilege extends not only to
that period when he shall be *extra expeditionem* or *extra castra*,
on furlough, but to a year, over and above the date at which he shall
have quitted the service, so that if he die within a year, the testa-
ment made in the time of war is still valid as a privileged testa-

\(^{1}\) § 456.
\(^{2}\) I. 2, 11, § 2.
\(^{3}\) de Colquhoun.
\(^{4}\) Vid. § 1211, h. op. Justinian calls it
*imperita*; Trajan, *simplicitas militium*; but
neither are correct, because this is equally
applicable to other ignorant or simple people.
Ulpian is correct, however, in attributing it
to the *functio periculorum*—that is, the
impossibility, by reason of their dangerous
occupation, of observing the legal solemn-
ities.
\(^{5}\) Frag. 23, 2.
\(^{6}\) I. 2, 11, § 3. Theophylus says, soldiers
could not testate militarily, *σταυρός Λυπερ
dίαμεν δυνάμας ἀνάγκη*. Thib. l. c. § 842.
ment; his discharge must, however, be with honor,1 missio bonesta, or upon account of sickness, missio causaria, not for cowardice or any misdemeanor, missio ignominiosa, for this invalidates it from that moment; moreover, though the testament have been made before the war without the necessary solemnities, and he add to, or alter it in war time, it enjoys the privilege as a new testament. But if the soldier live in his own house,6 or in other places where there is no necessity of being in readiness for an expedition or any fear of danger, he does not enjoy the privilege of being exempted from the usual solemnities.

The privileges consisted chiefly in the following points:—

1. He may die partly testate and partly3 intestate; for if he appoint an heir to part of his estate, the residue shall devolve on his heir at law.

2. He may appoint heirs till a certain time, and from a certain time,4 in diem and ex die.

3. He may die with more wills than one,5 which, if not contradictory, are all valid, otherwise it depends on his declaration, which if it was in favor of many, these are treated as co-heirs.

4. He may pass over his children, without any necessity of disinheriting them by name,6 without risk of a querela nullitatis or inofficiis.

5. Strangers (non-citizens) and women7 may be witnesses to his will; and two are sufficient, though they are not specially summoned, and though they neither subscribe nor seal in the presence of the testator, indeed, though there be no witnesses at all, if the intention of the soldier be proved to have been expressed by words or writing, it is sufficient. Such writing may even be written in blood on his scabbard or shield,6 or in the dust with his sword, if he be at the point of death; but if he say in common conversation that such an one shall be his heir, it is looked upon rather as an artful way of pleasing, or the effect of sudden transport, than as a design of making his will,—this is a question of animus testandi, or intention.9

6. He may name a direct heir in a codicil.10

7. He may substitute whom he will.11

8. His will is not avoided by the subsequent birth of a posthumous child, if he expected at the time he made it such might be the case.12

9. He can name as heirs persons otherwise incapable of being so, as peregrini and collegia illicita. The exceptions to this are:—That he cannot appoint heretics heirs;13 he is bound by the

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1 P. 29, 1, 26.
2 I. 2, 11, pr.
3 P. 29, 1, 6.
5 Ibid.
6 C. 6, 21, 19.
7 I. 2, 11, pr.
8 C. 6, 21, 15.
9 P. 29, 1, 24; I. 2, 11, § 1.
10 Höpfner, l. c.
11 Vid. substitution mil. h. op.
12 C. 6, 21, 10; P. 29, 1, 7; Nov. 115, 3 & 123, 19.
13 C. 1, 5, 22.
Lex Ælia Sentia;¹ he cannot make a captatorial disposition.⁴

The conditio jurisjurandi³ was illegal, and every turpis conditio.

A mulier in quam turpis suspicio cadere potest,⁴ or quae stupro cognita in contubernio militis fuit;⁵ a civilian could, however, do so, except in a case of adultery;⁶ but a soldier could bequeath to his concubine.⁷

10. He may infringe the Faldician fourth with impunity.

Lastly, though a filius familias can make no testament, be he soldier, veteran, or pagan—in short, though he come within any of the above exceptions, yet he may so dispose of his peculium castrense, or quasi castrense, as to exclude his parents and children from any remedy by the querela inofficiosi testamenti; and if he be in a military position, so as to admit him under other circumstances to the military privileges, he can even make an unsolemn will with regard to such property, otherwise he is bound by the usual formalities, for the property of itself does not confer them.

§ 1228.

In addition to the military testament, there were others that were privileged or exempted from the ordinary formalities; and, first, testamentum principi aut judici oblatum. Such testament was termed public, and was usually legalized in the following way: in the first case, it was either declared to the prince in writing, in which case it was registered, or the testator declared his will before him, or his deputy empowered in this behalf at the testator’s request, or delivered to such person in writing; or, in the latter case, before the judge when the will is delivered to him in writing to be registered, or orally declared before him, or his deputy empowered in this behalf at the testator’s request,—here the prince or judge supplies the place of formalities, and witnesses are dispensed with, but the will must be in other respects formal, and, although the prince or judge could receive the testation by deputy, yet the testator could not depute one to deliver or declare his will before the proper authority—it must, moreover, if in writing, and the testator be illiterate, be read before such authority, or it is invalid. The Canon law requires that it be attested by a notary of the court, or two credible witnesses.⁹

§ 1229.

Testamentum parentum inter liberos. By this will is understood one by which the ascendents, as father, mother, grand-

¹ P. 29, 1, 29, § 1.
² C. 6, 21, 17.
³ P. 29, 1, 29, § 2; Höpfner, l. c. § 493.
⁴ P. 29, 1, 41, § 1.
⁵ P. 34, 9, 14.
⁶ P. 34, 9, 13; Voet. h. t. n. 3.
⁸ C. 6, 23, 19.
⁹ X. 2, 10, 1; X. 2, 20, 28; Müller ad Leyser, 3, obs. 625.
father, or grandmother, declare which child or grandson shall succeed. Constantine, Theodosius, and Justinian, settled this law, which is grounded upon natural love and affection, and to avoid the indecency of children afterwards questioning their parent's will for some trifling omission in point of form (except the unitasactus), but it was unknown in the classical age.

If this was a written will, it was merely necessary that it should be in the handwriting of the testator, or signed by him, together with a date; but, if nuncupative, two witnesses were required, not for mere formality's sake, but for proof. The proportion of the inheritance destined for each child was to be clearly expressed,—as, "my eldest son shall have a seventh part,"—an exact date being thereto affixed.

It has been questioned if parents could disinherit their children in this species of testament,—but why not? as it can be done in all other privileged wills. It is to be observed that the testator cannot institute any stranger his heir; but it is a moot point whether he can leave a stranger a legacy. Höpfner, on good grounds, answers negatively; but the example he adduces is badly chosen, for he takes the case of the testator's wife,—now, as the wife might or might not be by fiction filiafamilias, according to the form by which she was married, this probably is the only case in which a person not related by blood to the testator could take part in it.

The difference between this and the divisiointerliberosis, that, in the first case, the children are made heirs and inherit ab intestato, and, if one get more than another, it is to be considered a prelegacy.5

§ 1230.

In testamentisrusticorum five witnesses were sufficient, on account of the difficulty of obtaining witnesses in retired spots; but the testament will be void if it were in the power of the testator to have procured seven witnesses, and he only took five or six. Any one witness may subscribe for the others,—this goes on the presumption of the illiterate state of peasantry in general; if, however, the testator could have obtained better educated witnesses, and did not do so, his will will be bad. Unitasactusis requisite.

On this head two questions arise,—first, have peasants alone the privilege, or any one living in the country, as for instance, a parish priest, country gentleman, or traveller who falls ill? Höpfner thinks that it extends to these latter also, for the ground on which both claim is the same.5
The second question is, on whom the onus probandi lies, in case it be asserted that more than five witnesses, or that better educated ones, could have been found? As the presumption here is against the probability of such being the case, the plaintiff will be bound to prove that there were such witnesses, for the defendant cannot be bound to prove the negative.1

§ 1231.

Another privileged testament is that made in time of plague; this originates in the difficulty that would arise in finding seven persons who would assemble to witness the will of one sick of a contagious or epidemic disorder; hence the law allows that they be got one after another as the testator best may, to hear the declaration of his will, or sign it, if in writing. The case given in the law supposes seven witnesses to be assembled to witness a will, and one falls suddenly ill, whereupon the others disperse from fear of contagion, and the actus is thereby interrupted.

This is a moot point,—can the unitas actus be dispensed with? the law must be interpreted in the affirmative. Many other questions may arise,—the epidemic must be so bad as to deter men from assembling generally. The degree of the contagion must be considered, also whether it was in the testator's house, and if the testator was ill of the epidemic, &c. Again, does the testament lose its force after the cessation of danger, if the testator have not died of it?—some say in a year; the general opinion is, that once good it will remain so, because of the absence of any law to avoid it.4

§ 1232.

Intestate heirs who have been excluded by one will, may be reinstated in another and subsequent one, which will be valid notwithstanding some formalities be wanting; as, for instance, when five witnesses only are present. The ground given is the favor shown towards the intestate by the lawgiver.5 Unitas actus is necessary.

§ 1233.

As it is not likely that the Church would lose anything for want of obtaining a privilege, any testament ad pias causas may be informal; under this head come wills in which anything is left to the poor, a church, monastery, or nunnery, hospital, orphan asylum school, provision for poor girls or students, &c., and the pretended ground for allowing the exception is the philanthropy

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1 Philippidiss. de test. hom. rural. 2, § 5; Stryk. l. c. § 9; Brunemann ad L. fin. C. de test.; Contra, Hommel in rhap. obs. 452, p. 470. 2 C. 6, 23, 8.
3 Bachov. ad Treutler, vol. ii. disp. 7, th. 6, lit. 2, p. 282; I. Gothofr. diss. de test. temp. pestis cond. in op. p. 627, sq.; C. id. 8 & 26; Stryk. l. c. 11, § 3; Leyser, op. 368, med. 1.
4 So Thib. l. c. § 848. 5 P. 28, 3, 2; C. 6, 23, 21, § 3; P. 59, 10, 2.
and piety of the testator, whereas the reverse is the case, for natural affection for the heir, thus passed over to enrich strangers, is thus violated. This testament is good by Canon law, as far as the pia causa is concerned, in the absence of all external solemnities, if the contents be only according to law. Some lawyers think two witnesses necessary; the Pope requiring two or three witnesses probably only for proof in case of a nuncupative will. It is this robbery of heirs by oral wills, made in articulo mortis before two confessors present, that has been the origin of so much injustice, and created so justly an ill feeling against the priesthood, and which in England has given rise to various statutes calculated to restrain these scandalous impositions; the reason given is as jesuitical as the object of fraud is patent, quoniam scriptum est in ore duorum vel trium testium est omnem verbum. The unitas actus must, however, be observed.

§ 1234.

Every one whom the law does not preclude from making a testament, is at liberty to do so; generally, all have the testamenti factionem who do not lie under certain peculiar disabilities. The first and indispensable requisite is Roman citizenship: those who do, and those who do not come within this rule, will be seen on reference to a former part of this work. In the second category may be placed those whose reflecting powers are insufficient; or, thirdly, those whose corporeal ailments form the bar; and, fourthly, those whose crimes have been the cause of depriving them of this privilege.

§ 1235.

With respect to the first impediment, he who really has the necessary citizenship, but doubts the fact; and a son who is ignorant if his father, who is abroad, be dead or not, whether he be a filius familias or not, are, it is curious to find, excluded from the testamentary right; but soldiers form an exception from this rule.

These disabilities may be reviewed in the following order:— Filii familias, servi, captivi, extranei or peregrini, impuberes prodigi, furiosi, mentis capti, and muti and surdi criminosi. Whoever will make a testament must be either mater or pater familias. Thus, even a married woman, if not specially prohibited; for the Twelve Tables say pater familias uti legasset, for a filius familias cannot make a will even with the concurrence of his father, on account of the unity of person; an exception

1 X. 3, 26, 10 & 11; Merenda, consult. 4, 16; Fachin. 4, 3; Zoesius ad Decret. tit. de test. n. 22; Schilter, ex. 8, th. 14; Lauterbach, call. th. pr. tit. de test. nul. 50; Puf. 2, obs. 172; Struv. de caut. test. 12, § 4.

3 § 1221, h. op.
4 P. 50, 16, 120.
5 I. 2, 18, pr.
6 I. 28, 1, 15.
arose in later times, when the rights of the peculium adventitium became acknowledged, in which case the father's permission enabled the son to dispose of it by will. Filius testamentum facere non potest, quoniam nihil suum habet, ut testari de eo possit. Sed Divus Augustus M. constituit, ut filius familias de eo peculio quod in castris adquisivit, testamentum facere possit. The father can confer no privilege on the son which the laws do not authorize; thus, the son can freely dispose of his peculium castrense or quasi castrense, for he was looked upon as a pater familias to the extent of that property, and some would extend this to the peculium adventitium extraordinarium, but without sufficient reason.

But if a pater familias make his will, and then be arrogated, his testament becomes of none effect, irritum fit; a military testament always excepted. If, also, a filius familias not within the above exceptions make a will, and subsequently become sui juris, his testament is void, for the rule “once good ever good, and once bad ever bad,” obtains here; we have, however, seen how far a filius familias could give mortis causa with permission of his father, although generally both follow the same rule.

The want of a civil status deprives a man of the power of making a will,—thus slaves laboured under the disability.

Such as are captive with the enemy during their captivity, for they are in a state of bondage,—not so if made prisoners by pirates or robbers; but if the testator make his will before he be taken, and die in captivity, his will is good, for it was good in the beginning, in addition to which it is good by the Cornelian law, which feigned the citizen to have died at the moment of his being taken prisoner; the third case is this, that a citizen makes his will, is subsequently made prisoner, but regains his freedom and returns, in which case his will is good, jure postlimini. Hostages of war follow the same rules, for they are in the relation of prisoners. A Citizen sent in exilium loses his power of testation, for he has undergone a capitis diminutio which affects his civil state.

Extranei or peregrini, foreigners, formerly called hostes, who are not citizens of Rome, for they were presumed to be enemies,—which law was afterwards repealed.

Foreigners can make valid wills of personalty in England.

§ 1236.

Impuberes could do no legal act sine auctoritate, under fourteen years of age, or under twelve if females, for want of judgment;
but a will made upon the last day of the last year after six in the evening shall be esteemed to have been made when the day was expired, nor will his or her subsequently coming of age render it valid.

Prodigi—those declared so by authority. For this two reasons are assigned,—one, that he is civiliter furiosus; others, because he is forbidden the alienation of his property, by which mode (per æs et libram) testaments were formerly made. By the thirty-sixth Novella of Leo, the will of a prodigal was declared valid if it be in its tenor reasonable and not extravagant; but this Novella is not received in many continental States, yet the will made before the interdict will be valid.

It has been before remarked that spendthrifts, judicially declared to be so, are unknown to the English law.

Furiosi. Furiosi may make valid wills in lucid intervals (intervalla furoris), but a stupid man may make a will.

In England. This is the same in England; but one who is so stupid that he cannot count ten, or have no more sense than a child of ten or eleven years old, is precluded.

Mentis capti. Mentis capti (idiots), in adversâ corporis valetudine mentis captus, eo tempore testamentum facere non potest.

§ 1237.

Muti, surdi, et cæci,—this refers to a bodily rather than a mental disability. A man may be deaf and dumb, or only deaf or only dumb; if both, he is incapacitated; for, never having had the advantage of an education, he can form no idea of the nature of the act; but a deaf man, surdus, may make a testament, written or nuncupative, were he born so or subsequently became so. The mutus by nature or disease is not incapacitated from making a written will; but neither of these last could testate per æs et libram, because the first could not hear, the latter could not repeat, the name of the familia emptor.

There is one sweeping exception, in case any of these be proved to have a correct idea of a testament, and can express himself by words or writing, but not by signs.

Cæci. Coecus may make his will, written or nuncupative, a notary or tabularius, however, or eight witnesses, must be present. He must not only name, but exactly and circumstantially describe the heir, and make no error in the person. Should he have already made a draft of his testament, it must be read over to him in the presence of the witnesses, and he must declare it to be his last will; the notary and witnesses must then sign and seal. It is advisable,
but not indispensable, that the testator sign himself; hence the testament of a blind man is a mixture of a nuncupative and written will.

In all the above cases, it must be ascertained that the disease which has produced the corporeal defect have not injured the understanding.

§ 1238.

Criminous persons are incapacitated from testation as a punishment.

Traitors are those who have committed the crimem perduellionis, that is, have made a hostile attempt on the life or kingdom of the prince.

Heretics, or those who fall off from the Christian faith, Apostates, Jews, Infidels, and Manichæans who acknowledge two beings, a good and an evil, are incapacitated; if this apply to heretics generally, it includes Protestants.

Those involved in incestuous marriages,—their property goes to their children by a former marriage, if any; if there be none, it is confiscated; in this case, a marriage within the degrees prohibited by the Roman law is to be understood.

Libellers.

Capitis damnati,—the property of those condemned to servipæna was, before Justinian's time, confiscated in all cases; but by the Novellæ, the servus pæna and confiscation of goods was abolished in case the convict have descendents or ascendants of the first or second degree, otherwise the property vests in the fiscus, but the relations obtain the property by "grace of the law," and not as heirs; consequently, in all these cases, the convict can make no will, having nothing to leave.

Manifesti usurii, notorious usurers, are, by the Canon law, punished by loss of the right of testation, all taking of interest being contrary to the Canon law.

§ 1239.

On the other hand, some persons were incapacitated from receiving by will the property left to them.

Foreigners—sons of traitors against the prince—apostates from

1 C. 9, 8, 5.
2 C. 1, 7, 1.
3 C. 1, 57, 4; 5; vid. § 1121, h, op.
4 Nov. 12, 1.
5 C. 5, 5, 6.
6 Nov. 22, 8.
7 Nov. 139.
8 In. vi. 2.
9 The words of this despotic law founded on the unitas persona of the testator and heir, or father and son, are:—Fili i vero eis quisquis vitam Imperatoris specialiter lentitate

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the Christian faith—heretics (Justinian only alludes to Manichaens) interpreted generally according to Frederick II. and the Canon law\(^1\)—the community of Jews (single Jews may be instituted), corpora illicita, these were called institutiones odiosa. Lastly, the prince to sustain a litigious title.

A man or woman who has married again, having children by the first marriage, can leave to all the children of the second marriage a sum equal only to the share of that child of the first marriage who gets least; this applies to all the different modes of transferring property mortis causa, will, dower, legacy, &c.\(^*\)

Although all natural children of another can be appointed, whether adulterini, incestuosi, or others, none such incestuosi and adulterini can be instituted by their own parents;\(^5\) if they be the issue of an incestuous connexion, they can be instituted; not so, if of an incestuous marriage.\(^*\) The issue of an adulterous connexion, stuprum and fornicatio, may be instituted, the legitimate children having first received their legal portions. The natural children by a concubine can be instituted by the mother on an equal footing with those born in wedlock; but the father, if he have legitimate children, can only leave the naturales \(\frac{1}{3}\); if he have not done so, the legal portion goes to the parents.\(^5\) It appears unfair that a father might leave the whole residue to a stranger, but only \(\frac{1}{3}\) to his natural children; this probably arose in the wish of the Christian emperors to check concubinage; the naturales legally had a father, but the other spurious children not having any, were therefore strangers. Persons convicted of adultery by a court of justice could not name each other heirs.\(^6\)

\(\S\) 1240.

An inheritance should be so divided that it will divide without a remainder,—for if this were not done, and the residue went to the heir-at-law, the testator would then have died partly testate and partly intestate, et nemo pro parte testatus, et pro parte intestatus decidere potest; and Pomponius says,—earum rerum naturaliter inter se pugna est, testatus et intestatus,\(^7\) consequently, he who is instituted for a part, if none be instituted for the residue, gets the whole, or As; for si unum tantum quis ex semisse urb grata hæredem scripserit totus as in semisse erit;\(^8\) but if several be instituted, and no division expressed, the As will be equally divided amongst all, and this will be the case when the testator has named his heirs at law testamentary heirs, who would otherwise by law have received unequal proportions.\(^9\)

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1 Auth. cred. C. de haeret. cap. 13, vres credentes x de haeret. C. 1, 2, 4, 2. 2 C. 5, 9, 6, Boehmer de restrictâ debonis suis in fav. secundi conj. dispon. fac. 3 C. 5, 9, 6. 4 Nov. 74, 5; Nov. 12, 1. 5 P. 28, 6, 45; Cod. Theo. de nat. lib. 1; C. 5, 27, 2 & 8; Nov. 89, 12. 6 P. 34, 9, 13. 7 P. 50, 17, 7. 8 P. 2, 14, 5. 9 Vinn. ad I. 2, 14, 6, 21, § 1.
The inheritance is, as a general rule, divided into twelve unciae; but the testator might divide it into fifth, seventh, or other fractional parts, and state that his heir should succeed to \( \frac{1}{4} \), B to \( \frac{1}{3} \), &c. The whole heritage is called \( \text{As} \), which, though it literally signifies a pound weight, which the Romans divided into twelve ounces, is in this sense intended to convey the idea of an integer; thus the \( \text{bares universalis} \) was called \( \text{bares ex asse} \); one-twelfth being termed uncia; two-twelvths, sextans, \( \frac{1}{6} \); the third, triens, \( \frac{1}{3} \); the fourth, quadrans, \( \frac{1}{4} \); the fifth part, quinque-uncia, \( \frac{5}{12} \); the half, semis, \( \frac{1}{2} \); the seventh part, sept-unx, \( \frac{7}{12} \); the eighth part, bes, \( \frac{8}{12} \) (the derivation of this word is unknown); the ninth part, dodrans, \( \frac{9}{12} \) (demto uno quadrante); the tenth part, dec-unx, or dextans, \( \frac{10}{12} \) (demto sextante); the eleventh part, de-unx, \( \frac{11}{12} \) (de uncia). These fractions are further divided into sem-unda, \( \frac{1}{12} \), or half an ounce; sex-uncia, duella, \( \frac{6}{12} \); the fourth part was termed sicilicum, \( \frac{4}{12} \) oz.; assepondium, one pound. Dupondium, or dupondius, is said of an heritage divided into twenty-four, and tripondium of that divided into thirty-six parts.

The estate must be so apportioned as to divide without a remainder; for if there be an unapportioned residue, the testator dies partly testate and partly intestate, which cannot be thus if the testator institute his brother, and two children of a deceased brother,—the brother will, by law, receive the half, and the children of the other brother the other half between them; but, in the above case of a will, the brother gets \( \frac{1}{2} \), and the children \( \frac{1}{2} \), for the Roman rule is \( \text{plure personae in eadem propositione nominatae pro una habentur} \)—that is, as many parts are made as there are sentences; thus, if the testator write, \( \text{Cuius share esto, Titius et Mævius pariter heredes sunt, denique et Tullius, Aulus, ac Tryphonius heredes sunt} \), three equal divisions will be made,—one allotted to Caius, another to Titius and Mævius between them, and the third to Tullius, Aulus, and Tryphonius, among them. Again, if the testator leave to one his house, his garden to another, and his paddock to a third, these are considered as prelegacies, and the residue of money will be equally divided among, and the debts of the deceased equally charged to, the accounts of these heirs.

1 I. 2, 14, 3. 2 οὐκεῖα τῷ λίτρῳ λίτρος, J. Pollux, 9, 6, sig. 8c. 3 Αλλὰ μέντοι τινὶ παρ’ δεύτερῳ (ἀπο- τοσιά) τινὶ δὲ ἐν τῷ ἑαυτῷ πολεμίῳ καὶ ἄλλα ἐν ἑαυτῷ διομένων νομοτάτων διαμετα, διὸν οὐκεῖα, ὡσπερ δύναται συλαβεῖν ιδια. 3 μονάδος quasi \( \frac{1}{12} \). As \( \frac{1}{12} \), derived from the Dorians, Sicilians, and Tarentines, which two latter made it \( \frac{1}{12} \), whence the Roman \( \text{As} \); Varro de L. L. 4, p 69. The Sicilians \( \text{Aira} \), a pound; hence the Roman \( \text{libra} \). 4 Brisonius de Verb. Signif. voce, \( \text{lb} \). 5 P. 33, 3, 35, § 2. 6 Maianius decius. hered. in disput. juris. t. 2, n. 37; Thibaut, Pand. R. § 720.
THE ROMAN CIVIL LAW.

If his portion be assigned to each, three cases may happen,—either the whole is divided, or is less, or more than the whole: —

A inherits $\frac{\alpha}{\gamma}$
B " $\frac{\beta}{\gamma}$
C " $\frac{\gamma}{\gamma}$

Each gets his share, the whole being apportioned.

Total $\frac{\alpha + \beta + \gamma}{\gamma} = \frac{\alpha}{\gamma}$.

Or secondly, A inherits $\frac{\alpha}{\gamma}$
B " $\frac{\beta}{\gamma}$
C " $\frac{\gamma}{\gamma}$

Less than the whole is apportioned.

Total $\frac{\alpha + \beta}{\gamma} = \frac{\alpha}{\gamma} - \frac{\beta}{\gamma}$.

Here the residue is divided in geometric proportion, singulis pro rata accrescit:—

The $\frac{\beta}{\gamma}$ have a share in the surplus of $\frac{\beta}{\gamma}$.

Or thirdly, A inherits $\frac{\alpha}{\gamma}$
B " $\frac{\beta}{\gamma}$
C " $\frac{\gamma}{\gamma}$

More than the whole is apportioned.

Total $\alpha + \frac{\beta}{\gamma} = \frac{\alpha}{\gamma} + \frac{\beta}{\gamma}$.

Here each suffers a subtraction, singulis pro rata decrescit:—

The $\frac{\beta}{\gamma}$ have to share in the deficit $\frac{\beta}{\gamma}$.

§ 1243.

If many heirs are instituted in a different way, the following cases are to be distinguished:—the one is instituted hares in re certâ, the others generally without assignment of proportions. 

(a) A is heir to my landed estate, B and C are my heirs; or A is heir to my landed estate, B and C in equal proportions; (b) or A is instituted heir sine parte, the others with fixed proportions, B $\frac{\beta}{\gamma}$ and C $\frac{\gamma}{\gamma}$. In the first case, (a) A is instituted for a certain thing, and is therefore in respect to the others a mere legatee, and gets no more than that which is assigned to him, and is responsible for no portion of the debts of the estate; but if the others be incapacitated from taking the inheritance, or repudiate it, A becomes a true heir, and receives the whole inheritance jure accrescendi.¹

In the other case (b) we distinguish, for instance, (1) when the portions do not exhaust the whole mass,—viz. A shall be my heir, B to $\frac{\beta}{\gamma}$, C to $\frac{\gamma}{\gamma}$; here A gets the residue $\frac{\beta}{\gamma}$; but if there be more than one, they get the residue conjointly nec interest, primus,

¹ Nov. 115, 3; Leyser, sp. 364, m. 9; Galvanus de usufr. c. 13, n. vi.; Vinn. 2, 14, ad § 8, n. 1.
an medius, an novissimus sine parte hæres scriptus sit, ea enim pars data intelligitur quæ vacat; neither does it matter whether A be named at the beginning, in the middle, or at the end. (2) If the portions of the mass be equal,—viz. A is my heir for 8 oz. \( (\frac{1}{8}) \), B for 4 oz. \( (\frac{1}{4}) \), and C shall be my heir; hereupon the law holds the testator intended to divide his property into a dupondium, or twenty-four parts, and meant by oz. \( \frac{1}{2} \), A and B get respectively \( \frac{1}{16} \) and \( \frac{1}{4} \), and C the rest; \( ^{3} \) for Ulpian says,—si asse expleto alium sine parte haredem scripserit, in alium assem veniet; the case would be otherwise, if it were A shall have \( \frac{1}{16} \), B \( \frac{1}{4} \), and C the rest, for then C would get nothing.

Lastly. (3) If the portions exceed the mass, A being heir to \( \frac{1}{8} \), B to \( \frac{1}{4} \), C shall be my heir, or inherit the rest; a dupondium would result—A would get \( \frac{1}{16} \), B \( \frac{1}{4} \), and C \( \frac{1}{2} \). Quod dupondium not sufficient, a tripondium would be made, in trientem venit. \( ^{3} \) Justinian’s concluding words, in omnibus enim testatoris voluntatem, qua legitima est, dominari censemus, are easier spoken than to be acted on.

§ 1244.

The appointment of an heir representing the testator was an internal solemnity which made the essence of a Roman testament; the maxim being si nemo subit omnis vis testamenti solvitur, \( ^{6} \) the heir is he cui competit jus successionis in universitatem defuncti; thus the heir succeeds to all rights and estates in being or in expectancy, therefore the words \( ^{7} \) Lucius mihi hæres esto amount to a good testament, and the word hæres \( ^{8} \) extends to heirs and heirs for ever.

A sole heir succeeds alone to the whole; but if there be co-heirs to his proportion only, with the jus accrescendi or expectancy of the residue, if the others refuse it or be not able to take it; but if he have only a certain sum of money or thing, it has been seen that he is not an heir, but a legatee or trustee, legatarius or fidei commissarius singularis. The hæres universalis takes all the estate, without it being specially left to him; if there be no disposition to the contrary, or such dispositions have become invalid, the singularis takes but his share, as left.

The heir succeeds to all the obligations of the deceased, which he must adopt as his own, facta defuncti præstare, and pay his debts. They are not merely personal rights and obligations which devolve on the heir, for there are rights which attach to the person,—as personal services, &c., offices which cannot pass, and obligations also, as punishments for crimes, guardianships, and partnerships.

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\(^{1}\) I. 2, 14, § 6.  
\(^{2}\) P. 28, 2, 13, pr.  
\(^{3}\) P. 28, 5, 17, § 3.  
\(^{4}\) I. 2, 14, § 8.  
\(^{5}\) P. 28, 5, 17, § 3.  
\(^{6}\) P. 50, 17, 181.  
\(^{7}\) P. 28, 5, 13, § 3.  
\(^{8}\) P. 50, 16, 70.
Must be a Roman citizen.

Capacity of heir may be temporal.

Conditional institutions.

Incapacity between institution and dilatation does not matter; otherwise between dilatation and acquisition.

When one may inherit who cannot testate.

Institution of an heir must be precise.

What is not a personal right as possession, does not pass before possession first obtained, except in so far as respects the right necessary for obtaining such possession.

Whoever aspires to these rights of a Roman citizen must be one himself, and have the *jus hæreditis*, or, as it is otherwise expressed by Florentinus, *cum eo debet esse testamenti factio*.

§ 1245.

Cases may, however, happen where the heir may be capable at one time and not so at another, as in case of a body not incorporated till after its institution; in such case, the heir must be capable at the time the testament was made, *ut constiterit institutio*, for what is not valid from the beginning cannot become so subsequently, and at the time when the inheritance falls to him *tempore delata hæreditatis*, in order *ut effectum habeat institutio*; and hence the question as to when the estate vests; in considering which a distinction must be drawn between conditional and unconditional (*pure*) institutions, in the latter case it vests on the death of the ancestor; but in case of the *conditionata*, again, two points are involved,—the condition may be fulfilled during the ancestor's life or after his death, the former case is the same as when the bequest was made *pure*, in the latter, the day of the decease does not enter into the question, but the condition is fulfilled *tempore existentis conditionis*.

If the heir be capable of the inheritance at the moment the will is made and at the moment it vests, he can be heir, though he may have been incapable in the mean time, for *media tempora non nocent*; but he must remain capable from the time it vests till he realize it, and a moment's interruption will vitiating his inheritance, for at the moment of such interruption, the co-heirs or heirs-at-law obtain a vested interest, of which they cannot thereafter be deprived.

Although a party may not be capable of making a will, yet he may have the faculty of inheritance, still called *testamenti factio*, though somewhat anomalously. Thus a *furiusus*, *mutus*, *postumus*, *infans*, *filius familias*, *servus alienus* are said to possess the *testamenti factio*; the extraneous heir has the same power of deliberating and abstaining.

§ 1246.

Precision is all that is required in the institution of an heir, as Ulpian says,—si quis nomen hæreditis non dixerit, sed indubitabili signo cum demonstraverit, quod pene nihil à nomine differt, non tamen eo, quod contumeliam causa solet addi, valet institutio; hence

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1 P. 28, 5, 49.
2 P. 29, 5, 67; P. 28, 5, 46.
3 P. 28, 5, 44, 1.
5 P. 28, 5, 6, § 2, & 50, pr.
6 I. 2, 19, § 5.
7 P. 28, 5, 9, § 8.
the name is not material, but the description must not consist in an offensive nickname, "the head pimp of this town," 1 or the like, vitiates the institution, because no one could assume the inheritance without declaring his own disgrace, which the law rightly repudiates; but my cousin, the bawd, might be good, for she need not apply as the bawd, but as the cousin. A false cause for institution will not vitiate it, for that resides in the testator's breast; but the institution must not be made dependent on the will of another, as A shall be my heir, if B will allow it: for Caius 6 says, — satis constanter veteres decreverunt testamentorum jura per se firma esse debere non ex alieno arbitrio pendere, the will is therefore void for uncertainty; the number of heirs also depends upon the testator, but that number must not be absurd, else the heirs-at-law step in; as, for instance, "I name all the inhabitants of the town my heirs," for this would be void for impossibility, although Justinian says,— et unum hominem et plures ad infinitum, quodquias heredes velit, facere licet. 8

§ 1247.

Though the heir may not have been either disinherited or passed over, 4 yet he may, after the death of the testator, be set aside as unworthy, though expressly instituted heir; or if there be no testament, he may be excluded from the intestate in succession, and the estate in that case is estreated to the exchequer.

Some of the causes of unworthiness to succeed are,—when the heir through neglect have occasioned the testator's death, great enmity with the testator continuing till death, an attempt on the testator's honor and reputation, or for not prosecuting the authors of his death, &c.; for causes such as these, he shall, on proof, refund what he may have gotten into his possession.

§ 1248.

Certain persons cannot be instituted, on the ground that their institution was obnoxious to the law, thence termed odiosa, and cannot inherit from any one, simpliciter instituti non possunt; others, on the other hand, are only prohibited from taking from certain testators in certain cases, or only a certain proportion of the property assigned, secundum quid instituinequeunt. As to the first case, the sons of traitors were incapable of all inheritance 5 by the Julian law on lese majesty.

Filii vero ejus quibus vitam imperatoria speciali lenitate concedimus (paterne enim debere perire supplicio, in quibus paterni, hoc est hereditarii criminiis exempla metuuntur) a materna vel avita omnium etiam proximorum hereditate et successione babantur alieni

1 P. 28, 5, 9, § 2; Wernher, sel. obs. for. 1, 5, 235; Höpfner, § 488, n. 41
Westphal. de test. § 364.
2 Vid. Vinm. de hered. inst.
3 P. 34, 9, tt. C. 6, 35, tt.
4 C. 9, 8, 51, § 1.
testamentis extraneorum nihil capiant, sint perpetuo egentes et
pauperes, infamia eos paterna semper comitetur, ad nullos prorsus
bonores, ad nulla sacramenta perveniant; sint postremo tales, ut bis,
perpetua egestate sordentibus, sit et mors solatium et vita supplici-
cum.

The next law denies pardon to those who dare to intercede
for the above. The visiting the sins of the fathers upon
the children appears to be taken from the Jewish polity, since no
principle so contrary to justice or mercy can be found among
the pagan Romans, and should so much the less be attributed to
the true principles of Christianity which Arcadius and Honorius, who
promulgated this law in the East and West, professed.

Secondly, Those who fell off from the Christian faith.

Thirdly, Heretics by the Canon law, for Justinian himself only
refers to the Manichæans, of whom he was the avowed per-
secutor.

A Christian cannot, although a Jew can, institute an entire
community of Jews; a Christian can, however, institute a single
Jew.

* Collegia illicita,* or illegal assemblies or bodies not deriving
their charter from due authority, cannot be instituted.

As to the second case, certain persons cannot in particular cases
be instituted; thus the prince cannot be appointed heir for the
purpose of sustaining a litigious title,—that is, when the testator
fears his heir will have to sustain a suit, and names the prince with
the malicious intention of his conducting it with the opposing party,
whose interests would be prejudiced, and his chance of success
diminished, and the suit prolonged by the influence and position of
his opponent.

This law is by Pertinax⁴ and runs,— *eadem oratione expressit*
*non admissurum se hæreditatem ejus,* qui litis causâ principem
reliquaret hæreditem; *neque tabulas non legitimi factas in quibus
ipse ob eam causam hæres institutus erit probaturum; neque ex
nudâ voce hæredis nomen admissurum neque ex ullâ scriptura
cui juris auctoritas desit aliud adepturum,*—that is to say, by
an unsolenn written or nuncupative testament, or by an invalid
written will; in addition to which, Paulus says, *imperatorem
litis causâ institut us odio sum est nec calumnia facultatem ex principali
majestate capi oportet.* It is probable that this institution, *animo
calumniandi,* was of very rare occurrence.⁵

One who has remarried, having children of the first marriage,
not being permitted to leave his second wife more than he leaves
the child, issue of the first marriage, to whom, if there be many,
he has left the least,—the surplus left over such sum, allowed by

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1 X. 5, 7, 13.
2 C. 1, 5, 4, § 2.
3 *Vid. ante,* § 870, h. op.
4 L. 2, 17, § 7.
law, being divisible among the children of such former marriage; and this law applies equally to all sorts of inheritances, be they trusts, legacies, or heirships, gifts *inter vivos* or *mortis causa*. The object is clearly to prevent the stepmother injuring the children of the first marriage.1

Every one but the parents themselves are permitted to institute children born out of wedlock, to whatever category they may belong,—*adulterini, incestuosi, &c.*, which latter cannot be instituted by either father or mother2 if they be issue of an incestuous *marriage*, although they can if of an incestuous *cohabitation*;3 nor does it require remark, that the legitimate children must not be deprived of the portion allotted to them by law.

Children, issue of a *stuprum adulterium*, or *fornicatio*, may be instituted by the father and mother, with reservation of the legal portion to the legitimate children, this being nowhere prohibited.

Natural children, that is, those issue of a concubine, were capable of institution4 by the old law; but Constantine the Great appears to have ordained that the father should not leave them anything when he had children born in wedlock, legitimate children, parents, or brothers and sisters, or other agnate relations,5 probably for the discouragement of concubinage.6 Valentinian, Valens, and Gratian mitigated the rigor of this law, providing that when legitimate issue, grandchildren or parents were living, the *naturales* could receive 1⁄2, but otherwise 3⁄4,7 which Arcadius and Honorious confirmed as far as the 1⁄2 went.8 In A. D. 428, Valentinian II. published a decree in the West, restoring the law of Constantinople, which was not, however, adopted by Arcadius in the East.9 Lastly, Justinian changed the 1⁄2 into 3⁄4, permitting the *naturales*10 to be instituted as to the whole in default of parents and legitimate issue; in the former case, however, the parents were entitled to their legal share.11 Hence the mother may institute her natural children as if legitimate,—the father up to 1⁄2, if he have legitimate issue, but otherwise without limitation, saving always the claim of the parents, should such be living, to their legal share.

The reason of natural children being placed in a more disadvantageous position than all other persons, is supposed to have have

1 C. 5, 9, 6; Boehmer de restricta de bonis sua in favorem secundii conjugis disponendi facultate in Elect. J. C. T. ii. 2 At least not by the mother, C. 5, 9, 6; Tit. ad Lauterbach, obs. 836. 3 Nov. 89, 15, *omnis qui ex complexibus* (non enim hoc vocamur nuptias) *aut nefariis aut damnatis processit*, iese *debuss naturatis nominatur*, neque alendus est *ad parentibus neque habebit quoddam ad praesentem legem partici- pium*. Here is no mention of an incestuous marriage, still less of *adulterini*, vid. et Nov. 4, 5, & 12, 4 P. 28, 6, 45; C. 6, 10, 13; P. 36, 17, § 4; P. 31, 1, 88, § 12. 5 Gothofr. ad C. Th. 1, 394; Heinec. ad L. I. et P. P. p. m. 174. 6 Vid. § 569, h. op. 7 C. The. de nat. lib. 1. 8 C. 5, 27, 2. 9 Goth. ad C. Th. 1. c. 2. 10 C. 5, 27, 8. 11 Nov. 89, 12; C. 5, 27; Auth. ad 8.
originated in the wish of the Christian emperors to discourage concubinage;¹ and it is also with the same view that they rendered marriage more easy. Other illegitimate children, *juris intellectu*, have no father, and, consequently, are in the position of strangers with respect to him; lastly, inasmuch as the natural children live in the house, they had a better opportunity than others of ingratiating themselves with the father, to the prejudice of the legitimate children.

An adulteress could not be instituted heiress in the testament of the adulterer, nor *e converso.*

§ 1249.

Heirs are either necessarii, *sui et necessarii*, or voluntarii, otherwise called *extranei*.

*Hæredes necessarii proprii pleno jure* are the testator’s own slaves in whom the testator had the *nuda proprietas*, and so termed, because he is forced to act in that capacity whether he will or no. Those whose debts exceeded their assets often adopted this method, that the disgrace of poverty might in some measure fall on the bondman, and that creditors might seize those goods which then appeared rather the heirs than the testators,³— in this case the slave was usually manumitted by will; but if not, still the freedom was clearly implied in the testament (though some lawyers thought it must be expressed), for the maxim obtains, who would arrive at a given result must adopt the necessary means, and the slave could not inherit if not free, but would only have acquired for the heir-at-law, on whom he would have himself devolved; neither would it have done to have freed him before death, as in that case he can repudiate the inheritance.⁴ Justinian changed this law, as he says, on a principle of equity, holding liberty to be always implied.⁵

The *servus alienus* is he in whom the testator has a usufruct⁶ only, a *nuda proprietas* being in another; but he cannot accept the heritage without his master’s consent, for the heritage comes to him through the slave, consequently, he must be capable of accepting the inheritance, and be a Roman citizen.⁷

A slave may be, as in the first case, the whole property of one person, *unius domini proprio*, or, common to many, *in solidum*; in the first case, he is said to be *pleno jure*, in the latter *nudâ tenus proprietate*.

The old law ruled, that if one master gave him his liberty or resigned his share, that share accrued to the remaining partners, and that the heritage followed the same rule if left to such slave,

¹ Concubinatus is not damnatus coitus, Hüpff.-ner. I. c. § 487, n. 5.
² Gaius, 2, 154.
³ Gaius, 2, 154.
⁴ I. 2, 14.
⁵ I. 2, 14; C. 6, 27, 5; Vinn. 2, 14, pr. 3; Ulp. 22, 16.
⁶ I. 2, 14, pr.
⁷ Vinn. 2, 14, pr. 3.
and vested in those who had an interest in him rateably as their
shares. Justinian extended to all citizens a law, till then pecu-
lar to military men, by which, if one partner in a slave manu-
mitted him, his co-proprietors could be obliged to accept the value
of their respective interests, to be fixed by the prætor, and the
slave thus gained his freedom; but in this case, the gift of freedom
must be mentioned in the will, hœres et liber, otherwise the
heritage will follow the rule of the servus alienus mentioned above,
and accrue to the co-partners. The servus hœreditarius had the testamento factio, and was
interposed under the fiction that he represented the deceased, in
order that the hœreditas jacens might be taken charge of, and vest
in some one ad interim.

§ 1250.

Sui hœredes et necessarii are children and grandchildren, as well
as others who were in the immediate power of the testator at the
time of his death, proximi in familias, they were otherwise called
hœredes domestici and necessarii, because compellable, whether they
will or no, to accept the inheritance under the fiction of their
being condornini ab intestato by will and by the law of the Twelve
Tables; the prætor, however, dispensed with their accepting the
inheritance, in cases where the estate had been seized by creditors,
— the term used in case of a suus hœres was abstinere, but with
regard to others the harder term repudiare; the prætor, it must
here be understood, in granting the beneficium abstinendi, did not
dispose with his suitas, but only with the necessitas; and if he
wish to claim this privilege he dare not have compromised him-
self, quoad the inheritance, in word or deed, or appropriated any
portion of it, otherwise he loses his right to abstain.

All children, as soon as they quit the paternal power, cease to be
sui hœredes, and a mother can have none such. In conclusion, it
is worth remark, that the Roman lawyers never put the word
sui after but always before the word hœres in this sense.

§ 1251.

Hœredes voluntarii were such as are neither the testator’s
slaves nor under his paternal power, otherwise called extrani,
such naturally are in no way in the testator’s power, consequently,
they cannot be obliged to accept the heritage, but use their
discretion, adquirere or adire sensu generale, or omittere, on the
maxim that hœredi ignaranti vel invito hœreditas non adquiritur.

Like other heirs these must, in order to accept the inheri-
tance, be capable,—
At the time the will is made in which they are instituted heirs;
At the time of the testator's death; and
At the time when he enters upon the inheritance. The status
of the heir, during the intermediate periods, is of no consequence, if
under the age of twenty-five, he may be testamentary or legal
heir, he may administer for the heir, or become heir by assuming
the inheritance which stands in the place of creation.

§ 1252.

Foreigners, peregrini, could not be instituted heirs, because
incapable of the rights of Roman citizens.

The Papian Poppæan law precluded bachelors caelebes, but
this disability was afterwards removed by Constantine the Great.

In the same category were orbi, or those whose marriage had
been unfruitful, who were only permitted to take a tenth, not
the whole; but if they had children by a former marriage, they
were allowed as many tenths as they had brought up children.

Strangers in blood could only take a half by will.

As to universitates, there has been much discussion; certain it
is, they could not cernere hæreditatem, and it would appear they
cannot in fact be instituted heirs, although they may acquire an
inheritance by bequest in trust, fidei commissum; and this was
distinctly permitted by the Senatus Consultum Apronianum, made,
as far as can be ascertained with any degree of probability, A.D.
117-123 under Hadrian, about which time Fasti Consulares men-
tion one Apronius as holding the consulsiphip. The effect of this
decree was to confer on municipalities the capacity of taking
bequests by fidei commissum; before that time municipia and munici-
cipes were incapable of institution on account of their being
corpora incerta, so that the whole, as members, were incompetent
of the volition necessary, or of performing a gestio pro hærede.

Under Marcus, it would appear that the concession of this decree
of the Senate to municipalities was extended to collegia; and
another decree permitted municipalities to be instituted heirs by
their freedmen—such were public slaves of the universitatis,
being manumitted.

After the Voconian law women were excluded; but Dion
Cassius tells us they were permitted to take millia nummum,

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drachmæ, which the Greeks always understood when speaking of Roman money; hence it follows that this law restricted the inheritance of women to 25,000 drachms or 100,000 sesterces.

Universitates termed ἄνδοροι, or those independent of the Roman state, who enjoyed their own laws, could be instituted; but later, universitates obtained this privilege, as well as that of receiving legacies.

The gods were also precluded from being instituted heirs,—in fact, lest the property so left them should only go to increase the luxury of the priests; this was, however, disguised by a civil reason, viz., because the gods nec cernere nec adire hæreditatem poterunt. The Roman emperors affected to make certain gods capable of inheritances, absurdly conferring upon them the jus liberorum—among which were the Jupiter Tarpeius, Apollo Didymæus, Minerva Miliensis (Iliensis?) Hercules Gaditanus, Diana Ephesia, Mater Deorum Sipelensis (Sipylensis).

§ 1253.
Uncertain persons may be instituted, if there be a possibility of solving the uncertainty whereupon the institution is good, which was not the case before Justinian’s time,—indeed, the uncertainty often remedies itself, tollitur eventu; secondly, the poor can be instituted, and, if the testator have not defined them, he means such as live near his habitation; thirdly, churches; fourthly, municipalities; fifthly, all corpora et collegia licita, for all these are looked upon as persona incerta; lastly, posthumi, as coming under this head, were rendered capable of institution as heirs. Here some general observations on the law relating to the institution of posthumous children as heirs will not be out of place.

§ 1254.
The jurists divided posthumous children (posthumi) into three kinds. The suus posthumus was he who, had he been born in the lifetime of his father, would have been a suus hæres; or,

Quasi posthumus was one born during life, but after the execution of the testament; such child was also equally a suus hæres.

Posthumus alienus is one not within these two categories; he could not be instituted by the Civil law, though the prætor would grant him the honorum possessionem secundum tabulas.

Subsequently Justinian directed, in a constitution which is now

1 The usual interpretation of this passage is, that the Voconian law prohibited any one who has 100,000 H. S. to leave more than a quarter part, 25,000, to a woman. Bachovius ad Inst. 2, 14.
2 Gronov. depec. vet. 3, 16; Perozon de L. Voc.; A. Gell. N. A. 20, 1.
3 Tac. A. 4, 43; Vulcacius Moschus, when exiled, left his property to the Mas-

sileanes, who were per Strab. Geo. 4, 1, § 53; Grot. de J. Bat. P. 1, 3, 12.
4 C. 6, 24, 12.
5 Paul. P. 30, 1, 122, pr.
8 Vid. Frag.
9 P. 5, 2, 6; P. 37, 9, 1, 12; P. 37, 11, 3.
lost, entitled *de personis incertis*, that all posthumi should be instituted.¹

The birth of a posthumous child, after the father's death, is called *agnatio sui hæredis*, and vitiates the parent's will; in like manner, the *quasi agnatio sui hæredis*, or birth of a grandson after the grandfather's death, who would succeed into the place of his father.

§ 1255.

Posthumi are also denominated *Aquiliani, Velleiani, Juliani, and Corneliani*: The first, after the famous lawyer Aquilius Gallus, who first pointed out to the grandfather the means by which he could prevent a grandson, born after his own and the father's death, from voiding his, the grandfather's will, viz. by instituting him according to the following formula:—

Filius meus hæres esto. Si filius meus me vivo morietur, tunc si quis mihi ex eo nepos sive quæ neptis post mortem meam in decem mensibus proximis quibus filius meus moreretur, natus erit, hæreses sunt.² The commentaries which have been written on this passage are without end.

§ 1256.

The *Velleiani* derive their name from the *Lex Junia Velleia*, by which grandchildren born in lifetime of the testator, he being the grandfather, and before the making of his will, but after the father's death, and after the execution of his testament, posthumi in sensu juris (quasi posthumi), are bound by the will in which they are named heirs or disinherited. Gaius³ says,— Posthumorum duo genera sunt quia posthumi adpelluntur ii, qui post patris mortem de uxore nati fuerint, et illi, qui post testamentum factum nascuntur.*

§ 1257.

The *Juliani* are grandchildren born after the execution of the grandfather's will, but in their father's lifetime, who, upon the death of the father, succeed into his place.⁴

§ 1258.

The *Corneliani*. The Corneliani, so called from the *Lex Cornelia testamentaria*, are children of a Roman citizen born during captivity in war.⁵

This premises that, according to the old law, no *posthumus* could be testamentary heir (which Allartucius, however, denies⁶), although he could succeed *ab intestato*, upon the assumption of his being a *persona incerta.*⁷

Hence every *posthumus suus*, whether instituted, disinherited, or passed over, vitiates the will.

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¹ Vinn. ad I. 2, 13, 2, & L. 2, 20, 26, 27 & 28; Sap. Gentilis tract. de erroribus test. 2.
² P. 28, 2, 29.
³ Gaius, 2, 3, 2.
⁴ P. 28, 3, 3, § 1.
⁵ P. 28, 3, 15; P. 49, 15, 22, § 4.
⁷ Finestres ad Lit. de lib. et post, p. 188, &c.
§ 1259.

Heirs may be instituted unconditionally, called pure, or conditionally, but not for or from a fixed time, in diem certum or ex die certo. Diem adjectum haberi pro supervacuo placet, says Justinian, and Papinian; as, for instance, "A shall be my heir for ten years," or "A shall enter as my heir ten years after my decease." The reasons of this are twofold,—first, that if the institutio in diem were allowed, the testator would die testate for ten years, and be intestate afterwards, or be intestate for ten years and intestate afterwards; but, again, none can be an heir and then cease to be so, therefore these institutions are bad; and the same reasons hold in institutions ex die, for the intestate heir must then enter, and afterwards cede to the testamentary heir.

But could the object be obtained by a fideicommissum, a system introduced to effect such like ends? It would appear not, for the Roman legislators held that an heir shackled with a trust was still the heir, even after he had surrendered his trust, for the heir in trust was hœredis loco.

The day may be totally uncertain, that one may not know if it will come or when, viz., "A shall be my heir when he initiates his first child"; or,

It may be uncertain only if it may come, viz., "A shall be my heir if he shall attain the age of 50"; or,

It may be uncertain only when it may come, viz., "A shall be my heir when the treaty now under negociation shall be signed."

All these are uncertain conditions; but "A shall be my heir the day I die," is considered to be no condition, and in consequence not to vitiate the institution, for the testament takes effect on the testator's death.

§ 1260.

An heir may also be instituted sub causâ, as,—"I appoint A heir because he has rendered me important services"; or sub modo, as,—"I institute A that he may study."

A condition is, in the general acceptation, an external right to which a certain right is attached. A condition is said pendere so long as its fulfilment is doubtful, existere when the circumstance on which it relies happens, and deficere when it is clear that this latter will not be the case, as in case of marriage and male heirs.

Conditions are subjected to yet further conditions, as to time in præsentis, in præteritum, vel in futurum collata,—I name A my

1 I. 2, 14, 9. 2 P. 28, 5, 34. 3 P. 28, 5, 88. 4 C. 6, 24, 9; P. 35, 2, 79, pr.
heir if he shall have been received an advocate before I shall have made this my will.

§ 1261.

There is a difference in operation between things impossible or merely difficult. Things may be utterly, or only under certain circumstances, physically impossible,—the former are absolute, the latter de facto per accidens ex suppositione impossibles, also falsa; if one or the other person may be able to fill them, but many be not, they are then called difficiles, of which examples are given in the Pandects.

§ 1262.

The possible condition is either casualis, protestiva, or mixta.

Casualis, when external circumstances not within the control of him whose right depends on the condition, must concur to its fulfilment, as,—“A shall be my heir, if peace be concluded this year.”

Paulus calls the protestiva promiscua, when the will of the party is necessary to the fulfilment, as,—“B shall be my heir on condition of his assuming my name.”

Mixta, when the two above conditions are combined,—“A shall be my heir if he beget a son.” Here the condition may be barred if uncontrollable external circumstances do not actively favour A, and if A do not choose to marry, is an instance of the first; “A is my heir if my son be dead,” is an example of the second; and, “A is my heir if he shall be married,” explains the third.

§ 1263.

A condition may be affirmativa or negativa. The condition is affirmativa when the right depends upon something being done, as,—“A shall be my heir if he become an advocate”; or negativa, when it depends on something being omitted to be done, as,—“A shall be my heir, if he do not enter the church.”

The condition may also be resolutiva, or suspensiva; in the latter case, the right of inheritance ceases with the extinction of the condition,—in the former case, it commences on the condition coming into existence.

§ 1264.

The condition may be possible or impossible, and this latter physically, or morally the former; as, for instance, “A shall be my heir if he draw a triangle whose three angles shall not amount to 180 degrees”—or morally, “A shall be my heir if he well drub

1 P. 35, 1, 72, § 7; P. 28, 7, 6.
2 P. 35, 1, 27 & 71, § 3 & 83; P. 36, 1, 63, § 7; P. 40, 7, 4, 1.
3 P. 35, 1, 11, § 1.
B, who has grossly insulted me,” for such condition is illegal, therefore morally impossible.

§ 1265.

The rules of conditions are generally as follow:—

A conditio in praesens, or praterium collata, does not defer the acquirement of the right, but merely holds it in uncertainty; for, on opening the will, it is seen that the condition has existed, or do exist.¹

An heir cannot be instituted sub conditione resolutivā, for once heir always heir.

A physically impossible negative condition is as good as none, or as an unconditional one,² and is no bar; but a morally impossible negative condition is operative, for the heir must enter into recognisances not to do the illegal act in order to inherit, such condition therefore vitiates the appointment unless security be given.

A generally impossible affirmative condition, be it morally or physically impossible, is looked upon as conditional, and is inoperative, pro non addicta habetur, evanescit, detrabitur, conditio, that is, the heir takes the inheritance despite the condition; in this case, the testator is punished by the condition not being taken account of.³

When the condition is possibly impossible, the questions arise of whether the testator were aware thereof or not,—if the heir can fulfil it, the same rule applies as to possible conditions,—but if he cannot, the question arises as to the animus of the testator. If he were conscious of the impossibility of the condition, it is considered as non existent; but if he were not aware thereof, it is valid, and the heir succedes to the estate.⁴

In possible conditions, three periods are to be observed as regard respectively the pendens, existens, and deficiens; for if the condition be pendens and casualis, or mixta, the heir cannot enter on possession, though the prætor will grant him, bonorum possessionem secundum tabulas,⁵ but he is bound to give caution to surrender the estate in case the contrary of the condition happen.

If the condition be potestiva affirmatīva, and the heir can fulfil it, he must do so immediately on the testator’s death; but if this be impossible, he must obtain the bonorum possessionem secundum tabulas and give security for subsequent performance,—as, for instance, if it were that he should marry, and was too young.

§ 1266.

In the case of negative conditions, the heir can enter upon the estate on giving the Mucian caution; for if it were that he should...
not become a soldier for instance, according to the old laws, he never could have inherited, for it would always be possible that he would infringe the condition. Q. Mucius Scaevola Pontifex Maximus introduced a clause to the effect that, in giving caution, he promised never to transgress the testator's will, hence called Mucian;¹ Ulpius says² expressly, Muciana cautioconsistit in conditionibus quae in non faciendo sunt conceptae.

This caution can then be applied to positive negative conditions, to-wit, in cases when nothing can be considered as fully complete before the death of the heir or legatee, quæ non nisi morte eorum, quibus aliquid relinquitur, finiuntur. Papinian³ gives the following example:—A testatrix says, "I give this sum to my daughter-in-law, under the condition that she do not separate from her husband." Here the Mucian caution does not apply, for the husband may die first, and it is certain she will not separate from him; again, it is of none effect if the condition be limited to time, as, "that one should not be a soldier before his twenty-fifth year," quia hac conditio ante mortem legataris finiri potest.⁴

If the condition exist, which may sometimes be fairly admitted in doubtful cases,⁵ the heir obtains the estate, not from the day on which the condition became operative, but from the death of the testator,⁶ retro pura censetur institutio; the heir must, however, live to see the fulfilment of the condition; for if he die before, his heirs get nothing, institutio sit caduca.

The same would occur if the fulfilment of the condition disappears, as, "B is my heir if he free Davus," and the slave dies before manumission. The will is void, and the heir loses all hope of his inheritance, testator intelligitur a principio intestatuscessisse.⁷

§ 1267.

If the heir be found willing, capable, and worthy, he continues heir by express declaration and acceptance; or, tacitly, when by any act⁸ he intermeddles with the estate, and behave himself as heir.⁹

The declaration of acceptance in the first case is called aditio, but in the second gestio pro hærede,¹⁰ a term construed very largely; thus, any positive act, such as entering upon a property, making arrangements with creditors,¹¹ or the like, will be so interpreted, but the act must not admit of a double interpretation, as burying another which may be out of natural affection; a declaration may

¹ P. 35, 1, 7, § 3; P. 36, 1, 65, § 1; P. 35, 1, 73-77, § 1-79, § 2 & 3; P. 35, 1, 101, § 3.
² P. 35, 1, 7.
³ P. 35, 1, 3.
⁴ P. 35, 1, 67; P. 28, 7, 4 & 6, & 15, & 28; C. 6, 25, 4; C. 6, 28, 4.
⁵ P. 34, 5, 10, § 1.
⁶ P. 29, 2, 54.
⁷ P. 35, 1, 31; P. 30, 1, 54, § 2 (1); P. 28, 7, 23. There is a conflict in the laws of the Digest on this question.
⁸ I. 2, 19, § 7.
⁹ C. 6, 30, 22, § 13 & 14.
¹⁰ P. 11, 7, 149, § 8.
¹¹ Ulp. Fr. 22, 26; Paul. R. St 4, 6; Voet. ad 28, 2, § 5.
also accompany any act that is not done *animo hæredis*, which secures the party.\(^\text{1}\)

§ 1268.

So long as an heritage be not entered upon, it is said to be *jacere*. Ulpian\(^\text{2}\) says, *personam defuncti sustinet*, and the law feigns the deceased to be still alive and in possession, which confers a sort of personalty on the inheritance, as Caius expresses it, *hæreditas domina est*; and if so, must be placed among the legal personages, which it has been seen it cannot be.\(^\text{3}\)

A guardian cannot assume an heritage without his pupil’s knowledge,\(^\text{4}\) nor can this latter do so *sine auctoritate tutoris*; but if he be a child, the legal fiction comes into operation, *pupillus pro hærede se gerere videtur auctore tutor*.\(^\text{5}\) Theodosius the younger,\(^\text{6}\) however, permitted the tutor to accept in the name of his pupil; but neither a father nor master can accept for the son or slave, for these must themselves do so at the command of the father or master.\(^\text{7}\)

The father could, however, pray *a bonorum possessionem* in his son’s name,\(^\text{8}\) until Theodosius permitted the father to enter for the son.\(^\text{9}\) Justinian went further, and permitted the son to accept without the father’s consent if *secundâ aetate*, viz., a minor beyond the years of puberty, considering it as a *peculium adventitium extraordinarium*.\(^\text{10}\) The curator may obtain the *bonorum possessionem* for an idiot ward for the sake of alimony, but not for a prodigal or madman,\(^\text{11}\) who must administer by their curators,\(^\text{12}\) and this *bonorum possessionem* vests if the mad or idiot heir come to his senses. A dies, leaving an idiot grandson. Here C’s father obtains the administration for him, C dies an idiot, and D, the grandfather’s brother, succeeds, for he would have succeeded if C had not been born.\(^\text{13}\)

§ 1269.

The acceptance must be voluntary, otherwise it is nugatory, and must be for all or none; and every declaration of acceptance is an entry which cannot, according to Paulus, be performed by attorney,\(^\text{14}\) *per procuratorem hæreditas adquiri non potest*, or, as

1. P. 41, 1, 34; I. 2, 14, § 2; P. 30, 1, 116, § 3.
2. P. 28, 5, 31; P. 46, 2, 24; Vinn. ad 2, 14, 2, n. 15; Finestræ, l. c. § 14; sed vid. § 358, h. op.
3. § 879, h. op. in fin.
4. C. 6, 30, 5.
5. P. 36, 1, 65, § 3; vid. § 358, h. op.
6. C. 6, 30, 18, § 2.
7. P. 29, 4, 1, 2; P. 26, 41, 2, & 36, § 1.
8. P. 37, 3, 1.
9. C. 6, 6, 8, § 3.
10. Reinold varior, c. 1.
11. C. 5, 70, 7.
12. C. 6, 61, 8; C. 27, 10, 7, § 2; Bohmer, intr. in just Dig. est 29, 2, 10.
13. P. 41, 2, 90, et vide § 358, prope fin.; § 895-6, h. op.
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Modestinus says, *homo liber hæreditatem nobis adquirere non potest.*¹ It is, however, doubted.

Acceptance cannot be *conditional,* as,—"should the estate be solvent" (*solvendo*). The reason thereof would appear to be, that the declaration must be certain and positive,² for it would be otherwise prejudicial to creditors and legatees, for the time might be deferred indefinitely; besides, A might be heir to-day, and B to-morrow, if the condition were resolutive, which is against the legal maxim—"once heir ever heir."

§ 1270.

It is a rule, that *hæreditas nondum adita non transmittitur.* The logical reasons for this rule are the failure of necessary acceptance on part of the heir, the fact of the right of inheritance being a *jus personalissimum.* To this there are four exceptions:—

*ex jure suitatis,* by the identity of the person of the heir with that of the testator; *Theodosiana,*³ by which emancipated children, who must *adire hæreditatem* by some outward act, are allowed, if they die before such act, to transmit the right of inheritance to their descendents, but to none other. The *Justiniana*⁴ permits the heirs of an heir, who dies during the period of deliberation, to declare the acceptance within the unexpired term; in which case, the inheritance is held to have been accepted by the deceased. *Transmissio ex capite restitutionis in integrum.* This is applicable when the next heir dies abroad on public duty, *causa reipublica,*—the next heirs can pray the above order, and thus obtain the inheritance.⁵

§ 1271.

An heir has to acquit all the debts of the deceased, fulfil all obligations, and assume all rights of the deceased, for he becomes one and the same person with him. If he be the universal heir, he must alone pay all the debts,—thus the Germans have a proverb, "wer ein Heller erbt, muss einen Thaler bezahlen," "inherit a farthing and pay a crown"; but if he be co-heir, the debts are divided *pro rata* as the shares, his obligations are considered *quasi ex contractu,* hence the claimants can bring an *actio personalis ex testamento* against him.

The heir cannot repudiate after acceptance; but an exception is made in favour of infants, because, if he be an infant and a minor, he can pray a *restitutio in integrum.*

When an heir declares that he will not accept the inheritance, he is said *repuadiare hæreditatem,* which may be by word or deed. In the former case it is properly called *repuadiare,*—in the latter, *omittere;* of which, first buying or hiring a parcel of land from the

¹ P. 41, 1, 54.
³ C. 6, 30, 18; F. A. Niemeyer de trans. Theod. ad Const. un Cod. 6, 52, de his qui ante surt. tab. Hales, 812.
⁴ Sed. preceding paragraph.
⁵ P. 41, 2, 30.
heir appointed on the part of the disinherited or passed over party, paying the debts he owed the deceased to the heir, or demanding of him what is due, are instances. No heir can repudiate before the estate come to him, as by declaring in the testator’s lifetime that he would not accept the inheritance, or declaring that if instituted under a certain condition he will not accept, or during the preparation of the inventory or deliberation of the nearer heir all such declarations are void, and he may nevertheless assume the heritage. Simple silence does not amount to an omission: no right on the inheritance accrues to whomsoever may be in possession before the expiry of thirty years. The act which will constitute a gestio pro herede, is also necessary to bar an omissio.

If the heir have once repudiated, he is for ever barred, except he be an infant or a minor; in which case, he has his remedy by restitutio in integrum.

§ 1272.

In order, however, to place the heir in security, the prætor granted him a period for deliberation, as to whether he would accept or repudiate the inheritance, which Justinian superseded by the beneficium inventarii, between which two modes the heir was bound to elect.

The jus deliberandi was introduced that the heir should not be compelled to pay ultra vires hæreditatis, but be enabled to throw it up as if it were a bankrupt estate.

If no one presses the heir, either as substituted heir, remainder man (heir in tail), or creditor, he has the term of thirty years to deliberate; but if he let this pass, prescription steps in, and the estate is lost if another has possessed it as his own in the mean time, otherwise prescription is no bar; but if the heir be pressed by a presumptive or intestate heir, or a creditor, he must decide within a year, which is reckoned from the time the heir was aware of the fact of his succession; at the expiry of this term, he may pray from the prince or proper authority a further term not exceeding one hundred days; the prince can only give a year, and the court only nine months, on sufficient reasons being assigned.

If the heir do not declare his determination within the first or second term, the estate falls in to the presumptive heir or creditor; if the latter, he can demand that the heir enter—though Thibaut, on examination of the old laws, is of another opinion—or that the entry be taken as made, but if the heir die during the period without declaration, his heirs may declare within the unexpired part of the period.

1 P. 29, 2, 94. 2 P. 29, 2, 27, § 1; Id. 70 & 77. 3 Leyser sp. 272, med. 1. 4 P. 30, 40, § 2; C. 2, 40, 1, § 2. 5 Vinn. 5, 19, ad § 5, n. 1, c. 3. 6 C. 6, 30, 19. 7 P. 28, 8, 1, § 2; C. 6, 30, 22. 8 Thibaut, Theor. d. R. 2, 7. 9 C. 6, 30, 19.
It may be then assumed on the authority of many lawyers that the term to which the heir has a right without petition is a year, but the time to be prayed is either twelve or nine months, every heir may deliberate a year; if this be insufficient, he prays a second *spatium deliberandi*, this agrees with the codex, and we may assume with Voet that the law of the Pandects falls to the ground.

These prefatory remarks will have rendered the *transmissio Justiniana* more clear, which is, that if the heir die within the legal time or that prayed for, he transfers to his heirs the right of declaration during the residue of the period.

§ 1273.

It was doubtless a useful and reasonable permission, that an heir should not be compelled to accept a *damnosa hareditas*; but the means by which this end was supposed to be effected were far from sufficient, for a creditor might come in when the heir thought the estate perfectly solvent, and render him liable *ultra vires hareditatis*; it was to obviate this inconvenience that Justinian introduced the *beneficium inventarii*, or the privilege of causing an inventory of effects to be made under the sanction of public authority, beyond the amount of which no heir was obliged to pay claims upon the deceased; by these means the beneficial heir was secured from risk. The deliberation in its original sense, therefore, became unnecessary.

It was requisite (1) that such legal inventory should be begun within thirty days, reckoned from the moment at which the heir had learned that the inheritance had accrued to him; (2) that it should be finished within sixty days if no obstacle presented itself, otherwise within a year; (3) that *tabularii* should be employed, otherwise called conditionales,—these were public officers corresponding to notaries, whose business it was to draw up public documents, or in want of such three witnesses; (4) that the legatees and trustees be invited to be present; and (5) that the heir subscribe the inventory so made if he can write, but if a marksman, by the *tabularius*, adding *venerabile signum crucis*.

This is now done otherwise on the continent,—the authority or a notary seals up the property of the deceased, makes an inventory, enumerating all the property of the deceased, without calling in the legatees or trustees; in Saxony, this is superseded by a *jurata specificatio*, by a private hand.

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1 C. 6, 30, 22, 13.
2 Voet, ad Pan. de jur. delib. 2.
3 P. 28, 8, 1, § 2; Id. 2, 3, & 4.
4 C. 6, 30, 22, 4.
5 C. 6, 30, 22, 2.
6 I. 2, 19, 6.
7 Nov. 1, 2.
9 Milosch Obrainovitch, the Gospodar of Servia, signed his abdication by proxy, with this paragraph, *non sapendo scrivere fo il cenno venerabile della croce*.
§ 1274.

We now come to the origin of the jus accrescendi, or right of survivorship, the history of which is shortly as follows:—Before Augustus, it applied equally to heirs who took under a testament, and to those who succeeded as heirs-at-law; the Lex Julia et Papia Poppeæ, however, enacted si hæres pro parte, legatariusue quibus puræ vel in evertum diem hæreditas legatumue relictum erit, post mortem testatoris ante apertas tabulas testamenti decidet vel pereger fiet ea hæreditatis pars caduca sunto populoque deferuntur; and in another place, si hæres legatariusue post mortem testatoris ante eventum conditionis deficiat, hæreditas legatumue caduca sunt populoque deferuntur; lastly, si quicunque hominum, hæres, legatariusue vivo testatore post testamentum conditum decidat conditione deficiat relictum in causa caduci esto et populo quasi caducum defertor. The Sctum. Trebellianum abrogated the last paragraph, and Justinian all three, so that the jus accrescendi was restored to the position in which it had been before Justinian.\(^2\)

This jus accrescendi or right of survivorship must occasionally occur where there are co-heirs, one of whom will not take, or becomes otherwise incapable of taking his share, such share then accrues to the other co-heirs, accrescit reliquis,\(^3\) such accretion being purely an accidental circumstance equally incidental to inheritances under will or ab intestato.

If some of the co-heirs are especially nominated heirs in a sentence, co-hæredes conjuncti or collegae, and one of them fail, he who is conjoined with him excludes the other disjuncti;\(^4\) for instance, A is my heir, also B and C,—if, then, B fail, C acquires the portion so vacant. This jus accrescendi accrues when the one heir dies before the testator, before the fulfilment of the condition, when the condition is not fulfilled, or when he turns out to be incapable of inheritance.

The heir can neither demand nor prevent its operation except in the case of a military will,\(^5\) when it is necessary to show that it was the testator's intention, for a soldier can die partly testate and partly intestate, which a paganus cannot; another exception is that of a minor who prays restitutio in integrum, before entering upon the heritage, in which case a co-heir cannot be compelled to accept the vacant portion, sed bonorum possessio creditoribus datur;\(^6\) but in ordinary cases the co-heirs cannot repudiate this portion, either they must forfeit the whole or take their share with the rest; hence it is not necessary even that they know the fact of a co-heir having gone off, for the heir or co-heirs being the successors to all that the deceased had, if any portion remain

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1 Lost his citizenship.
2 C. 6, 51, 1; Hopfner, 1. c. § 492.
3 C. 6, 50, 1, 10; 28, 5, 63.
4 C. 6, 51, 1; 10; P. 28, 5, 63.
5 P. 29, 1, 37.
6 P. 29, 2, 61.
unappropriated, the deceased would have died partly testate and partly intestate. ¹

§ 1275.

The practice of substituting one heir for another is referable to a double origin,—first, to the fear a Roman had of his testament becoming destitute of an heir; and, secondly, perhaps to the anxiety manifested of preserving the sacra privata. The former reason is however the better, inasmuch as, on a testament becoming destitutum, the inheritance would by law devolve on the proximus agnatus, whereby the object of preserving the family sacred rites would have been fully answered, except indeed the agnati all abstained. It may therefore be assumed that the real object of the Roman testator was rather to retain the power of regulating the ultimate destination of his property, according to his will, as far as practicable. This is effected by instituting a series of conditional heirs, reversioners, or remainder men, for it is possible that the heirs-at-law failing, the heir instituted may abstain from the inheritance, if it should be suspected of being damnosa, and so it would in fact become an hereditas jacens, or vacua, and lapse to the exchequer, in which case certainly the sacra privata would become extinct in that line. This became of less importance when the practice of inventories was introduced, together with the principle of the heir not being bound to pay debts beyond the assets, because then the heir could have no reason for repudiating or abstaining from the inheritance; nevertheless, the chance of death, before the inheritance had vested so as to pass by the law of intestacy, remained, and substitution could not in consequence be dispensed with,— such substituted heirs were termed hæredes secundi, tertii, &c. Appianлерαμαίας παραγράφων τοῖς κληρονόμοις ἔτέρων, καὶ μὴ κληρονομοῖον ἐμ πρώτου. We have the record of a substitution by Augustus, who instituted Tiberius and Livia, and substituted as second heirs the grand and great grandchildren, and in the third place the chiefs of the State.⁴

Entails in England form an exact parallel with substitutions, an heir in tail being an heir appointed by the testator to succeed, failing the former, but it does not extend beyond one generation unborn.

§ 1276.

If the heirs be instituted successively, the one failing his predecessor as after or heir in remainder, a direct substitution, properly so called, is created; but if all be instituted together,
all are direct heirs,—in other words, cohaeredes, or joint heirs; but if one be instituted for his life with a condition that at his death another should succeed, the substitutio is fidei commissaria, and in fact no substitution at all, for the first heir only has a life interest, and holds the estate as a trustee in fact for the remainder man.

Substitutio is then the institution of a second heir in case the first fail, a third for the second, and fourth for a third, and so on. Secundum haeredem scribere simply means to substitute,—hence substituted heirs are termed haeredes gradum secundo tertio, &c.

Substitution may have reference either to the person or to the case in which the substitution should take place. Firstly, it is military, or it is not so—which will be discussed in its proper place; secondly, in respect to the case, it may be vulgaris, pupillaris, or quasi pupillaris.

§ 1277.

The common substitution happens when the first institutus becomes not heir at all, is incapable of becoming so, or decline the inheritance; it is then called vulgaris, quia vulgo et promiscuo omnibus haereditibus a quovis testatore fieri potest; it is most useful, for the heir may die before the testator, or become incapable by a capitis diminutio, which often happened at Rome, or the testator may fear his heir would not except the estate; thence it was a frequent practice to put in a slave, novissimo loco in subsidium, in case the estate should have run the gauntlet of the other substituted heirs. The form of this substitution was Titius hares esto, si Titius hares non erit tunc Seius esto.

The pupillary substitution is calculated to supersede the heirs-at-law in case a child should die an infant, in which case, the substitution is made secundum tabulas, that is, to determine who his heir should be, if he die an infant, this is to secure the infant's life from interested and base attempts on the part of the heirs-at-law; thus, a careful man, to keep the substituted heir in ignorance, sealed up the part of his will containing the substitutions, ordaining that it should not be opened before the child's death, if that event should happen during infancy.

§ 1278.

The form used for the pupillary substitution was "Filius meus haeres esto se filius meus haeres non erit; sive haeres erit et prius moriatur quam in suam tutelam venerit; tunc Seius haeres esto. Quasi substitutio presupposes idiot children who might die in that state,—this was otherwise called substitutio Justiniana."
The vulgar substitution is open to any one,—the pupillary is confined to the father, and the quasi pupillary to the parents. The military to military men.

§ 1279.

In the vulgar substitution it may happen that the heir will not or cannot be heir; the first is called a casum noluntatis, the second casum impotentiae, according to others potentiae, which is shortly expressed thus: casus noluntatis sub se complectitur casum im- potentiae et casus impotentiae casum noluntatis.

For exemplification,—A is heir, but if he will not accept the estate, B is heir. Now, if A die before the testator, he cannot become heir, and B consequently succeeds, for under the noluntas impotentia is tacitly implied; the same is the case if the testator only expressed the impotentia, and the heir can, but will not assume the inheritance, for in this case also the substitute is admitted.¹

§ 1280.

Inasmuch as substitution is the institution of a second or more heirs, he that can be instituted can also be substituted, and vice versa.

Many can be substituted, for one instituted, thus,—Titius hæres esto, si Titius hæres non erit, tunc Tullius et Sempronius hæredes sunt, or conversely. *

One may be substituted for many instituted, thus,—Seius et Caius hæredes sunt, si Seius et Caius hæredes non erint tunc Titius hæres esto; or divers individuals in the place of divers other individuals, singuli in locum singulorum, thus,—Tullius et Caius hæredes sunt, si Tullius et Caius hæredes non erint tunc, Seius in locum Tullii et Sempronius in locum Caii hæredis sunt; or divers individuals in the place of divers other individuals, singuli in locum plurium, thus,—Tullius et Caius hæredes sunt, si Tullius et Caius hæredes non erint tunc, Seius in locum Tullii et Sempronius in locum Caii hæredis sunt; or divers individuals in the place of divers other individuals, singuli in locum plurium, thus,—Tullius et Caius hæredes sunt, si Tullius et Caius hæredes non erint tunc, Seius in locum Tullii et Sempronius in locum Caii hæredis sunt; or divers individuals in the place of divers other individuals, singuli in locum plurium; again, co-heirs may be mutually substituted for one another generally, hence called substitutio mutua or reciproca, and sometimes ill-named breviloquus, thus,—Seius, Sempronius, et Titius hæredes sunt siquis eorum hæres non erit tunc reliquorum qui velerit hæredes sunt. Julian² has the following passage:—Publius, Marcus, Caius invocem substituti, hærede mihi sunt; sic in- pretendenda sunt, breviter videtur testator tres instituisse hæredes et invocem eos substituisse,³ whence we may conclude, that this was not the usual form, a doubt being evidently cast upon the construction, by the fact of an opinion being considered necessary; the usual form was probably more precise, and may have been somewhat similar to the example given, or even more lengthy, and is merely this,—let A B C be my heirs, if A refuse, then

¹ Walch, contr. p. 176; Stryk. de caut. et test. c. 18, § 9; Struv. ex. 33, th. 13; Voet. ad P. 28, 6, n. 12; Berger, resolut. P. 28, 6, qu. 5; Cocceii, jur. contr. P. 28, 6, qu. 5; Pufendorf, tom. 2, obs. 98.
² P. 28, 5, 37, § 1; P. 28, 6, 45, § 1; Voet. ad com. 25; P. 2, 20 & 22.
³ P. 28, 5, 37, § 1.
let B and C be my heirs if B refuse, then let A and C be my heirs, and if C refuse, then let A and B be my heirs; here, then, are three substitutions contained as it were in one, which is most succinctly expressed in the above example upon which Julian decides; in this case, each receives a share of the vacant share in proportion to that left him, thus,—if \( A = \frac{1}{2}, B = \frac{1}{4}, \) and \( C = \frac{1}{4}, \) and C declines, then \( A = \frac{1}{4} + \frac{1}{4} \) and \( B = \frac{1}{4} + \frac{1}{4} \) more in proportion to his original share.

The substitution of persons, who are nevertheless co-heirs, is by no means superfluous, notwithstanding that the *jus accrescendi* will come into operation in due course of law, for such substitution differs in many respects from that rule of law. First, then, as relates to the persons, the testator is at liberty to substitute co-heirs, who by the law of accretion would be superseded by others,—and in respect to the acquisition, the share vacated is, by the *jus accrescendi*, acquired *ipso jure*; but in the case of substitution, not until administration or entry, which is of consequence in the transmission of the inheritance. Lastly, the co-heir cannot decline the accretion, whereas the substitutus can, but he is not authorized to enter upon the estate if he be not also instituted heir.

Thus, the second heir takes the same portion as the first would have taken, in so far the testator may have made no other provision.

A and B are my heirs, \( A \) of \( \frac{3}{4}, B \) of \( \frac{1}{4}. \) C is substituted for A, and D for B; failing, then, A, C takes \( \frac{3}{4}, \) and failing B, D \( \frac{1}{4}. \)

Now, in a reciprocal substitution of co-heirs, each takes so much of the unappropriated residue as he takes of the whole estate. Now, if A B C be heirs, \( A \) of \( \frac{1}{12}, B \) of \( \frac{1}{8}, \) and C of \( \frac{1}{8}, \) and are reciprocally substituted for each other, but A's portion becomes vacant, such portion must be divided into eleven parts, whereof B takes eight, and C three.

§ 1281.

The substitute must survive the condition on which he is substituted,—for if he die, as has been seen, even during the period of the first instituted or previously substituted heir's deliberation, his heirs have no claim through him, for the inheritance had not vested in him at the time of his death. The interest in expectancy, moreover, naturally ceases on the previous substituted, or on the instituted heir's accepting the inheritance.

Now, if the testament provide, let A be my universal heir, Examples. 

1 C. 6, 26, 1; P. 28, 6, 24; I. 2, 15, § 2. 2 P. 28, 6, 45, § 5; Westphal. Test. § 616, as to the Faldician portion in cases of legacy; P. 35, 2, 1, § 13, & 78, & 87, § 4; Voet. ad P. 25, 2, 20 & 22; Westph. Vermich. et F. C. 2, 1151, etc.; Bech-
but if he neither can nor will be my heir, let B be my heir; and A, being in doubt whether he will or will not take the inheritance, prays the tempus deliberandi, during which the substitute dies, after which A declines the inheritance, to which the heirs of B lay claim; they, however, cannot succeed, for B did not outlive the condition upon which he was substituted, A having a legal right to his year's deliberation. In like manner, the entry or acceptance of A extinguishes the substitution, for the case or condition presupposed in the institution never accrued.1

§ 1282.

Inasmuch as substitutions were invented to prevent testaments being destitute of heirs, Heineccius establishes the maxim of,—whoso is substituted for a substitute, is substituted for the instituted heir. A is my heir, but if he fail let B be my heir, and failing B, C. A then is institutus, B substitutus instituto, and C substitutus substituto, for which very reason he is also substitutus instituto—that is, of A.

The heirs are A, B, X,—each of §.

A is substituted for B.

B is substituted for X.

A is institutus, B substitutus instituto, X substitutus instituto.

Now, let it be supposed that A and B die, or decline before addition or entry, and X gets §,—the § of B as his substitute, but, being also substitute of A, he gets his §, also nam substitutus substituto etiam est substitutus instituto.

It is erroneous to suppose that he obtains this § jure accrescendi, and that the substitution is superfluous, for no question of cretion arises where the inheritance has not been entered upon; and, even if it were applicable, it would not assign § to X, substitutus ab utramque partem sine distinctione admittitur.2

It is curious that the Roman jurists occasionally admitted one as a co-heir in cases in which it was doubtful whether a substitute could succeed as such; on the first of these cases there is a very curious response by Julian.3

Caius is instituted, Titius is substituted, and Sempronius vulgariter substitutus. The first and third are free men, the middle man and first substitute turns out to be a slave, Caius goes off, Titius's master claims the inheritance as acquired by him through his slave, and Sempronius opposes his claim, and in equity on good grounds, for the question hinges on this,—either the testator knew Titius to be a slave or he did not; if he did, he intended to substitute the master through the slave, in which case the master's claim is good; or he did not, in which case his claim

2 I. 2, 15, § 3; Vinn. ad eod. n. 1.
3 P. 28, 6, 27.
is bad, for wills are to be construed according to the probable intention of the testator (in testamentis plenius voluntates testamenti interpretantur,—and, again, voluntas facit quid in testamento scriptum valet), who in this case intended to benefit the individual, not the master—a presumption the more reasonable because the slave might have been transferred to another master before the inheritance fell to him.

But another case may arise. Let us suppose Titius to have been notoriously a freeman at the time the testator wrote his will, and subsequently to have fallen into slavery; here the same argument will apply to contrary circumstances. The testator intended to benefit Titius individually, but circumstances have rendered his desire impossible; therefore, as Titius is individually incapacitated, the inheritance should devolve absolutely on the third person, Sempronius. Although this may seem logical and clear, yet Julian decrees the master of the slave and Sempronius to be co-heirs. It is true, a commentator calls this judgment anile et rusticum—a strong term to apply to so great a lawyer; as Julian Alciat, one of the greatest jurists of the middle age, depending probably on a passage of Ulpian, supposes Caius to have been instituted, and Titius and Sempronius substituted as co-heirs, which would justify Julian's judgment; but this hardly appears to have been the case,—at all events, this question would form an excellent subject for the schools. Brunus, Vinnius, Otto, Puttmann, Finestres, and many others, have discussed this question, and to which the reader is referred should he wish to examine the matter at length, and the learned arguments on this subject. In the latter case, English lawyers would say that a common law court would perhaps decide in favor of the master of the slave, and that relief could only be had in equity by the second substitute, Sempronius.

§ 1283.

Pupillary substitution is the substitution on the part of the father of an heir to his infant son, who may or may not have a peculium, and may or may not inherit from his father in addition.

If the infant have property the substitution is vera, but respectiva when the infant has a peculium as well as an inheritance in expectancy from the father; but if the child have no property from its father, and, in short, peculia property alone, the substitution is made on that account, for there is absolutely no second or after heir.

1 P. 50, 17, 10; P. 30, 1, 12, § 3. 2 P. 28, 5, 40 & 41; I. 2, 15, 4. 3 Fr. 23, § 34. 4 Dim. in jus civ. p. 203. 5 Ad id § ult. n. 3. 6 Ad id § ult. 7 Prob. lib. 1, cap. 16. 8 In prælect. ad tit. Pan. de vulg. et pupill. substitut. p. 214; Höfner, com. § 503, n. 3; Ulp. Fr. 23, § 34. 9 Merenda, contr. lib. 4, c. 6; Reuter, dim. de sub. recip. § 1, n. 1; Vinn. 2, 17, n. 4; Thibaut, System des Pandrechts, § 696.
§ 1284.

Of the pupillary substitution the *patria potestas* again forms the groundwork, and the reason wherefore the law has given the father the power of substitution is on account of the legal incapability of infants to make wills. Thus the father in fact testates for his son, naming an heir for him, and consequently he must first make his own will; hence it may be said that a will in which the father substitutes his son is double (*igitur in pupulari substitutione secundum prælatum modum, duo quodomodo sunt testamenta; alterum patris, alterum filii, tantum se ipse filius hæredem sibi instituisset; aut certe unum testamentum est duarum causarum id est duarum hæreditatum*), but requiring only seven, not fourteen witnesses, though the case is otherwise if the two wills be made at different times.

§ 1285.

The foundation of the pupillary substitution being, as it is, the paternal authority, this power vests in the father or grandfather (direct male agnate ascendent alone), but not in the mother; and the child born or yet unborn must be (*suus*) in his power, (yet how if they set up a house of their own?) be he father or grandfather, for *posthumi* can be substituted, being considered as already born in the eye of the law, because the substitution is to their advantage; but the grandfather cannot substitute should the children fall under the father's authority on the grandfather's death, hence the father must die before the grandfather. But if *Avus* has a son *Pater*, with his *Nepotes* under the paternal authority, and makes his will, can *Avus* pupillarily substitute the *nepotes*? certainly not, for, on *Avus's* death, *Pater* becomes *sui juris*, and the *nepotes* fall under *Pater's* power; but it is not so if *Pater* die before *Avus*, who is then at liberty to substitute the *nepotes* pupillarily.

The formula introduced by the *lex Junia Velleia*, however, enables the *Avus* to get over this difficulty, by framing his substitution as follows:—*Filius meus hæres esto, si vero me vivo suus hæres esse desinit, nepos ex eo mibi hæres esto; et si hic ante pubertatem descesserit Pomponius ipsi substitutus esto*. Hence, applying this formula to the above case, *Avus* must say,—my son *Pater* is my heir; but if he pass from under the paternal authority in my lifetime, but my grandchildren *nepotes* remain thereunder;

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1 I. 2, 16, 2.
2 I. 2, 16, 20, pr.
they shall be my heirs, but if they die under age *Pomponius* is substituted in their place.

§ 1286.

Upon the same principle of advantage to the child, a father may substitute his disinherited children, for disinheritance by no means dissolves the paternal authority. The father cannot, however, compel the substitute of a disinherited child to pay legacies, execute trusts, and the like, for no one can burden with legacies and trusts one whom he does not at the same time honor by leaving him legacies.¹

§ 1287.

Emancipation destroys the substitution, for the law requires that the child should be under power not only at the time the testator made his will, but also at the time of his death,² *si quis ex his mortis quoque tempore non fuit in familia substitutionis pupilaris sit irrita*. Arrogation of the infant after the father's death destroys the substitution, because the arrogator must give caution to pay over the infant's property, in case of his death, to those who would have received it had the arrogation never taken place, and such person is the substitute.³

§ 1288.

Male infants can only be substituted until their fourteenth, and females until their twelfth year,⁴ but may be for a shorter period, in which case it expires with such period; but if it be made for a longer period, for instance, till minority ceases, or till twenty-five, then it holds good till fourteen and twelve,⁵—the remaining period, however, being illegal, is not taken cognisance of.⁶ The Germans, however, allow it to continue for the remaining period as a trust or fideicommissum.⁷

Papinian has a somewhat remarkable passage,—*cum pater im-puberis filiae, quae novissime diem suum obiisset, tabulas secundas fecisset, et impubes filia superstite sorore pubere vita decessisset, irritat esse factum substitutionem placuit, in persona quidem prioris, quia non novissima decessit, in alterius vero quia puberem etatem complevit*. Now the father has two daughters under the age of puberty, and pupillarly substituted,⁸ that one who should survive,

¹ C. 6, 38, 24; Vinn. ad 2, 17, 4, n. 3; Westphal. von Vermachtungen, th. i, § 99. It is difficult to suppose a child of such tender years deserving disherition, or it may be done with a laudable view, vid. querela inoff. test. ad fin.

² P. 28, 6, 41, 2; Hunn. resolut. p. 461, qu. 11.

³ P. 1, 7, 17, 1; P. 1, 7, 18; Bachov. ad Treutler, v. 2, dim. 11, thes. 8, lit. D, thes. 9, lit. F.

⁴ P. 28, 6, 7.

⁵ I. 2, 17, § 8.

⁶ P. 28, 6, § 41, 7; P. 28, 6, 37; I. 2, 16, § 6.

⁷ Stryk. caut. test. cap. 18, membr. 2, § 24; Lauterbach, coll. de Vel. P. S. § 25.

⁸ Tabulas secundas fecit.
for her who should first die. The elder attains puberty, and the junior dies under puberty. The substitution then fails, for the elder daughter having attained puberty, the substitution quoad her is at an end. The younger has not died first but last, hence the substitution never affected her.

§ 1289.

The father cannot name an heir for his son and die himself intestate, the pupillare testamentum being considered as a pars et sequela paterni testamenti, or as the accessorium, which always presupposes a principale; but it is not necessary that they should be in the same will, for they may be diversis tabulis, executed at different times; moreover, the father’s will may be nuncupative, and that of his infant child in writing, or e converso,1 but of course the father’s will must be of a date prior to that containing the pupillary substitution, or both may be done, actu eodem conjunctim, or uno contextu, in which case it matters not whether the child’s or his own heirs be first mentioned. As the father’s testament is so intimately connected with that of the son, it follows that if it become void, ruptum, or irritum, or destitutum,6 the pupillary substitution is void also; still, an exception is made when the father’s will is declared inofficiosum or nullum, according to the provisions of Novell 115. A father has disinherited his infant child without assigning just and good cause, and pupillarily substituted him; the will is impeached and upset, in which case it is the general opinion that the substitution is valid, for in fact the institution of the heir is all that is overturned,—the other provisions remain, however, in force.3

§ 1290.

When the child dies in infancy. In cases in which the child dies in infancy, the substitute acquires not only the father’s property but the child’s peculium also,4 taking precedence of all its relations, even of the mother herself; still, it would appear that she may claim her legal share,5 inasmuch as the will is made in the child’s name, a view confirmed by the Code,6 which decrees that no one shall be deprived of his legal share under any circumstances whatever;7 but Ulpian,8 on the other hand, states clearly that the mother in this case is debarred of her legal portion, in which Bonifacius9 concurs, whereupon Dr. Hœpfner remarks with some naïveté that it is

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1 P. 28, 6, 20, § 1; I. 2, 16, § 3.
2 Vinn. 217, pr. n. 9. The substitution is not avoided by the child instituted in the father’s testament abstaining from the inheritance.
3 Vid. post de querela inofficiosi.
4 P. 28, 6, 10, § 8; P. 28, 6, 5; Klein, jurist Bib. 26, 230.
5 Brunnemann ad, 5, 2, 8, 5; Finkelthaus, obs. 29, n. 17; Harperecht, I. 2, 17, n. 47.
6 C. 2, 28, 30, & 32.
7 P. 5, 2, 8, § 5.
8 In vi, 3, 11, 1.
in vain the commentators dispute in the face of such positive laws.¹

§ 1291.

Substitutio quasi pupillaris, or exemplaris,² so called from its similarity to the foregoing, also termed *Justinianea*, because permitted by Justinian³ without the imperial dispensation thitherto necessary, is founded on *humanity*, because the child might die *mente captus*. It differs from the foregoing in this, that all ascendants,⁴ including the mother, could make use of it, nor is it required that the children should be in the father's power, nor that the child should be an infant. The child feeble in intellect must be instituted before all other persons; but if the imbecile person have no children, his or her parents and brothers and sisters must be instituted,⁵—as, for instance, the mother for her legal portion, &c., or e *converso*; but if these be wanting, the testator is free to institute whom he will.

With respect to who are to be esteemed such, the law determines,⁶ *iste tamen filius vel filia, nepos vel neptis, pronepos vel proneptis mente captus vel mente capta perpetuo sit*; and it would appear that though this is a *jus singulare*, and as such not to be extended to like cases, as of *furiosi, muti, prodigi*, and others not permitted to make wills, as some suggest, yet that such maxim is incorrect, and that it is capable of extension⁷ so far as such persons may be incapable of making a will, but that if they afterwards become capable of testation the substitution will become of none effect,⁸—*sed quare*, if the faculties of an imbecile person become clear, and he afterwards relapse into imbecility,⁹ Vinnius thinks the substitution remains in force where the descendent himself has not testated during the period he was of sound mind, and the imbecility has recurred during the life

¹ Carpazov, pt. 3, c. 8 & 1; Hartmann, Pistor. obs. 30; Merenda, contro. lib. 3, c. 40; Faber, conj. 15, 9; Stryk. de caut. test. cap. 18 memb. 2, § 16; Franzk, exper. 6, qu. 7; Puf. tom. 3, obs. 117; Heisler, diss. de pup. subst. matrem excludente, Madhun tr. de subst. impub. § 23; Klüber, Kl. jur. bib. xv. 375; Decis Capet. tom. 1, deci 66; Küstner, diss. de pup. test. praeterit. impuberis mater rato, Lips. 1783.

² Duarrenus, disp. annivers. lib. 2, cap. 7, calls it innocent. C. 8, 26, 9; I. 1, 11, § 3, 4.

³ Which substitution is to be preferred when both father and mother substitute an imbecile child and institute other heirs as well? Some prefer the paternal; others hold the paternal good as to the paternal, and the maternal as to the maternal property. With respect to any other property which may be in question, some prefer the paternal substitution, but others hold in favor of a division.—Martini, de subst. pup. cap. 4, § 3. But how can two substitutes co-exist, as a *paganus* cannot die with more than one testament? Vinn. l. c. n. 2.

⁴ Nov. 115; Stryk. de caut. test. cap. 18, § 20.

⁵ C. 6, 26, 9.

⁶ Hunnius in resolut. p. 4, 74; Perez, ad Cod. 8, 26, n. 36; Giphan, expl. diff. L. L. Cod. 6, 26, p. 60; Faber, praelact. c. 3, 26, n. 3; Voet. c. 8, 26, n. 6.

⁷ Stryk. caut. test. c. 1, memb. 3, § 13, 14; Struv. ex. 33, th. 36; Müller, Vinn. 2, 17, ad § 1, n. 3; Martini, l. c. cap. 3, § 15, seq.; Lauterbach, coll. th. p. 2, 17, § 42; Argum, P. 28, 5, 6, § 2; P. 28, 6, 41, § 2; I. 2, 19, § 4.

⁸ Vinn. ad I. 2, 16, n. 8.
§ 1292.

Military substitution. Military men are also privileged in this respect, in this that they can substitute beyond the years of puberty, and even their emancipated children, in respect of property, they may derive from them; moreover, they can substitute directly "if he may become heir," but a paganus only in case "the person named as heir does not or cannot become heir;" otherwise such direct substitution is treated as a fidei commissum; if such intention appear with the soldier, it is a direct substitution materially differing from a fidei commissum, and may run thus,—"A shall be my heir if he become so and die, or become my heir and die before his thirtieth year, B shall be substituted in his place;" nevertheless, the soldier can only substitute in respect of property to be inherited of himself, not in respect of that which may belong to the child as his own property, but the general rule, that the vulgar substitution comprehends the pupillar, is not applicable to the privileged military testament. Lastly, the soldier is not compelled to begin by naming his own heir, as others must do.

1 P. 28, 5, 6, § 2; I. 2, 19, § 4; P. 28, 6, 115, C. 6, 26, 8; Cuja. 2 obs. cap. 27.
2 P. 28, 6, § 2; I. 2, 12, § 1.
3 P. 29, 1, 41, § 4; Donell, com. 6, 28, n. 10.
4 Costa, l. c. Struv. ex. 33, th. 40;
5 Bauer, l. c. § 21.
6 I. 2, 23.
7 P. 29, 1, 5.
8 C. 6, 26, 8; Westphal. de testam. 794;
  Schwepp, Röm. Privat. 747.
TITLE XII.

Quibus Modis Testamenta Infirmannt—Inofficiosa Testamenta—Lex Furia—Voconia—
Falcidia—Exheredatio—Preteritio—Querela Inofficiosi Testamenti—Testamenta Nulla
—Injusta—Destituta—Rupta—Irrita—Recissa—Codicilli—Fidei Commnissae Universaalis—
—Senatus Consultum Trebellianum—Pegasianum—Bequests in Trust.

§ 1293.

In the more remote times of ancient Rome, when the provisions of the Twelve Tables were literally adhered to, no limit was set to legacies; parents and children, and brothers and sisters might disinherit each other without let or hinderance, a practice as injurious to the heirs as to the legatees, because, when an inheritance had been burdened with legacies to such an extent as to render it disadvantageous or worthless, the heir repudiated it; and, the testament having thus become destitute, the heir-at-law stepped in and the legacies were all superseded. This free right of legacy was so often abused by the exheredation of those who had the nearest claims of blood, that the centumviral court lent its aid to correct it, by the invention of the querela inofficiosi testamenti, which consisted, as will be hereafter seen more at length, in the impeachment of the will on the ground of the imbecility of the testator, on proof whereof the will itself was produced containing the exheredaton clause; it is probable that the legatees were

1 Pater familias uti legatus super familias pecuniæ tutelæve sum rei ita jus esto, Ulp. Fr. 11, 14, & § 1216, § 1181, h. op.
2 Gaius, 2, 224.
3 This is the view of Hotomann; Cuiacius, obs. 2, 21, & 17, 17, thinks there was a lex Glacia existing A.U.C. 504 to this effect; Augustinus de leg. et Scrm. in L. Glacia; Gravina de leg. et Scrm. 80, p. 649, seq.; Grut. Inscr. 290, n. 11; Hein. A. R. 2, 17, § 5.
4 Val. Max. 1, 7 & 8.
heard in support in their right, the heirs-at-law showing cause against the will, who, if they made out their case, the testament was set aside. The practice of this court of equity soon established precedents of cases in which it would set wills aside. The danger thus incurred by the legatees was doubtless the origin of the testator leaving his next of kin such portion of the inheritance as should be an answer to the querela inofficiosi testamenti, if brought against his will after his death,—this share obtained the denomination of portio legitima; but as, on the one hand, this principle had been established for the protection of the relatives of the testator against the law of the Twelve Tables, so its great extension so circumscribed the free right of testation as to be considered oppressive; on the other hand, no man could be sure his will would not be set aside as inofficious, and something more definite than the authority of the res judicata, which had extended the right of querela to distant relatives of the testator, was required. This appeared in the shape of the lex Furia before mentioned, which was, however, faulty in principle, because it fixed 1,000 asses* as the maximum of a legacy, without any reference to the total amount of the corpus left by the testator: this extended to the sixth degree, except as to cognates and the children of the Sobrini.3 But this law was as injurious to both parties, the legatee and the heir, as the old practice: if the estate were considerable, the legatee received a mere nominal sum compared with the whole; and if it were large or small, these legacies, multiplied to one or many, would exhaust it. Citizens of the first class being now forbidden, by the Voconian law of 585 a.u.c.,4 to institute women heirs, lest they should by accretion obtain the whole inheritance; and as in that case nothing would have been left them but these miserable legacies, that part of the lex Furia was abrogated as to citizens in the first class (census), who were allowed to leave women as well as men legacies, provided they did not exceed together the share which fell to the share of the heir or co-heirs. Walter5 supposes the lex Furia still remained in force as far as regarded the lower classes of census. Both these laws were superseded by the lex Falcidia, with which we have more particular concern.

§ 1294.

The first head of this law, the history of which has already been given,6 revives the free right of testation, and the second adds a proviso that at least a fourth must remain over for the

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1 Winkler, diss. de diff. inter test. nullum ruptum et inofficioso. c. 3; Zipernik diss. (Pand. Nettleblad) hist. jur. civ. de leg. pert. parent. p. 35.
2 Gaius, 2, 225; & 4, 23; Ulp. Fr. 1, 2; Theophil. 2, 22, pr.
3 Walter Gesch. des R. R. § 641.
4 Vid. § 1181.
5 Walter Gesch. des R. R. § 641.
6 § 1183, h. op.
heir,\textsuperscript{1} which could not be burthened with legacies; secondly, should the testator by legacies infringe on this \textit{quarta Falcidia}, the heir can subtract from the legatees rateably, so as to reserve for himself a clear fourth without upsetting the testament,—which has been preserved in most continental codes by reason of its obvious equity.

Let an estate be supposed to amount to . . . . \textbf{Aurei.} 12,000

The testator may dispose by legacy of . . . . \textbf{Aurei.} 9,000
Leaving for the heir one-fourth of the whole . . . . \textbf{Aurei.} 3,000

\begin{tabular}{|c|c|c|}
\hline
Aurei. & & \\
\hline
6,000 & are left to A, & \\
3,000 & " B, & \\
1,000 & " C. & \\
\hline
10,000 & in all to A, B, C. & \\
\hline
\end{tabular}

Hence 2,000 only remains for the heir, who can therefore deduct ten per cent. from each heir,—

\begin{tabular}{|c|c|c|}
\hline
12,000 & & \\
\hline
\end{tabular}

Thus 5,400 will remain for A,

\begin{tabular}{|c|c|c|}
\hline
Aurei. & & \\
\hline
2,700 & " B, & \\
900 & " C. & \\
\hline
9,000 & " total of legacies. & \\
3,000 & " the heir. & \\
\hline
12,000 & total amount of the \textit{corpus h~ereditatis}. & \\
\hline
\end{tabular}

\section*{§ 1295.}

The Falcidian law provides that the \textit{testamentary} heir only shall have this right of subtraction, which, it will be seen, was afterwards extended to \textit{intestate} heirs and trustees.

The next question relates to the persons who have claim to this \textit{portio legitima}. Sons, daughters, grandchildren, and great grandchildren have a claim upon it. Legitimate children can claim it from the father alone, but the illegitimate also from the mother; but if there be no children, or are such excluded by testament without the power or wish of upsetting it, this portion falls to the parent's grand or great grand parents,—that is to say, in both cases the legal portion follows the descending or ascending

\textsuperscript{1} P. 35, 2, 1, pr.; Gaius, 2, 227; Ulp. Fr. 24, 33; Dio. Cass. 68, 33; I. 2, 22, pr.
In the collateral line; failing these, and in the case of their disinheritance, or inability, or unwillingness to impeach the will, the legal portion falls to the brothers and sisters, or collateral line, but then only in the case of an infamous person having been instituted; and here it must be remarked that the claim on the legal portion is not to be confounded with intestate succession. Fratres germani, brothers, sons of the same father and mother—and fratres consanguinei, brothers of the same father but of different mothers, have this claim; but it is doubted as to the half-blood, uterini, those of the same mother but of different fathers. The Codex certainly excludes them, and the Novellae also, according to the better opinions.1 Children of brothers and sisters,2—that is to say, uncles, and aunts, and nephews, clearly have no claim to the portio legitima.

In the collateral line the brother is not bound to leave his sister the legal share, except he name a person as heir infamia juris laborans, or who has the levis nota maculam in the sense of the Roman law,—as, for instance, a mulier quaestuaria. Before the time of Constantine the Great, it was doubtful whether the uterini could maintain the querela inofficiosi testamenti, or whether they were only admitted to it as against a turpis persona, for Constantine certainly confined it to the germani and consanguinei. Thus, Fratres uterini ab inofficiosi actionibus arceantur, et germanis tantummodo fratribus adversus eos duntaxat institutos heredes, quibus injustas constiterit esse notas detestabilis turpitudinis, agnatione durante, sine auxilio pratoris petitionis aditus restatatur. A slave being a hares necessarius is not infamis, because he does not benefit by the property. Actresses, and the like, were among those who had the levis nota maculam. Thus, servus necessarius hares instituendum est, quia non magis patrimonium, quum infamiam consequitur. Unde adparet, actionem inofficiosi fratribus relaxatam, cum infamiae asperrima vitis est, qui hares exitit, omniaque fratribus tardi, quae per turpitudinem aut aliquam levem notam capere non potest institutus. Ita in hac quoque parte, si quando libertis hereditibus institutis frater exemplo alieni, inofficiosi actione praesepa praevalent in omnibus occupandis facultatibus defuncti, quas illa perperam ad libertos voluerat pertinere.

Justinian consolidated these two laws,3—Frates vel sorores uterini ab inofficiosi actione contra testamentum fratris vel sororis

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1 Bochmer, diss. de querel. inoff. don. frat. § 3 in Elect. L. C. 1, p. 350; Püttemann, diss. de querel. inoff. frat. uterini haed conced. Lips. 1769, in opusc. num. 1; ejusd. progr. vind. diss. cont. lb. n. 3; Lorenz. diss. utroem. frat. uter. uterpi heredi scrip. leg. relig. 15, necne? Goetz, 2774, § 6, seq.; Wüstenberg, de leg. diss. 2, 49; Marchart interp. i. C. lection, 7, 14, p. 66; Boehmert, diss. de querel. inoff. frat. consang. § ult.; ex ad Pand. vol. ii. p. 815; Finestres, ad tit. de inoff. test. 5, 71, seq.; Trummer, diss. de querel. inoff. frat. her. haud deneganda, ed. 1783.
3 C. Th. de inoff. test. 55 & 3.
4 C. 3, 28, 27.
LEX FALCIDIA.

penitus arceantur; consanguinei autem durante agnatione vel non contra testamentum fratis sui vel sororis de inofficiis questionem movere possunt, si scripti heredes infamiae vel turpitudinis vel levis notae macula adspergantur, vel liberti qui perparam, et non bene merentes, maximisque beneficiis suaum patronum adsequi sunt; excepto servos necessario institute, et, as will have been observed, added and altered them in many places.

Now, the question arises as to whether the 18th Novella repeals this law: the Codex excludes the uterini because, not being agnati, they had no right of intestate succession; on the other side, it is urged that all intestate heirs have not a claim on the portio legitima; moreover, that the uterini inherited ab intestato at that time, although they had no querela: the reply is, that if they were excluded from the legitima only because they did not inherit ab intestato, that when they could, the right to the legitima followed; moreover, that it is a special grace to the uterini, still they could not be admitted to the querela. Again, it is asserted that Tribonian adopted the law of Constantine in 528 into the old Codex, and forgot to strike it out in the new edition in 532. Upon the whole, the case is stronger against than for the uterini.

§ 1296.

The old law fixed one-fourth as the amount of the legitima ab intestato, but by the 18th Novella it varies from the half to a third, according to the number of claimants,—where four or less claimed it was $\frac{1}{2}$, but where five or more $\frac{1}{3}$, which will be noticed at length under intestate succession.

There are some important rules respecting the legitima,—the first is, that as between parents and children, the obligation is not only to leave the legitima, but also to institute as heir. By the old law it was indifferent under what denomination the legitima was acquired and the will held, whether it was left titulo legati, fidei commissi, dotis, donationis propter nuptias, or mortis causa; but Justinian directed children and parents to be instituted heirs if they had not deserved exheredatio, and that it should not suffice to leave them their legitima; hence they must be instituted, and if so instituted, the legitima may be left then under any title whatsoever; thus the following bequests would be valid:—"All my children shall be my heirs; I bequeath to my eldest son, who must be content with his legitima, a legacy of 1,000 aurei, which is as much and more than his legal share." In like manner, the testator may use any words implying an institution, as, "I leave,"

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1 Pro germani consanguinei.
2 On account of the difference between sui and emancipati having been abolished by Anastasius, C. 5, 30, 4.
3 Infamiae and turpitudini asperae synonymous here.
4 A new exception by Justinian.
5 C. 6, 37, 14.
6 Nov. 115.
"I bequeath," &c., but he must not expressly or impliedly declare such son shall not be his heir, for that will avoid the testament. The *legitima* must be *absque onere, absque gravamine*, &c., without service or duty in respect thereof, or any condition or object; but if he wish to do this, the testator must bequeath more than the *legitima*, and add, that failing such condition, &c., he shall only have his *legitima*, but he may repudiate the excess and take his *legitima* alone.

Lastly, if one be instituted as heir with less than the *legitima*, the testament stood, but he might bring his *actio expletoria*, otherwise called *condictio ex L. 30 C. de inoff. test.* for the deficiency.

§ 1297.

*Ex or disheredatio* is the express exclusion of kin to whom a portion of the entire inheritance of right belongs, from the whole thereof; for if ever so little be left to an heir, he is not disinherited, less so if nominated to his entire legal portion, thus it is no disheredation to exclude one who has no claim on a legal portion, as an uncle or nephew; the exheredation is express when the declaration is made clearly that such and such a person shall not be my heir, and the form of words is immaterial, thus, by the Roman law it was a disheredation to say *ille filius meus alienus meae substantiae fiat.*

*Prateritio* differs from disherition, and is passing the heir over in silence; he need not, however, be passed over in total silence, thus,—*cum filius meus ingratuserga me fuit, Sempronium haredem instilio;* thus, then, if I neither nominate one heir, nor expressly declare that he shall not inherit, *non exheredatus sed prateritus est*.

Let us now inquire as to the form, the cause, and the effect of disheredation and praterition.

§ 1298.

The old Roman laws provide that the disheredation of children shall be *pure*, and this Hermogenianus and Ulpian say expressly,—the former gives the reason, *certo enim judicio liberi à parentum successione removendi sunt.* Papinianus and Ulpianus are of opinion that a man may make his son his heir, *filium suum sub conditione protestiva*; but if he do this, he disinherits him impliedly in case the condition be not fulfilled. Marcian observes that a man may disinherit his son under a casual condition, by placing him in the adverse category. If this be the case, where is the

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1. C. 3, 28, 32 & 36, § 1.
2. F. C. Book, Schleswig, 1799.
3. C. 6, 28, 3; Bauer, diss. circa form. exhaer.
4. An heir is said to be in conditionem tamen positus when the words are *si filius meus hares non erit, Seius hares esto.*
5. P. 37, 4, 18; P. 28, 2, 3, § 1.
6. P. 38, 7, 28.
7. P. 28, 5, 4-
8. P. 28, 5, 86.
EXHÆREDATIO—PRÆTERITIO. 265
certum judicium? the question savors, however, somewhat of sophistry.

§ 1299.
Secondly, the form must apply to all co and every substituted heir, fieri debet ab omnibus hæreditibus et ab omni gradu,1 that is, if several co-heirs be nominated in various clauses, the disherition must be so expressed as to apply to all, not to one of the co-heirs.

Ex gr. The words,—A hæres esto, Filius exhæres esto, or A hæres esto, B hæres esto, Filius exhæres esto, would be a disherition bad for uncertainty. Thus, it should be,—A hæres esto filius exhæres esto, B hæres esto, filius exhæres esto, or Titius, excluso filio, hæres esto, Caius hæres esto, would be wrong, for it must run,—Titius et Caius excluso filio hærdes sunt, or Filius ex hæres esto, Titius et Caius hærdes sunt. Thus also, in a substitution of one heir for another, the disherition must apply to all heirs equally, thus,—Titius hæres esto. Thus, the testator must not say,—Titius hæres esto, si Titius hæres non erit, Caius hæres esto, filius exhæres esto, nor Filius ex hæres esto, Titius hæres esto, but Titius hæres esto, Caius hæres esto, if Titius hæres non erit, Caius hæres esto, Filius exhæres esto; or shorter,—Filius ex hæres esto, Titius hæres esto, si Titius hæres non erit, Caius hæres esto. These forms are of course not in use among those modern nations who adopt the Roman law.2

The sons must be disinherited by name, the daughters could be disinherited generally and undefinedly inter cateros; thus, in the case of two sons, a daughter and grandchild, the testator might say,—“My two sons shall be my heirs, I disinherit all the rest,”3 or cateri omnes filii filiaeque mea exhærdes sunt, was held good by Paulus.

One is disinherited if either named or accurately described alia certa demonstratione, quæ vice nominis fungitur; thus Ulpian4 thought,—hence, “my eldest daughter shall be disinherited, my son the student of theology shall be disinherited”;5 but if the testator have an only son, he can say,—“my son shall be disinherited.”

By Justinian’s constitution, all descendents without distinction of degree of sex (sons, daughters, grandchildren, &c.) must be disinherited by name.6 The same formula should be used at present among nations adopting the Roman law.7

When these forms are observed it is called exhæredatio, when not præteritio.

1 P. 28, 2, 3, § 2. 2 Bauer, l. c. § 9. 3 P. 28, 2, 25. 4 P. 35, 5, 34- 

The form of exhæredation.

1 P. 28, 2, 3, § 2. 2 Bauer, l. c. § 9. 3 P. 28, 2, 25. 4 P. 35, 5, 34-

VOL. II.

Sons by name, daughters generally.

Justinian decreed that all descendents without distinction should be disinherited by name.

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The Novella required a good cause to be assigned for exheredation.

Valid causes for which parents can disinherit children.

§ 1300.

By the law of the Novella, good reasons must be added in the will to the form of the actus in the disinheritance of parents and children; but the old Roman law, it has been seen, did not require, in cases of disinheritance, that the cause thereof should be mentioned in the will; but the person so disinherited could, if he thought himself aggrieved, institute a quærela inofficiosi testamenti, which was tried by the centumviri, or the judges having jurisdiction in such matters, giving judgment according to their discretion, in which the onus probandi lay on the heir. Justinian directed the reason always to be stated, in the 115th Novella: he went further, in fixing certain grounds of disinheritance between parents and children; the same applied to preterition, one or more of which are to be expressed in the will; he added nothing as to brothers and sisters, with respect to whom the old law remained in force, and it is an error to believe that the 22nd Nov. 47 applies to such persons, with which compare 118th.

§ 1301.

The following are the causes for which children can be disinherit by parents:—

1. Verbal injuries, abuse of parents.
2. Real injuries, striking parents.
3. Attempting life of parents.
4. For accusing his parent of a criminal offence (accusatio)—treason forms an exception.
5. Of a civil offence, whereby he is damaged (delatio).
6. When the son consorts with conjurors or poisoners (maleficiis).
7. For preventing the parent from making a will by threats, contrivances, or otherwise; if the parent die in consequence intestate, the child's share is confiscated to the exchequer.
8. For refusing to ransom parents taken prisoners of war.
9. For turning sectarian, that is, non-conformity with the tenets of the councils of Nicea, Ephesus, Constantinople, and Chalcedon.
10. For not taking care of parents during temporary aberration of mind.
11. For lying with his stepmother or father's concubine.
12. Si inter mimos vel arenarios esse filius sociaverit, for associating with buffoons and tumblers against the father's will.
13. If of the age of eighteen, for not bailing parents out of prison for debt on request.

1 Nov. 115, 6, 28, 4.
2 Siccamæ de jud. centumv. lib. 2, D. Zepernik.
3 Z. E. Bauer, diss. cit. § 18.
4 C. 6, 28, 30.
5 Cocceii, jur. contr. cit. de inofficiosi test. qu. 9, ibique Emminghaus in not.
6 These two do not apply to a daughter; the 13th, because a woman could not by law give bail.
EXHÆREDATIO—PRÆTERITIO. 267

14. The daughter for marrying against the parents' consent, or leading a disreputable life; as, for marrying a slave for lewdness, marrying against her parents' consent, if the parents have endeavoured to find her a husband.¹

§ 1302.

Parents can be disinherited by their children for eight causes:—

1. For accusing ( accusatio ) or giving information ( delatio ) against their children for a capital offence, treason always excepted,—si ad interitum vite libera tradiderint citra causam tamen quæ ad majestatem pertinent cognoscitur.

2. Attempting the children's lives.

3. Lying with the stepdaughter or son's concubine.

4. Preventing the children from making a will.

5. Not ransoming them when in captivity.


7. Becoming heretics.

8. The father or mother can be disinherited by the children, by the one giving the other poison, or otherwise attempting the life, so that the party die or lose the understanding.

A question arises as to whether any other reasons be admissible, for Justinian says,— præter ipsas nulli liceat ex alid lege ingratiudinis causas opponere nisi quæ in hujus constitutionis serie continetur; it, however, cannot ever have been Justinian's object, as Cocceii² observes, to have let worse offences go unpunished.³

§ 1303.

A soldier by reason of his peculiar privilege, or a mother, or grandmother, because their children are not under their power, may pass by their children in silence in their testaments, and it amounts to a disheredation as much as if they had been disinherited by name; yet, by a later law,⁴ if in the mother's or grandmother's will they be passed by without just cause, the will may be set aside as inofficious.

§ 1304.

It has been seen that a valid cause was indispensable to exheredation or preterition; means were, however, open to him who had been improperly deprived of the share legally due to him.

By the strict rule of law, before Justinian, the testator passed over descendents who were no longer under his paternal authority; but to remedy the evident injustice of this, the prætorian edict allowed such emancipated persons to impeach the will, and petition for a bonorum possessio contra tabulas.

¹ This does not apply to the son. ³ Vinn. ad pr. 1, de inoff. test. n. 2;
² In jur. controv. tit. de inoff. test. qu. 13. ⁴ I. 2, 13, § 6, 7.
³ Vinn. ad pr. 1, de inoff. test. n. 2; ⁵ Bynkershoek, obs. lib. 5, c. 5.
⁶ Nov. 115, 3.
Moreover, strict law required no cause for the disheredition or
preterition of parents or children in the paternal power.

Equity protected such when disinherited or passed over without
good reason by the *querela inofficiosi testimanti*.

Strict law did not require brothers and sisters to be instituted.

Equity allowed such a remedy when a *turpis persona* was in-
stituted.

The new law of Justinian\(^1\) distinguishes between the cases
when a valid ground is stated and when not, allowing the in-
stitution of the heir to be impeached without affecting the testa-
ment generally. But the form of the Novella must be observed,
for otherwise the *querela* will be *nullitatis*, not *inofficiosi*, which
consists in the grounds being assigned as the law requires.

\section*{§ 1305.}

A *testamentum nullum* and *inofficiosum* are, therefore, as diffe-
rent as the remedies applicable to them,—the *querela nullitatis in-
officiosi* and *bonorum possessio contra tabulas*. Now, if a testament
be inofficious only, it is so far good as to supersede a previous
will, which is then *ruptum*; but if a testament be *nullum*, it does
not so supersede a former will.

Another difference is, that the *querela nullitatis* endures thirty
years, and affects the heirs; a *querela inofficiosi* only five, and does
not affect them.

The *querela nullitatis* upsets the testament.

The *querela inofficiosi* the institution of the heir only.

The defendant can, in the case of an inofficious suit, plead the
truth of the cause of disheredation; but in a suit of nullity he
cannot do so.

The *bonorum possessio* differs from both,—first, in the limitation
of the action, which in the case of parents and children must be
instituted within a year; but in that of other persons, within one
hundred days, reckoned from the period of the fact of the delation
of the inheritance coming to the knowledge of the plaintiff.

*In summa* the *querela nullitatis*, by the old law, annihilated the
whole testament; the *querela inofficiosi*, the institution of the heir
only; and the *bonorum possessio contra tabulas*\(^2\) (B. P. c. T.), while
it assigns the inheritance to the petitioner, compels him in certain
cases to pay the legacies.

\section*{§ 1306.}

The later Roman law differed essentially from the old in respect
of the persons who could and those who cannot be disinherited or
passed over.

\(^1\) Nov. 115.

\(^2\) Reinhardr, *diss. de quer. null. et inoff. test. differentiis et usu earundem practico*,
Goett. 1736; Haubold, *diss. sub. pres.*

Winkler, *de diff. inter test. null. et inoff. 5, 6, 7, § ult. p. 38, gives ten causes of
difference, but the treatise is unfinished.
A. By the old law there was a difference between the children, parents, and brothers and sisters of the testator. Parents and brothers and sisters would be passed over, but children not without a distinction.

B. As regarded the father and mother, the former could not pass over the children without a difference, while the mother and maternal ascendants could.¹

C. The *sui*, or such children as were *sub patria potestate* on the father’s death, could not be passed over, but the *emancipati* could.

D. An emancipated child of the body, if passed over or not duly (*ritē*) disinherited, could petition for *B. P. c. T.*, not so an emancipated adopted child.

E. Sons must be instituted or disinherited by name, but daughters could be passed over.

F. Grandsons could be passed over like daughters.

G. Children in existence when the testament was made, can impugn it as *nullum* if passed over in a manner not recognised by law. Posthumous children rendered the testament *ruptum*, or could petition for the *B. P. c. T.*

§ 1307.

The later Roman law wholly repeals the differences, F and G, between sons and daughters, children and grandchildren, A being partially repealed by Nov. 115.

Parents can be passed over, but, as is the case with children, a valid cause must be assigned.

The second difference, B, between father and mother, is also partially repealed by the 115th Nov. The mother may pass over the children without formally disinheriting them, but she must assign one of the fourteen causes required for the disheredation of children.

But it may be doubted if it be a pretention when the party is named,—if not named he must be at least circumstantially described; hence it may be asserted that a mother must in fact disinherit her children by name.

C & D. Some jurists are of opinion that the Novellae make no distinction between *sui* and *non sui*,—hence, that the *querela inofficiosi* is competent to both alike, and that the latter need have recourse to the *B. P. c. T*. But others are of opinion that the difference is not entirely abolished,—and only in this, that both may require a valid cause for their disheredation to be assigned.

One distinction, however, remains,—viz., that the *sui* can impugn a testament, according to the Civil law, when passed

¹ What applies to the mother applies equally to the maternal grandfather. *Matre et avo materno liberis jure civili pro extraneis sunt.*—I. 2, 19, § 3.
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over or not duly disinherited, or where no legally valid reason therefor is assigned.

The non sui, on the other hand, must in all cases seek the B. P. c. T. Upon these points Höpfner¹ thinks, probably correctly, that the non sui require no B. P. c. T. when they impeach a testament for non-observance of the provisions of the 115th Novella, Justinian having made therein no distinction between sui and non sui, but that it is a moot point whether the non sui must in other cases seek relief in the B. P. c. T., or whether, like the sui, they can institute the quærelæ nullitatis and inofficiosi.

The later law does not permit the father and male paternal ascendants to pass over the children of their bodies, and grandchildren being under their power and born at the time of the making of the will; and, if they do so, the testament is nullum.

If they disinherit such, but not in conformity with the form prescribed—that is to say, not rite, or duly, inasmuch as such exheredation, in which the formalities prescribed in the old laws² are not observed, is to be considered as a preterition, the testament is as regards its whole contents nullum.

If the exheredation be rite, duly, made, but the provisions of the 115th Novella be not observed—that is to say, there is no cause adduced, or, if adduced, is not among the fourteen recognised by law, the institution of the heir is of none effect, testamentum corruit quoad institutionem, and a quærelæ nullitatis ex jure novo ex Novella 115 is maintainable.

Nor will it avail the heir to assert that the person disherited had committed one of the fourteen offences involving the penalty of exheredation, for if so it should have been stated.³

But the testament is good, except the heir's institution, and the legacies, &c. stand, whereas by the old law the whole testament would have been nullum.

If one of the fourteen reasons be adduced, and its truth disputed by the party disherated, he must commence the quærelæ inofficiosi in order to put the heir to the proof of its truth;⁴ if he fail therein, the institution is upset as inofficious,—but if he succeed, it stands, and the testament is confirmed.

¹ Com. § 527; ed. 8.
² i. c. That which obtained before the promulgation of Nov. 115.
³ Harpræcht, ad I. 2, 13, § 5, n. 6; Donell, Duaren, Hotomann, Fachineus, etc. assert that the institution alone is affected when a father passes his child over in silence, but assert generally that a testament is invalid by reason of the preterition or disheradation of the children; Hunn. quant. sel. 2, 203; Cocceli, in jur. contr. ht. qu. 43; Pufendorf, T. 4, obs. 76, § 16.
⁴ Harpræcht, i. c. n. 92; Mens. de test. p. 840.
⁵ A strict proof is not required.—Leyser, sp. 457, med. 5.
§ 1308.

If a father of paternal ascendent neither institute nor disheredites, nor duly exheredates (for that amounts to pretention) the issue of body, or grandchildren not under his power non sui, they may petition under the edict for the B. P. c. T.

If they be rité exheredated, they must first seek a qualified B. P. termed litis ordinandæ gratia, and, having obtained this, institute the querela inafficiosi.

§ 1309.

The foregoing is correct of children already born when the testament is made, and is applicable to the posthumus, with the only difference that if the suus was extant at the time of the making of the testament, the testament is nullum,—whereas, if a posthumus suus be passed over, it is ruptum.

In the case of posthumous children, the difference between sons, daughters, and grandchildren, is not so defined as is the case of children already born. If a filia posthuma or filius posthumus be passed over, the testament is ruptum.

The difference in the form of the exheredation of male and female posthumi was, that the former must be exheredated nominatim, the latter inter cæteros, with a legacy ne viderentur praterita esse per oblivionem.¹

It is a common vulgar supposition of the lower orders in England that the heir-at-law cannot be disinherited without a legacy,—vulgo, “the eldest son must be cut off with a shilling.” The above shows that the prejudices of the vulgar always have a foundation, and that such foundation is usually based on a misconceived view resulting in an absurdity.

The next question is,—do the valid reasons for exheredation apply to posthumi, for how can a valid cause be assigned against one not yet born? The explanation lies in a fiction. The grandchildren under power of the father are to be considered his posthumi. Now the avus may say,—Filius meus hæres esto, si me vivo moriatur, liberi sui hæredes sunt, excepto primogenito quia me feriit, exhæres esto.

Secondly, children acquired under paternal power by legitimation, after the making of the testament, are posthumi: such a daughter may be exheredated for having led a lewd life.

§ 1310.

If children be perfecté adopted or arrogated, and are under power, they are in exactly the same category as issue of the body; if minors, they may, though exheredated, claim the quarta Divi Pii at least, if they be so without just cause; but if emancipated, the case of adoptive children being disinherited by the father.

¹ Vinn. ad I. 2, 18, § 1, n. 4, et Hein. ad id.
they may be passed over. Those imperfectē adopted only inherit ab intestato, and can, consequently, be pretermitted in a testament.

The mother and maternal ascendants may exclude at pleasure adoptive children; but it will be remembered that women sometimes obtained the right of adoption by rescript, these can demand no legitima, for the imperfectē adoptatus cannot claim it from the father, à fortiori not from the mother; 1 as a matter of course, a child adopted by the father has no claim of legitima on the mother.

§ 1311.

The mother and maternal ascendants may exheredate or pretermit the issue of their bodies; hence the querela nullitatis ex jure antiquo will not lie, nor will the prætor grant B. P. c. T.; the querela inofficiosi, however, is available. The querela nullitatis ex Novella 115 applies, if no legally valid cause be stated, and corruit testamentum quoad institutionem, nor is the heir allowed to prove such a cause to exist in fact, although not stated. 2 But if such cause be stated, the person exheredated must have recourse to the querela inofficiosi.

If the mother or maternal ascendants make a will, and afterwards have children or grandchildren who are not instituted, the will is not ruptum; but a querela nullitatis juris novi, or a querela inofficiosi, may be instituted.

§ 1312.

When parents are exheredated by children, one of the eight legally valid reasons must be set out in the will; but if this has not been done, or if the children have given none such, or one not within the eight aforesaid, corruit testamentum quoad institutionem, on a querela nullitatis being instituted by them; nor will it avail the instituted heir, if he succede in showing that the parents have been guilty of one of the eight legal causes, so that be not set out; if, on the other hand, one of such eight be set out, and the parent exheredated assert its falsity, he must do so by a querela inofficiosi, and the onus probandi veritatis lies on the heir instituted; if he succede the testament is confirmed, if he fail the institution of the heir is upset. This is clear by the Novella 115, not so by the old law. 3

§ 1313.

If brothers and sisters be exheredated or passed over, and a turpis persona instituted, they have, whether a cause of exclusion be set out in the testament or not, no other remedy than the

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1 Glück. Th. i, § 37, h. 3; Gloss. ad P. inoff. test. 29, § 3; Höpfner, l. c. § 532, n. 3; Noodt. ad tit. inoff. test. p. m. 159.
2 Contra, Haber, h. t. n. 14.
3 P. 5, 2, 3, § 1; C. 3, 28, 28; sed vid. Nov. Majoriani viii. (Cod. Th. Ritter Ed. Append. S. 156). Si vero matri contra religionem sanguinis propositumque pietatis externus haeres insidiatorque subrepserit quidquid ab ea non justus causis extantibus quas sine dubio probaturus est qui videtur filiis antefieri donatum fuerit vel relictum, id totam ab ipsdem filiis vindicatur.
QUELELA INOFFICIOSI TESTAMENTI.

querela inofficiosi; upon which the question is raised of whether the exheredated sister has so conducted herself towards the testator as to deserve exheredation,—if so, the testament is confirmed; if not, upset. It is disputed upon whom the burden of proof falls: it would appear that the plaintiff must prove generally that he or she behaved as a good brother or sister, but he need not prove his innocence of the charge; the proof of which is for the defendant. Others say, the plaintiff must also prove this, as Justinius did not alter the old law as to brothers and sisters; but the former appears the more reasonable.

§ 1314.

Before considering how a will may be set aside for informality, it will be well to examine how a testament, otherwise good may be invalidated rescindatur, on a principle of equity by the inquiry or plaint (for it was not, strictly speaking, to be called an action), termed querela inofficiosi testamenti. This is a remedy given to persons whom the testator has deprived of their legal share, either by exheredation or by pretention, upon the fictitious presumption that the testator who would thus deprive persons nearly related to him of their due share must be of unsound mind. This suit may be instituted by children, parents, and brothers and sisters, in cases where a turpis persona is preferred to them, although they may have been disinherited or passed over in the usual acknowledged form; but where the reason is non proven, the inquiry is directed against the heir, and if the plaintiff recover judgment the will is upset, and he succeeds as heir-at-law, and this is equally the case if the cause assigned be false, or non proven; and here it may be remarked that the reason may be a legal and good cause, yet false as to fact, thus the son may be falsely stated to have struck the father.

It is instituted against the heir who has been instituted in the place of him who is disinherited, and against such person the querela inoff. test. lies, praying that the will may be rescinded to the extent to which the plaintiff isDamnified, and that he may be admitted to the B. P. i. T.; the entire testament, however, is not so destroyed as to render the testator intestate; in cases where, of two heirs with equal claims, one is disinherited and the other not, the querela invalidates the testament only as far as the plaintiff is concerned.

§ 1315.

But here a very important question arises: if the fiction upon which the testament is destroyed be that of insanity, it follows that the whole must be void, not a certain clause of it; to meet

1 C. 3, 28, 28, arg. 4 J. C. Koch, de quatinus test. per quer. inoff. test. reddatur intestatus, P. 5, 2, 8, 8; P. 5, 2, 19; Nov. 115, c. 3, & c. 4, ad fin.

2 Hommel, diss. de diff. inter querel. inoff. quae parent. ad lib. et quae frat. compet. 3 I. 2, 18, pr.

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this, Justinian ruled in the 115th Novella, with respect to parents and children, that the institution of the heir should only be affected, not the whole will; but what is the law for brothers and sisters, here the old law then remains in force? Some have written in favor of one, some of the other view.\(^1\)

Inasmuch as this form of inquiry called the sanity of the testator into question, without however proving anything, it was reluctantly adopted; hence, where the end could be obtained by other means, as by *actio nullitatis, rupti irriti, or bonorum possessio contra tabulas*, such were preferred. To act otherwise would also have been, under the new law, absurd, as this latter course upset the whole testament; whereas, the *querela inoff. test.*, the heir's institution alone.\(^2\)

This action could not be commenced by the heirs of the disinherited party, when this latter had not juridically or otherwise declared that he intended to institute the suit, to which Justinian introduced the exception, in the case of a disinherited child dying during the period of deliberation of the instituted heir, that his descendents can institute the *querela*, despite the silence of the deceased on the subject.

The action is limited to five years; whereas other suits, relative to inheritances, are not barred till after a lapse of thirty years.\(^3\)

There is a curious penalty in force respecting legatees who institute this suit without bringing it to a successful issue; they lose their legacies as a punishment for having accused the testator wrongfully of unsoundness of mind,—this is, indeed, a fact founded on fiction, which continued even after the fiction had ceased, the new law, however, rendered it unnecessary; and if we admit the principle of the law ceasing with the cause\(^4\) to apply here, all the other provisions which certainly remained in force under the new law would be annihilated.\(^5\)

This *querela* could not be instituted when the testator had disinherited from a good motive, *(bona mente)*, as when a father disinherited his imbecile or extravagant son and instituted his children, or when he disinherited his infant son ordaining the heir to deliver the inheritance to him on his puberty, or when the son is in debt and the father foresees that the creditors will absorb the whole property.\(^6\)

Whoso by silence or consent shall have acknowledged the will of the testator is barred from this suit; such an act as accepting a legacy will have this effect, for the validity of the will, and consequently the sanity of the testator, is thereby acknowledged.

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\(^1\) Pro Hommel, diss. cit. § 10; contra, Struv. ex. 10, th. 22; Voet. com. tit. de inoff. test. 1215; Cocceii, jur. controvers. cod. tit. qu. 11.

\(^2\) P. 5, 2, 8, § 12; Püttn. adv. lib. 1, exp. 6.

\(^3\) Püttnmann, opusc. p. 27; Voelker, diss. trans. quer. inoff. test. ad hered.; P. 5, 2, 8, § 17 & 9.

\(^4\) Sed vide Koch, specim. compend. Pand. med. 5.

\(^5\) Leyser, sp. 358, 2; Pufendorf, tom. 1, obs. 192; Boehmer, jur. controvers. p. 417; Ayer, diss. cit. 28.
Testaments may be avoided in various ways, and are then termed nulla, injusta, destituta, rupta, irrita, or recissa; even the Roman lawyers, however, occasionally confuse these terms.  

A testament is said to be nullum when some vice exists in its internal requirements arising from the will or personalty of the testator, thence termed defect; or that of the heir, in which case the testament is correctly said to be nullum in specie; for example, when any person who must be instituted or disinherited under penalty of nullity is not so instituted or disinherited or rite disinherited, or when a person incapable of inheritance is instituted, as an apostate or an illicitum collegium, when the testator had no power of testation as in case of a prodigus, when the testator was forced or fraudulently induced to make the will, or when the legacy is captatoria or dependent on a reciprocal condition between two parties.

Injustum, or illegal, on the other hand, applies to a want of some external solemnity necessary to the validity of a will, as from a want of the due number of witnesses, their formal rogatio, or unitas actus, &c.; this is, however, a comparatively modern distinction, as the old Roman jurists called all wills void, ab initio, injusta, non facta, imperfecta, non jure civilis facta, inutilia, nullius momenti, whether the vice be internal or external.

With a testamentum nullum, all legacies and trusts fall to the ground, nor can any subsequent occurrence remedy the defect, for though a son, who should have been rite exheredatus, die before the testator, still the will is nullum; it must, however, be premised that the codicillary clause in some measure remedies the defect in a testamentum injustum, or the prætor may do so when a filius prateritus repudiates the inheritance.

A testament is destitutum or desertum when the heir will not or cannot assume the inheritance, for an heir may die before the inheritance vests in him, and thus be prevented from transmitting it to his posthumous or living heirs; may have become incapable of accepting since the will was made, or the conditions of the institutions may not have been fulfilled; in such cases, the heirs-at-law step in as such unfettered by legacies and trusts.
§ 1318.

A testament may be cancelled or ruptum in two ways, either by the subsequent birth of a person who must by law be instituted or disinherited,1 or by the making of a subsequent will. The first case may occur on the birth of a posthumous child, and, indeed, this is the only case admitted by the Code and Pandects (posthumosi bae redes) on the birth of a child not mentioned in the will.

A mother may in a certain legal sense (although the term may appear absurd according to its physical signification)2 have a posthumus, quoad the testament, as if she bear children after the making of her will, or if one of her children die and the others survive, in such case the testament is not ruptum, but nullum or inofficiosum according to the 115th Novella.

The bae redes necessarii, born to a testator after the making of the will, may be descendents, posthumis, or ascendents,—for instance, the testator's mother was living when he instituted his son and a stranger in blood, the son dies before the father, and the grandmother administers as necessary heirress, and can impugn the will.3

Strictly speaking, posthumis bae redes alone can render a testament ruptum; by the law of the Pandects and Codex,4 mothers must seek relief in the B. P. c. T. or in the Q. I. T.5

The remedies, by the 115th Novella, against a will in which the bae redes necessarii are not duly considered, are in dispute; but, for consistency's sake, greater rights at least cannot be granted to necessary heirs who come in after the making of the will, than would have accrued to them if they had been in existence at the period at which it was executed, and at which time they had been improperly excluded from the inheritance.6

§ 1319.

Arrogation subsequent to execution, or when a descendant be adopted, for this must not be understood of the adoptio minus plena, as in that case the adoptive person has no claim otherwise than as heir-at-law: the legitimation of a natural child by marriage or rescript; or when a child, the death of whose father leaves them immediately in their grandfather's power, and who have been neither disinherited nor instituted.

§ 1320.

A subsequent testament renders the prior one ruptum. Such subsequent testament must of course be in due form, but it is not

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1 I. 2, 13, 1; § 2, 3; I. 2, 17, 1; P. 28, 2, 3; F. 28, 2, 17; C. 6, 29, 1.
2 Physically, a woman can only have a posthumous child by the Caesarian operation, vid. § 677, b. op. n. 8.
3 Stryk. caut. test. 34, § 8.
4 I. 2, 17, § 1; I. 2, 13, § 1, 2, 3; P. 28, 2, 3 & 17; C. 6, 29, 1.
5 Querela inofficiosi testamenti. These initial letters are used for the convenience of abbreviation.
6 Koch, cit. diss. § 34.
necessary to be stated that the former will is revoked if this second will become *destitutum* for want of the acceptance of the heir instituted, or his death before the testator, or *si deficit conditio de futuro* whereupon the heir is to found his right; hereupon the first testament is *ruptum*, and the second likewise,—the first *quia testamentum semel ruptum semper ruptum manet* by the fact of the existence of later and formal will, the second because its provisions cannot be complied with. As an example of this,—A makes his will, instituting an expected *posthumus*, he loses this expectation, and makes a second will without mention of a *posthumus*; he now dies, but yet the *posthumus* is born, thus the second will is *ruptum*, for the *posthumus* was not instituted, and the first is not revived.

Neither is *clausula capatoria* or *derogatoria* in *futuro* in a will, declaring any subsequent will to be void, of effect, though some are of opinion, but without good reason, that in such case the testator in any later will must expressly abrogate such clause.¹

§ 1321.

A later will must be formal, for, if not so, it has naturally not the effect of revoking the former, being in itself a nullity.

Before the time of Pertinax, a doubt appears to have existed whether the second testament must be valid, if the first became *ruptum*; to remove it, the Statum. intituled "ne alias tabulæ priori jure factæ irritæ sint, nisi sequentes jure ordinatae et perfectè fuerint,"² appears to have been made. If the intestate heirs be excluded in the first, but instituted in the second, the last is valid, although five witnesses only have attested the instrument. If the second will be made in a privileged form recognised by law, it will revoke the first,³ for the words of Pertinax only apply where the second will was informal. An exception, however, obtains as to the *testamenta parentum inter liberos*, which can only be revoked in the usual form applicable to wills generally.⁴

Now two cases may occur,—one by a *conditio de præsenti* or *de praeterito*, and another by a *conditio de futuro*. A makes a will in 1840, and in 1847 makes another, instituting B his heir if he should have then done a certain lawful act; on his death, it appears that in 1847 B had not even then performed the prescribed condition,—in this case the first will stands good, for the will was bad ab initio.

As regards the *conditio de futuro* it is otherwise. Thus, as before, B is my heir when he shall have performed a certain act; if B do not perform it, the second will is *destitutum*, and the first *ruptum*,⁵

¹ Vid. § 263, p. 296, h. op. in fin.
² I. 2, 17, § 7; de quo in extenso A. F. Schori, comm. ad orat. Pertinacis de test. post. imperf. prius perfect. baud rump. in opusc. p. 41, seq.
³ P. 29, 1, 36, § 4; P. 28, 3, 2.
⁴ Nov. 107, 2; this is controverted, Voet. ad P. 28, 3, 3; Pregel (Koch) de test. rupt. § 7.
⁵ P. 28, 3, 16; Arch. Lud. Carl. Schmidt, diss. de test. priore post. derogante, Jen. 1755.
on account of the mere existence of a second, consequently the
testator dies intestate.

Sometimes a first testament may be treated as a codicil, or
fidei commissum.—A having made a will in favour of C, makes a
second will, instituting B heir to a certain thing, and declaring the
first will shall stand good; B then serves himself as heir, and,
keeping back what was left him, delivers the residue to C, the heir
of the first testament, as his trustee.

Now, when two testaments bearing a like date were found,
neither were valid, but the praetor gave the honorum possessionem
secundum tabulas, according to Ulpian, which may appear a
contradiction, because paganus cum duobus testamentis destedere
nequit, but in such case the praetor considered them as duos codices
simul signatos, or, as Ulpian says, pro unis tabulis, or as plures
tabula ejusdem testamenti, and this rule is applicable by liberal
interpretation to the case where, of two testaments, neither or
one only is dated.

§ 1322.

The doctrine of Honorius, of the limitation of testaments, is so
striking, that it deserves some passing explanation.

The emperor Honorius, about the beginning of the fifth century,
decreed that a testament should lose its effect in ten years from its
execution, without any act of revocation by the testator, upon the
presumption that a testator changes (or ought to change) his mind
periodically every ten years, with the chance of circumstance and
age, or perhaps with a view to favor intestate heirs and check rash
legacies. Justinian, being a friend of finality, except where
his own acts were affected, modified this too practical policy of
progress by a qualification, viz., that the lapse of ten years should
not alone suffice to invalidate a will, but that if after such lapse
that the testator declared judicially, or before three witnesses at least,
he revoked his will, it should thereupon be invalid. Sin
autem testator tantummodo dixerit, non voluisse prius stare testa-
mentum vel aliis verbis utendo contrarium aperuerit voluntatem,
et hæc per testes idoneos, non minus tribus, vel acta manifestaverit
et decennium fuerit emensum: tunc irritum est testamentum
tam ex contrariâ voluntate quam ex cursu temporali. Thus,—
A makes his will in 1840, in 1850 he annuls it before three or
more witnesses, and dies in 1851, his testament is irritum.

Notwithstanding the clearness of this passage, its meaning has
been disputed, some asserting1 the revocation may take place
directly the testament is made, after which the expiration of ten
years must be awaited,—others, that, assuming the above for their
ground, seven witnesses will operate immediate revocation, and
supersede the necessity of waiting ten years. It is unnecessary to
add that these views are opposed to the obvious spirit of the laws
both of Honorius and Justinian.

Now, if the testament were in writing, the testator has two
obvious ways of annihilating it, by cancelling or destroying the
tables, or by making another. This law, as applied to the
first case, may have been introduced for the sake of more
easy proof of the fact of destruction, and this appears the more
probable as a judicial revocation is given as an alternative,
or it may be intended to provide for the case of a testament
being lost or mislaid, which is a fair supposition after ten years
have elapsed. But the most probable presumption is perhaps,
although the law speaks generally, that it was intended to apply
to nuncupative wills only, and to give the testator a locus peni-
tentiae after a lapse of ten years, and permit him in this simple
negative declaration to pass the inheritance to his intestate heirs;
three witnesses being substituted, in fact, for seven. This example
shows that there was little to choose as to obscurity between im-
perial laws and imperial Acts of Parliament, and that the res judi-
cata and common law, as settled by decisions, are preferable to
both.2

§ 1323.

Any act by which revocation is implied, as burning, cutting,
tearing, cancelling, or otherwise destroying a testament, will make
it ruptum, but the testator must himself do the act, or authorize
another in his behalf, and, if there be many copies, all must be so
destroyed. The proof of authorization3 to another to cancel or
"break" his testament for him, is of the greatest importance,
and its admission or rejection depends in a great measure on the
custody of the document, for if the testament so cancelled be
found in the testator's own custody, it is presumable that he has

1 I. Citi. Marb. T. 1, consil. 34, n. 48, p. 144; Mantica, de conj. ult. vol. lib. 2, tit.
25, n. 19; Püttmann, interp. et obs. cap. 17; Schott, disc. cit. cap. 93 in opusc. cap.
80; Greve, dis. de mut. et revoc. test. tam quad modum quam quad effectum, Got. 1789,
§ 9; Hannisen, dis. (sub praes. Gebaueri) de test. accidente decennii lapsu
revocatione, Got. 1756, § 7; Gentilia, tr. de error. test. cap. 5.
2 As this law must be construed with

that of Honorius, the author has here ven-
tured to disagree with all the authorities,
even Höpfner, l. c. § 517, whose view
comes nearest his own, viz. that a will may
be made in 1770, revoked in 1775, and
become irritum in 1780.—de Colquhoun.

3 Lauterbach, coll. tit. de injust. rupt.
irr. § 14, seq.; I. H. Boehmer, dis. de
scrip. non legib. c. 3, ex ad Pan. tom. 40,
p. 315; Westenberg in D. Marco, dis. 40;
Pufendorf, tom. 1, obs. 137.
A testament may be ruptum in part or in whole.

Destruction of the written memorandum of a nuncupative testament does not affect it.

Testamentum irritum.

Testamentum recissum.

Summary of the foregoing.

From the foregoing it may be collected shortly:—

That a testamentum is nullum when the vice consists in an internal error in point of law, and in such case it is void, ab initio. That it is—

1 Vinn. ad § 2, l. 2, 17, n. 3; Hofacker, prin. jur. civ. Rom. Germ. § 1270, 1271, 1354.

§ 1324.

A testament becomes irritum if the testator forfeit his civil rights by either of the two chief capitis deminutiones, viz., maxima or media, for it is not sufficient that the testator have the necessary status civilis merely at the time he makes his will, he must continue to have it till his death; this appears in contradiction to the principle, that a will valid in the beginning remains always valid, but vicious in origin never can become good, but in fact, this maxim is not and need not be infringed; the testament itself remains good, but has become of none effect, for so soon as the testator loses his civil rights by the means above stated, his property passes away from him, be it by confiscation to the treasury, or by its merging in another as in the master, when the testator becomes a slave, &c., hence there is nothing, in fact, for the testamentary heir to inherit; Vinnius’s explanation is anything but satisfactory, and is, moreover, erroneous. Lastly, a testament is recissum in case of a querela inofficiosi testamenti having been decided against the validity of the will.

§ 1325.

That a testament is nullum when the vice consists in an internal error in point of law, and in such case it is void, ab initio.
Destitutum or desertum when from some cause the heir does not present himself. That it is
Ruptum by the agnatio or quasi agnatio of the suus hæres;
By a change in the intention of the testator;
By the testator’s destroying it;
By his superseding it by a later one.
That it is Irritum
By a change in the civil state of the testator.
That it is
Recissum by judgment of the court.
It now remains to be seen if and how any of these defects can be remedied, and if remediable, by what means.

§ 1326.

These means of remedy are twofold, either in equity or in law. In equity, by the causing the bequests of a testamentum ruptum to be carried out. In law, by the revival of a testament in operation upon some strict legal reason.

Although a testamentum ruptum is invalid with all its provisions, yet the prætor sometimes gave it execution by the bonorum possessio secundum tabulas, in cases where the vitiating circumstance ceases in the testator’s lifetime,—as, for instance, where a posthumous child whose birth had vitiated the testament dies before the father, or where the testator has destroyed a subsequent will under the supposition that the first would be revived.

The Civil law revives a testamentum irritum by the jus post-liminii acting upon the same principle, but with an equitable extension; the prætor considered a testament rendered irritum by the loss of civil rights to be revived by granting the bonorum possessio, s. t. if the testator regained his former rights before his death, and died a civis and pater familias.

Whosoever is arrogated vitiates his will made before arrogation impliedly, for he consents to the arrogation; hence, to revive such testament after emancipation, he must declare his intention in that behalf, and this he is allowed to do.

§ 1327.

A codicillus, or a little book in its classical signification, implies a note addressed to a person residing in the same place as the writer, epistolæ ad præsentem missi, in which sense it is often used by Cicero. Whereas epistolæ from the Greek, ἐπιστολὴ ἐπιστολῆς, signified communications in writing, inter absentes, or between those living in two different provinces, and agrees with the English word, letters. Seneca has the two words in juxtaposition, video te,
Origin of codicills.
Were merely directory.
Cause of their introduction.

No legal difference between epistola and codicilli.

How first acknowledged to be legal.
Lentulus's codicill.

§ 1328.

The origin of codicills is attributed to L. Lentulus, who was consul, A. u. c. 751, with M. Valerius Messalinus. Lentulus made a will at Rome, in which he named his daughter and the emperor Augustus his heirs; he then went to Africa as pro-consul, and made a codicill, in which some fidei commissa were enjoined to the emperor, and legacies to the daughter; on his death, Augustus paid the fidei commissa, and the daughter the legacies as directed; whereupon Augustus called the lawyers together and asked them, that inasmuch as up to that time the legal force of codicills had not been acknowledged, whether it were not advisable to confirm such decrees by a law? C. Trebatius Testa, who enjoyed a high reputation, was of the number, and concurred in the emperor's view, on the ground that sometimes Roman citizens might die on journeys where seven Roman citizens are not to be found, and can consequently make no testament; we do not,

1 Codicilli nihil alium fuerunt quam epistolae scriptae ad heredes de eo quod post mortem suam (ac testatoris) scribentes ab hereditibus fieri vellent. Boehmer, diss. de codicillis sine test. valid. c. 1, § 3, 4, p. 5, 6.
2 P. 30, (l.) 41, § 2.
3 Reinesii Inscr. Cl. x. p. 597, n. 3.
however, learn that Augustus ever passed a law to this effect; somewhat later, the renowned lawyer Labeo, whose sense of justice, we learn, was beyond all question, made a codicill, from which time no one ever doubted the validity of codicills; Justinian also refers to this circumstance.

§ 1329.

Codicills were certainly at first void of all solemnities, being simply prefaced by the ordinary salutation used in common letters. L. Titius, praedibus primis et substitutis salutem. Codicills, however, were not invariably addressed to the heirs, they were often directed to the trustees themselves; but most elaborate forms may be seen, both in Greek and Latin, on reference to Brissonius and Guido Pancirolus.

The law of the Pandects require no witnesses to a codicill, and we have no means of ascertaining by what means their genuineness was proved; probably by the handwriting, on the best circumstantial evidence which could be adduced. The emperor Constantine, or perhaps his son, first directed five or seven witnesses, which number in what cases we are ignorant of; but probably seven in the case of intestate codicills, but in ancillary codicills five.

In addition to this, Theodosius the younger directed that all codicills should be made in the presence of five witnesses, that an unitas actus should be observed, and that if the codicill be in writing the witnesses should sign it at the foot, in omni autem ultima voluntate, excepto testamento, quinque testes, vel rogati vel qui fortuito venerint in uno eodemque tempore debent adhiberi sive in scriptis sive sine scriptura voluntas conficiatur; testibus videlicet quando in scriptis voluntas componitur, subnotationem suam accommodantibus.

The Institutes require no formalities to be observed as to codicills. Codicillos autem etiam plures quis facere potest et nullam solemnitatem ordinationis desiderant, which ought to be followed? The Institutes were confirmed A.D. 533; the second edition of the Codex A.D. 534. The law of the Codex, which permits a testamentum posteriorum imperfectum, in which the intestate heirs are instituted if signed by five witnesses, to be good as a voluntas ultima intestati, is also to be looked upon as a decree of Theodosius.

Theodosius, the younger, it has been seen, fixed the number at five, which has since been adhered to; these witnesses may be required to a formal will; where a will did exist, five for proof.

1 A. Gell. N. A. 13, 12 & 375.
2 I. 2, 25, pr.
3 P. 40, 5, 56; P. 30, iii. 37, § 2 & 3.
4 P. 30, ii. 75, pr.
5 De Formulis, viii. p. 686, seq.
6 Theaur. Varr. lect. i. 29.
7 Co. Th. 4, 4, 1.
8 Where a will did not exist, seven, or the same number as would have been required to a formal will; where a will did exist, five for proof.
9 C. 6, 36, 8, § 3. This passage is not to be found in the C. Th., but it may have been corrupted by Alarick, through whom it has come to us, or has been taken by Trebonian from another law of Theodosius.
10 I. 2, 25, § 3.
11 C. 6, 23, 21, § 3.
12 Vid. Donius, tr. cit. cap. 1, § 1, seq.
13 C. 6, 36, 8, 3.
accidentally present, quinque testes qui fortuito venerint, nor need they be specially rogati; some think even a woman may witness a codicill, but this opinion is to be received with much suspicion, —certainly there are many obvious reasons against their admission as witnesses, and none sufficiently strong to render their capacity more than very doubtful; the witnesses must sign,1 but are not required to seal; the signature of the maker of the codicill is not required to the document; lastly, as in a testament, there must be a unitas actus.

Codicills may be either written or nuncupative,2 although the word etymologically certainly implies a written document; this is, however, not the case, as Justinian speaks of codicillis non scriptis.

A codicill may or may not be confirmed by the testament; if it be so, some contend no witnesses are required,—such is at least the practice; this confirmation, Paulus3 tells us, may be in four different ways,—aut in futurum, aut per fidei commissum, testamento facto, aut sine testamento.

§ 1330.

A codicill4 is, in fact, nothing more or less than the solemn will of one who dies testate or intestate without the appointment of an heir.5 A testate codicill is, when he who has made his codicill has, either before or afterwards, made his testament upon which that codicill depends, or to which it refers,—such are termed codicilli testamentarii, or ad testamentum facti; they are valid, though not confirmed in the testament,6 though, if the testament falls, the codicills fall with it. An intestate one is, when one leaves behind him only a codicill without a testament, hence termed codicilli ab intestato, wherein he gives legacies only to be paid by the heir-at-law, and not by any heir instituted by testament; thus a legacy can be left by codicill, a slave freed, a trust erected, a testamentary guardian given to a child, &c., because for the execution of these acts no heir need be named, nor is he bound by codicills, as was the case with the fidei commissa in more remote period, although they obtained a greater force at a later period.

These two codicills are very different in their effect. Those ab intestato are of themselves perfect, and do not depend on the testament or aught else, but have a direct binding force on the intestate heir: thus,—

A makes a codicill, and burdens his brother and heir-at-law, B, with a legacy, but, B dying before A, C becomes the heir-at-law in his place, and must carry out the directions contained in the codicill.

Codicillis ab intestato.
CODICILLI. 285

A codicillus testamentarius, on the other hand, stands or falls with the testament. Now these may be testamento confirmati or not so, and those confirmed may be so before or after they are made. An example of the first is,—

"I declare the codicills made before the testament valid, and to be considered as if incorporated therein;" or, as an example of the second,—

"I declare that the codicills which I may make after this testament shall be valid, and be looked upon as a part thereof."

§ 1331.

Whoever can make a testament can also make codicills, and who cannot make a testament is equally disqualified from making a codicill. The chief difference between the two is, that a testament must contain the nomination of a direct heir,1 but not so in a codicill, consequently no one can be directly substituted or disinherited, no nor even can any condition2 be prescribed to an heir, for this is in fact an ademtio conditionalis excluding him on non-fulfilment of the condition. On the other hand, legacies and fidei commissa,3 even commissa universalia, can be directed, slaves freed, a testamentary guardian appointed; it can direct how much the heir ab intestato shall receive; and regulate those portions of the testamentary heirs not settled by the testament itself;4 but no gift (donatio) can be made by codicill, for such requires acceptance; nevertheless, if it be declared by any one in a codicill that he gives A B such a thing, though it cannot be supported as a gift, it may be so as a legacy or bequest in trust.5

§ 1332.

The law of codicills, confirmed or not by testament, differs in this,—that what is bequeathed in a confirmed codicill, codicillis confirmatis, is of as much force as if left in the will itself, inasmuch as it be not contrary to the nature of a codicill.

The chief difference between the two are as follows:—

1. *Legata* could be left in confirmed codicills only; *fidei commissa* in unconfirmed codicills.

2. *Libertas* could be left directly in confirmed codicills only.

3. *Tutor testamentarius* could be appointed in confirmed codicills only, and would then not require the confirmation of the authority having jurisdiction in matters relating to guardianships.

Since Justinian assimilated *legata* and *fidei commissa*, legacies and freedom can be left in either, and the third alone remains.

A fourth difference is added by some, but as the laws of the

1 P. 28, 5, 77. 2 P. 35, 3, 10. 3 Vin. ad § 3, de legat. n. 5, ad § 10, de fiduc. hæred. n. 2. 4 P. 10, 2, 39, § 1. 5 Zepper, tract de codicil. 7, 87, seq.
The Roman Civil Law.

Codex and Institutes are in conflict on the subject of witnesses, this cannot be enumerated as a difference. ¹

The difference between a codicill and a testament consists in this, that—

A testament requires many solemnities. ²

A codicill scarcely any, except the subscription of five witnesses accidentally present at the same time.

A testament must contain the institution of an heir; ³ a codicill must not.

No one can leave many testaments behind him; but he may leave many codicills, which may all be valid, ⁵ except contradictory to each other, because by testament a successor in omne jus quod defunctus habuerit is named, and this can be granted at once; whereas, by codicill, particular legacies only are bequeathed.

§ 1333.

A codicill may be public, private or privileged.

Public are such as are made before the prince or public authority, and require no solemnities whatever,—the same rules being applicable to codicills so made as to testaments. ⁶

A private codicill is either solemn, unsolemn, or privileged. Whoever can make a privileged testament can make a privileged codicill; ⁷ thus, if a religious house be instituted in a testament, all solemnities are omitted; in like manner, if anything be left in a codicill to a religious house, solemnities are dispensed with.

Testaments, as between parents and children, are privileged from formalities, so also codicills under like circumstances.

A solemn codicill, although it dispenses with the special rogation of the witnesses, appears to require five and their signatures when the codicill is in writing, also the unitas actus; but if it be nuncupative or oral, they must necessarily be called upon to attend to what is said, though they need not be expressly invited to come for that purpose. The seals of the witnesses are dispensed with, without which a testament would be informal. The signature of the maker can be dispensed with, and some are of opinion that when a codicill is confirmed in the testament it requires neither witnesses nor signature; and it must probably be understood that women are not good witnesses, for it must be presumed by witnesses are meant persons usually qualified to be witnesses, no deviation from the general rule being stated. ⁸

With respect to this contradictory and difficult question of wit-

Witnesses.

¹ § 1229, h. op.
² C. 6, 36, 8, § 3.
³ I. 2, 25, § 2.
⁴ I. 2, 25, § 2. ⁵ C. 6, 36, 3.
⁶ Vid. § 1228, h. op.
⁷ Vid. § 1227—1233, h. op.
⁸ Contra, Reinold, varior. cap. 5; Span- genberg, com. de muliere ob testium solo. testimon. fersund in cod. exparte, Goett. 1770; Walch, controv. p. 338, ed. 3; pro Jenichen, de eff. nul. testim. in cod. in Leyser, med. ad Pand. vol. ii. p. 75, seq.; Müller ad Leyser, obs. 590; Westphal. Vinn. § 1916.
ness it may be correct to assert, that where there is a will in which all codicills are confirmed, none are required, because it becomes a part thereof; but where there is no will, then, as it becomes of itself a sort of privileged testament, and directs the intestate heir to do certain things, witnesses are necessary. Still, it must be borne in mind, that the before-cited law of the Codex is general. Semble that this difficulty is met by considering confirmed codicills a part of the testament.

Lastly, in testaments, the heir cannot be a witness from his fictitious identity with the testator, or because he is witness in his own behalf. If the testament be considered in its old view of bargain and sale, can the legacy be so in a codicill? Höpfler weighs the evidence, and decides in the negative; but, it would seem, without good grounds, for the legatee of a codicill is not the heir, or in the position of one. The heir-at-law is the heir, and if a legatee be a good witness in a testament, why not in a codicill? The doubt is diminished in the case of a confirmed codicill (if indeed such require witnesses at all).

§ 1334.

A so-called codicillary clause is a paragraph or note appended to the will, to the effect that, "If this my testament be not valid as such, my desire is that it be taken as a codicill"; for though the law of testaments and codicills is distinct, yet, as has been already seen, an imperfect testament may often be supported as a codicill.

To the above clause, foreign notaries often add the following general tail piece:—"Inasmuch as this my testament, by reason of certain causes and imperfections, may not be effective in law as a solemn, complete last will or perfectly valid testament, it is nevertheless my will, that the same shall have force and validity as a nuncupative testament, codicill, trust, donatio mortis causa, or in what way soever it may best be rendered valid in law."

This flourish is, however, supererogatory, for if it be good as a codicill, it is good as a trust; but as a gift in contemplation of death it can never be valid, for the acceptance is wanting; neither can it be a nuncupative testament, not having been declared before the witnesses to be such, or read over to them: this whole addition is, then, a mere piece of legal surplusage invented by indolent persons to save the trouble of reasoning, or by ignorant ones incapable of it.

§ 1335.

The simple codicillary clause has no effect to make a defective testament valid as a codicill.

1 P. 29, 7, 14, pr.; P. 29, 7, 2, § 2; P. 49, 15, 12a § 5; Com. § 626; Müller ad Leyser, obs. 558; P. 28, 6, 41, § 3; C. 6, 36, 8.
2 de Colquhoun.
3 P. 36, 8, 1; C. 29, 7, 1.
THE ROMAN CIVIL LAW.

1. When the testament is valid as a testament;
2. When made by persons under disabilities;
3. When the unitas actus is wanting;
4. When the witnesses do not amount to five;
5. When they are women;
6. When they have not signed it.

But when these last five objections do not exist, the defective testament may be supported as a codicill, under the simple codicillary clause.

This clause's operation is to turn a testamentary heir into a trustee, *institutionem hæredis directi in institutionem hæredis fidei commissarii conversere*; the testament is looked upon as directory to the heirs-at-law to assume administration, and deliver it to the testamentary heir, after deduction of the Trebellian fourth.¹

Some will have it that the codicillary clause may always be understood in a testament; but those who deny it appear to have the best of the argument, especially taking into consideration the above passages.²

§ 1336.

There is no branch of the Roman law which has entered so largely or so usefully into the law of England, as that relating to *fidei commissa*, or trusts; indeed, almost invariably where there is any property, some trust will be found connected with it for some purpose or other. In Germany, by making an use of land perpetual, the object of keeping landed property together, and in the same family, is more sufficiently attained than it can be by any other system; it therefore becomes important to examine the Roman origin of *fidei commissa*.

The form in which a *fidei commissum* was erected has been already seen where bequests in trust, relating to single things, is treated of.³ Effectively, a trust was a mere evasion of the law by and in favour of persons devoid of the testamenti factio, or power of giving or taking under a will, such as *peregrini*,⁴ and may, in conjunction with codicills, be considered in principle as the final and largest imaginable extension of the right of testation; that it is so in practice has been sufficiently demonstrated by the fact of no more liberal system having been since introduced, so that, after nearly nineteen centuries, we find the courts of

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¹ P. 28, 6, 41, § 3; C. 6, 36, § 10.
² Carpazov, part. 3, c. 4; D. 38, et lib. 6, resp. 7; Zepper de cod. cap. 4, n. 138, seq.; Franc Alef, diss. de oto claus. cod. c. 2; C. A. Tittel, opusc. de claus. cod. taciti subintellect. Jen. 1759, § 51, seq.; Hassler on the operation of the tacit cod. clause, etc. (German) in d. Sam. f. Abh. Th. 1; Stryk. de caut. test. cap. 23, § 32; Lauterbach, coll. th. pr. h. § 17; Wernher, pt. 1, obs. 279; Walch, controv. p. 342, ed. 3; Helfield, l. c. § 20; H. W. Schorch, diss. qua claus. cod. presup. non dare adseritur, Erf. 1763; Boehmer, diss. de verb. direct et obliq. § 15; Exor. ad Pand. 1, 116.
³ § 1191, h. op.
⁴ Gaius, 2, 285.
equity substantially following the principles laid down by Augustus but 751 years after the building of Rome.

§ 1337.  

Fidei commissa, as their name implies, were originally entirely dependent upon the honour of the person to whom they were directed; the property vested in the testamentary heir, who might or might not execute the request made to him—might or might not violate the trust imposed on him.

The first historical notice we have of this mode of testation occurs in Cicero, Quintilian, and Valerius Maximus, who relates that Q. Pompeius Rufus, who, being an exile, could take nothing by the will of a Roman citizen, nevertheless received property from a certain person, who had made over certain landed estate by way of fideicommissum in trust to his mother for him,—and we further learn that she executed this trust.

§ 1338.  

As may naturally be supposed, acts of dishonesty often occurred in the operation of a system totally uncontrolled by law; and it is probable—indeed, we are told—that the frequency and prevalence of breaches of trust led Augustus to take measures for the regulation of a system which it had become impossible to abolish. D. Augustus primus semel iterumque, gratia personarum motus, vel ob insignem quorundam perfidium, jussit Consulibus auctoritatem suam interponere. Quod quia justum videbatur et populare erat, paulatim conversum est in adiduam jurisdictionem tantusque eorum favor factus est, ut paulatim etiam Praetor proprius creator qui de fidei commissis jus diceret, quem fideicommissarium adpellant. Thus it appears that Augustus gave the cognisance of such business to the consuls, who appointed a commission of delegates yearly for the purpose of regulating testamentary trusts, and of compelling their performance according to the directions of testators.

The authority of the consuls, however, in matters of trust, did not extend to the provinces, which remained therefore still under the old system, until Claudius extended the power formerly committed by Augustus to the consuls, to the presidents of provinces. With respect to Rome, he confirmed this jurisdiction too, and made it a perpetual attribute of the consuls, and moreover appointed two prætors with exclusive jurisdiction over F. C., thence termed prætores de fidei commissis. These new judges

1 De finit. bon. et mal. 2, 18, § 56.  
2 Declam. 325 ; Vel. Max. iv. 2, 7.  
3 The persons here alluded to are probably L. Lentulus and his heres fidei commissarius, whose heres fiduciarius Augustus also was.

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were not to send the causes down by writ to the *judices pedanei* for trial, as was the practice of the praetors in other cases, but to adjudicate thereon themselves. This bears a striking resemblance to the practice of the equity judges of England, especially under the old system, where an original writ was issued out of chancery, containing the form of action, to be tried by the common law judges, who in so far stood in the place of the *judices pedanei* of the Romans.

Trajan withdrew one of these praetors, and, as the consuls had concurrent jurisdiction, it was usual for the praetors or praetor to adjudicate in the minor cases, and refer those in which a larger interest was concerned to the consuls. The emperors themselves even occasionally took cognisance of *F. C.*, according to Papinianus.

§ 1339.

*F. C.* might be a particular or a universal mode of acquisition of the former, has been treated of under the singular modes of acquisition, and applies to a particular thing, *res singularis*, left in trust to be delivered by the heir to a third person, whereas a *fidei commissum universale* goes to the whole inheritance, which will pass by it; nevertheless, the heir in trust differed from the direct heir in many material points:—

Where the *possessio* is *vacua*, a direct heir can assume the possession if not opposed; whereas,

The heir in trust must await the administration of the direct heir, and the delivery by such to himself, except in case of refusal to administer on the part of the fiduciary heir, with other concurring circumstances.

A direct heir can only be appointed by a formal testament; whereas,

An heir in trust can be nominated in three several ways.

A direct heir must administer (*adire bæreditatem*), in order that it may vest in him, and pass through him to his heirs.

The heir in trust transmits the estate to his heirs, without even having declared that he would accept the trust, *fidei commissum licet nondum agnitus ad bæredes transmittitur*, but not a real right by the mere falling in of the *F. C.*, but a mere right of personal action against the fiduciary heir to compel him to administer.

1 Cuj. obs. 21, 34; Merilius, obs. 6, 36; Quint. l. c.; P. de prob. 26. Perhaps there was an appeal to the consuls as to the chancellor from the chancellors.

2 Vid. § 1347, h. op. n. 3; Nov. 1.

3 P. 36, 1, 25, pr. et 46; C. 6, 42, 3; Struv. ex. 36, th. 45: Bachov. ad Treutler, vol. ii. disp. 14, th. 8, lit. A; Averan. interp. lib. 4, c. 6, 7, 8; contra, Faber, de error. prag. dec. 37, err. 1, conditional F. C. vest from the fulfilment of the condition; C. 6, 51, 1, § 7.

4 P. 5, 3, 63; P. 36, 1, 1; Averan. l. c. Westphal. Verm. § 1850.
§ 1340.
In bequests in trust, fidei commissa (F. C.), there are three parties:

The testator fidei committens is the testator who commits his inheritance wholly or in part to his heirs, by them to be delivered up according to his directions (T. F. C.).

The heres fiduciarius (H. F.), so called from the fiducia reposed in him by the testator fidei committens, whose business is to pass the inheritance to the person for whom he takes it in trust, and still continues heir after execution of his trust; he is not a mere usufructuary, for the inheritance is absolutely his own up to the time at which he must deliver it over.

The heres fidei commissarius is he who is to receive the inheritance in whole or in part (H. F. C.).

§ 1341.
A fidei commissum was tacitum in its proper classical sense, when made secretly with a view of evading the lex caducaria, and had not the sense of implied applied to it in later times.

The secret F. C. are said to have been noticed in the lex Pap. Popp., but there is no sufficient proof of it; under Vespasian, however, the Stc. Plancianum contained a provision forbidding them under penalty of loss of any caduca, to which a claim might be laid under a will. Tacitum is, however, now synonymous with implicitum, as contradistinguished from expressum applied to a F. C., left clearly and expressly to a certain person, and not by implication and the obvious understanding of the instrument.

§ 1342.
The old law required, in order to erect a F. C., that the person who could be legally capable of testation, but it was exactly these incapacitated persons who sought relief in F. C.; the new laws, however, made the F. C. of such persons dependent upon the right of testation; but there were cases in which a man might erect a F. C., but from circumstances was unable to make a will.

Whoever can be instituted direct heir can be F. C. heir; by the old law this was otherwise, for he could be heir to its uses, to whom all property could be left directly, and these were the very cases in which F. C. were used to evade the law.

All heirs could be burthened with F. C., whether intestate-testamentary, civil, or praetorian heirs, heredes directi et fidei commissarii. Thus,—I may direct my heir A to deliver the inheritance to B, and B to C, &c. But Justinian thought right to...
limit this power to four degrees, which are reckoned thus, first
degree,—A is my heir and shall deliver the inheritance to B.

First degree, Caius haeres esto haereditatem ut Seio restituet.
Second degree, Seius Sempronio.
Third degree, Sempronius Titio.
Fourth degree, Titius Q. Sexto.

§ 1343.

This limitation is not observed in Germany in the so-called
Familien fidei commissa instituted as a substitute for a majority,
than which they are much more effective, lasting so long as any
member of the family exists. Thus, a testator directs "my estate
shall remain a fidei commiss in my family for ever," whereupon the
estate acquires and retains the qualitas fidei commissaria so long as
any descendent of that blood remains. We find in the Novella1
a case of this description, which is a rarity, as individual disputes
are not usually inserted in these decrees. A testator directed, banc
rem per omnia et perpetuo velim permanere in familiâ mea, neque
unguam de meo nomine egredi. Justinian assigned the estate, after
the fourth restitution, to two women as heirs of the last possessor,
annulling the subsequent trust.2 In some continental states attempts
are being made by the Radical party to get these family entails
abolished, of which Montesquieu shows the error in demonstrating
the evils following the partition of land. "On sait que Romulus,"
says the president, "partagea les terres de son petit état á ses citoyens," il me semble que c'est delà qui dérivent les loix de Rome
sur les successions. * * * * * * * * * * * * * * *

La permission indefinite de tester accordée chez les Romains, ruina
peu á peu la disposition politique sur le partage des terres; elle in-
trouisit, plus que toute chose, la funeste différence entre les riches et
la pauvreté. Plusieurs partages furent assemblés sur une même tête;
des citoyens eurent trop une infinie d'autres n'eurent rien. Aussi
le peuple, continuellement privé de son partage, demanda-t-il sans
cesse une nouvelle distribution des terres. Il le demanda dans le
temps où la frugalité et la pauvreté faisaient le caractère distinctif
des Romains, comme dans les temps où leur luxe fût plus étonnant
encore.4

Majorities with regard to land are preserved by those F. C. in
Germany.

§ 1344.

Blackstone5 very correctly remarks, that the law of Solon, by
which he permitted testation on failure of issue, was soon pro-

1 Nov. 159, 2 & 3.
2 Westphal. v. Verm. et F. C. Th. 1, §
352-57; Ritterahus, ad Nov. 159, n. 4;
Fachineus, 44, 10; StruV. ex. 36, th. 303;
Knipschild, de F. C. fam. c. 9, n. 404, seq.; Hofacker, prin. I. Ger. 7, 2, § 1585;
Erhard, de F. C. fam. obs. pract. Lips.
1806.
3 Dion. Hal. 2, 3; Plut. Numa et Lyc.
4 Esprit des Lois, 27, 1, 8.
5 Book 2, ch. 23.
ductive of intestine discontent and tyranny, resulting from a too great accumulation of property in individual hands, and of the final subdivision of the state. The prohibition to testate was a public measure intended to obviate the evil; and on an unlimited power to do so being given by law, practice proved the error of the measure, and private persons contrived for themselves a family law to meet the evil in effect, very much the same as the general law of which they had complained.

In Germany, where anciently wills were unknown and the intestate succession of children was alone recognised, a free system of testation was next introduced at a very early epoch with the Roman law; but so soon as that great continent became civilized, a system of family trusts sprang up equivalent to the majorities now established in England, whereby the free action of the tenant in possession was effectively shackled and circumscribed in perpetuity.

In England, the system of entails is less extensive indeed, but in its practical operation closely allied to that of Germany. Although an entail is usually destroyed in every generation, it is likewise revived in every succeeding step of the pedigree, for the principle being, that an entail can only extend to one person in posse or unborn, and requires the consent of the next heir in esse to its destruction, it is usual for the heir in tail to agree with the ancestor in possession to destroy the entail, and allow the estate to be burthened in futuro by the tenants in possession, on consideration of a certain income being granted and paid in præsenti to the heir in tail until the tenant's demise; the estate is then resettled on the issue of the heir-at-law generally, or on a particular person born or to be born; to effect this a trust is created; consequently, most estates in England are in trust, or, in fact, are fidei commissary. The same re-occurs when such issue comes to manhood, and so on. Foreign writers have attributed the political prosperity of England to this system of majorities; and if we look at the present state of France, it will lead us to believe that their conjecture is well founded. Since the first revolution it has been a law finally settled by the Code Napoléon, that land must be divided among the legal heirs with a stipulation forbidding gratuitous alienation during life, and all substitutions are forbidden; the result of this mixed system has been that usually resulting from mixed and half measures, viz., to produce the very same evil as a system of free testation would have introduced, by cutting up the country into small plots or sums, progressively subdivided in each generation, too small for the subsistence of the possessor, or to give a vested interest in the state. These small patches or sums are collected temporarily into the hands of large capitalists, and create the very evil produced by the law of Solon and of the Decemvirs upwards of twenty-five hundred years ago.

A F. C. may be left conditionally or unconditionally, as,—

Seius hæres meus esto sed semissem hæreditatis Sempronio statim restituat; or conditionally, on a circumstance, as,—Seius hæres esto, si liberii legitimi ei non supersint Sempronius hæreditatem sumito; or conditionally, as to time,—Seius hæres esto durante vita hæreditatem habeto, illo mortuo Sempronius hæreditatem sumito.

By these subterfuges the law, which forbade an heir to be instituted directly, from and till a time fixed (directa hæredis institutio ex certo die et in certum diem,) was evaded, and the same result attained.

But although the H. F. might thus be dispossessed perhaps of the whole inheritance beyond his legal share, he remained notwithstanding heir in the contemplation of the law, and was bound to pay the debts of the estate; hence it was possible that he was not only without any benefit, but might be exposed to real loss, and it was for this reason that the H. F. often repudiated such trust estates, and that the testaments became destituta in consequence.

To remedy this defect, the emperor Nero, on the 25th August, issued his decree to the consuls elect, Annæus Seneca and Trebellius Maximus, to bring a S.C. into the Senate, to the effect that restitutâ hæreditate omnes actiones qua hærediti ei et in hærudem competebunt, ei et in eum dentur cui ex fidei commisso restitutaat hæreditas, transferring the actions from against the H. F. to the H. F. C. After this we find the praetor allowed equitable actions to be brought against the H. F. C. post quod S. C. prætor utiles actiones ei et in eum qui recepit hæreditatem quasi hærediti et in hærudem dare capiti. Nevertheless, the H. F. remained heir nudum nomen hærdis retinet, the H. F. C. being considered loco hærdis. This was termed the exceptio S. C. Trebelliani, or a plea by statute. In practice the action was probably commenced against the H. F., who, pleading the S. C. discovered who the H. F. C, or, in English law, cestuique use, was, and prayed relief, whereupon the praetor granted the equitable action before mentioned.

The words of the S. C. Trebellianum, as we learn from Ulpian, were as follows:—Quam esset aequissimum in omnibus fidei commissariis hæreditatibus si qua de his bonis judicia penderent, ex his eos subire, in quos jus fructusque transferretur, potius, quam cuique periculosam esse fidenem suam, placuit et actiones, qua in hærdes hæreditibus dario solent, eas neque in eos, neque his dari, qui fidei sua commissum, sicuti rogati essent, restituisissent, sed his et in eos, quibus ex testamento fidei commissum restitutum fuisse, quo magis in reliquum confirmentur supremae defunctorum voluntates. Justinian's law upon this S. C. has been the subject of much controversy;
the suggested alteration in the punctuation by Savigny, however, renders it pretty clear:—Et sine scriptura per F. C. barbitas recte relinquitur. Igitur si uxor tua, et prevignum suum, indiscrimine mortis constituta, designavit velle successionem obtinere: usque ad dodrantem ejus voluntatem ratam servari convenit; quum ab intestato ei succedentes, de restituendo fidei commisso conventos ultra quartam, ære alieno deducto, quantum penes eos sententia Scti. relinqui præceperit, tantum obtinere præsiterit. Here the husband and his son must be supposed to be in possession of the whole inheritance, hereupon the intestate heirs bring an action for their fourth, which it would have been in their power to retain, and to have made the husband and his son plaintiffs instead of defendants, had they the intestate heirs been in possession instead of the husband and his son.

§ 1346.

The H. F. C. was, however, not only answerable pro rata; therefore, if he had received in truth and in fact but half the estate, he would be obliged to pay but one-half of the debts.

This provision, however, failed to satisfy fiduciary heirs to whom nothing was left, for a person might be instituted who had no claim for the portio legitima; such heirs, therefore, often repudiated the inheritance, which became destitute as before. To induce them, therefore, to administer, it was necessary to pass some law which, by making it their interest to administer, might afford a remedy to the inconvenience. With this view, the consul Pegasus, whose colleague was Pusio, framed a S. C. in the reign of Vespasian, founded on the principle of the lex Falcidia, which it extended to F. C. empowering fiduciary heirs to retain a fourth part of the inheritance free of all incumbrance, even although the T. F. C. might have left him less, and to deliver the remaining three-fourths to the H. F. C. To this provision a penalty was appended, for should the H. F. despite this advantage repudiate the inheritance, it was held to have been administered in contumaciam, and the H. F. compelled to deliver it in its entirety. This S. C. was, after its promoter, termed Pegasianum; and, as it was in fact a mere extension to F. C. of the Falcidian law, which thitherto had applied to legacies only, this fourth part was not termed pars Pegasiana, but pars Falcidia,—hence, when the H. F. restored three-fourths, he was looked upon as a legatee to the extent of such one-fourth. Justinian deprived the H. F., whom he transformed into a legatee, of his fourth, if he neglected to make an inventory; but the testator

2 Cramer.
3 As equivalent to praecoelusurit by the Glossa.
4 Contius, lib. 2, lect. cap. 4, in opp. p. 81, et l. 1, c. 3, disp. p. 139.
5 Vinn. ad l. 2, 23, § 3.
6 Nov. 1, 2.
THE ROMAN CIVIL LAW.

could expressly bar the Falcidian law, which before that time he was not at liberty to do. 1

§ 1347.

Thus stood the law, as far as we have reason to suppose, unaltered up to the time of Justinian, who confirmed these \textit{Sta.} with certain modifications, which were to be considered as incorporated in, and as forming a part of, the \textit{Sc. Trebellianum} and \textit{Pegasianum}; as, however, these constitutions are unfortunately lost, we are restricted to presuming their particular tendency from the meagre and general information conveyed in the Institute 2 on this subject, according to which, the effect of these constitutions was, firstly, to enable every \textit{H. F.} of the whole or part of an inheritance to withhold his Trebellian fourth; but if he voluntarily handed over the entire inheritance, to pass the \textit{actiones hereditariae} over to the \textit{H. F. C.}; where this, however, was not the case, as when he was directed by the testament to hand over the moiety only, or retained his fourth by virtue of the law, then to pass over the \textit{actiones hereditariae pro rata portionis} only, in the above cases to the extent of a half or three-fourths respectively, thus rendering the \textit{stipulationes partis et pro parte} unnecessary. Secondly, to compel the \textit{H. F.} to administer, should he refuse \textit{adire hereditatem}, and to pass the \textit{actiones hereditariae} over to the \textit{H. F. C.} These provisions, however, involved certain logical and legal consequences. The inheritance must have been judicially \textit{taken as administered} to where the \textit{H. F.} contumaciously refused to administer, since otherwise the will could not have been supported; 4 but instead of being \textit{in contumaciam}, the \textit{H. F.} might simply have died; if he had then already administered, or otherwise passed the legal estate to his heirs, they would have been exposed to the same actions as he himself would have been had he lived; if, on the contrary, he had died without heirs \textit{after} administration, the inheritance would be held to have passed to the \textit{H. F. C.}; 5 but if he died \textit{before} administration and without heirs, then it appears there would have been no remedy, but the testament must have failed as destitute, involving the uses and trusts or \textit{F. C.} dependent upon it.

The codicillary clause, however, if such existed, would have remedied this misfortune, because the intestate heirs could in that case have been reached. 6 The result would have been different in the case of a \textit{direct} heir dying after the death or during the lifetime of the testator, nor would it be material whether this latter had or had

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1 P. 35, 2, 27 & 64; compare Id. 88, § 2; Westphal. Verm. § 1282, etc.; et vide P. 35, 2, 96 & 56 § 5, as to in how far this depended upon the heir; C. 6, 50, 9; P. 35, 2, 59; C. 6, 50, 33; C. 35, 2, 36; C. 3, 28, 36, pr.; Nov. 131, 12, as to in how far this depended upon the nature of the legacy; P. 30, 1, 28, § 1; P. 35, 2, 81, § 6 & 3 § 10, as to in how far this depended on the heir.
2 I. 2, 23, § 7.
3 § 1339, h. op. n. 2.
4 Westphal. Verm. § 1724.
5 C. 6, 49, 75, § 1.
6 C. 6, 42, 14; Westphal. 1. c. § 1589.
not been aware of the fact, for in such cases the testament even of
a civilian, *paganus*, was upheld, so far as its *F. C.* or uses and trusts
were concerned, for the benefit of, and as an act of justice to the
*H. F. C.* The privileged testament of a military man as in
other cases, so also in this, formed an exception, and was not
affected by these contingencies.  

§ 1348.

A *F. C.* can be left either in a written testament or nuncupatively, that is, by oral command, to the direct heir, for it will be
a good bequest if he be told to execute the trust in question, even
though no witnesses be present; nor is any acceptance on the
part of such heir necessary as some suppose, or any promise to
execute the trust; it suffices that he has been directed to do so; nay, he may even be put upon his oath as to the matter, that is,
the *juramentum delatum* may be required of him. A *F. C.* may
also be created in a codicil.

Where the *H. F.* holds by direct appointment in the case of
the payment of legacies as in that of universal *F. C.*, the *H. F.*
has a right to have his fourth clear, consequently, he could
demand back the excess paid in error, whereby his fourth is
infringed; on the other hand, everything which the *H. F.* may
have received from the testator, *quocunque nomine*, by way of
legacy, *donatio mortis causa titulo universali singulares*, or other-
wise, was included in the fourth to which he was legally entitled,
and everything the testator allowed him to retain. But to this
rule there are three exceptions:

1. The profits accruing from a fourth, or by the fault of the
   *H. F. C.*

2. The prelegacies paid by co-heirs;

3. Everything received from a legatee on discharge of a condition.

§ 1349.

From the above it appears that, where the *H. F.* is directed to
hand over more than three-fourths of the inheritance, he is author-
rized to retain one-fourth, which is termed *pars Falcidia* by the
Roman, and *Trebelliana* by the middle age jurists.

Not only can the testamentary, but also the intestate heir be

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1. P. 29, 1, 14; Donell. *com. F. C.* lib. 7, c. 21; *Boehmer, Rechtssäle*, 1 B. nr. 29.
2. P. 29, 1, 23, fn. 1; C. 6, 42, 5.
3. C. 6, 42, 33; I. 2, 23, § 12.
7. This is a disputed point. *Hopfner*, *com. § 614*; *Bolley, Verf. über L.* 91, ad
   *VOL. II.*

L. *Fal. et vide Jurid. Arch. Tub.* 1803, 3
B. 1 *Hfr.*; P. 35, 2, 86 & 91; P. 36, 1, 2, § 16, 20, § 3; I. 2, 23, § 9; C. 3, 26, 24;
C. obs. 8, 4, supports the identity of the
et utrum aliqua parte differat a Q. Falc.
*Heid.* 1815; *Arch. f. C.* 4 B. 3 Hfr.
*nr. 30*; vid. *Pfordhen, l. c. p.* 82-111.
8. *P. 36, 1, 22, § 1, 2.

The retention of the Treb-ellian fourth.
directed to transfer the inheritance, nor is this unjust, because it is in the testator's power utterly to exclude such heir-at-law from the succession; this duty, then, is one which he is bound to perform in consideration for his *portio legitima*, which he has a right to receive *sine ullo gravamine*.

§ 1350.

The deduction is made from the entire inheritance,—

Save when the *H. F.* is allowed to retain any particular thing amounting to a fourth in itself; ¹

Save when he has received his fourth out of profits for which he is bound to account; and

Save when he has received that amount out of the proceeds of a sale.²

To suppose a case:—

<table>
<thead>
<tr>
<th>Let the estate amount to</th>
<th>12,000 aurei.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The fourth to</td>
<td>3,000</td>
</tr>
<tr>
<td>The fruits enjoyed to</td>
<td>6,000</td>
</tr>
<tr>
<td>Three-fourths thereof</td>
<td>4,500</td>
</tr>
</tbody>
</table>

Now, inasmuch as these three-fourths amount to more than his legal share, he is not justified in making any deduction, but must restore the inheritance in its entirety of 12,000 aurei.

<table>
<thead>
<tr>
<th>But should the estate amount to</th>
<th>12,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>The fourth to</td>
<td>3,000</td>
</tr>
<tr>
<td>The fruits enjoyed to</td>
<td>2,000</td>
</tr>
<tr>
<td>Three-fourths thereof</td>
<td>1,500</td>
</tr>
</tbody>
</table>

In this case the heir can deduct, in addition, 1,500 from the inheritance, and retain his fourth, and 1,500 aurei in addition, because, if the fruits enjoyed equal or exceed the fourth, the *H. F.* is not authorized to subtract anything; but as the fruits on three-fourths of the integer are only taken into account, or, what is the same thing, he is only charged with three-fourths, the one-fourth is not charged against him, for it accrued on his own property.

§ 1351.

Now, since the *H. F.* had his fourth free, and was directed to deliver the half only to the *H. F. C.*, he delivered such half and paid the debts *pro rata* under the *S. C. Trebellianum*; thus, if he had delivered but one-third and retained two-thirds, he paid two-thirds of the debts, and the *H. F. C.* one-third; but if by this arrangement it turned out that he had not one-fourth clear, to which he was entitled under the *S. C. Pegasianum*, he deducted

¹ P. 36, 1, 6, § 1; C. 6, 42, 5. ² L. 2, 23, § 9. ³ P. 36, 1, 3, § 3.
such fourth, and stipulated with the H. F. C. that he should pay three-fourths of the debts; should the H. F. C. decline this proposition, the H. F. would naturally threaten to repudiate the inheritance, in which case the H. F. C. would get nothing; or if the court compelled the administering in contumaciam, it would also compel the H. F. C. to pay the debts, or agree with the H. F. to do so on condition of his administering. This agreement was in fact the stipulatio partis et pro parte made between an heir and a legatarius partarius. 1 This arrangement was necessary, because the S. C. Pegasianum did not particularly mention the actiones hereditariae in cases of the delivery of the inheritance, hence the H. F. would have been liable to the creditors; he therefore protected himself by this agreement, and, if sued by creditors, brought his action on the agreement against the H. F. C.

§ 1352.

A H. F. must give to the estate the same care that a man of common prudence does to his own affairs up to the term of the restitution, 2 and must not sell of his own authority aught that he should hand over; but if he do so, the H. F. C. is competent, when the proper time arrives, to impugn the sale as null and void; 3 nor is it an impediment, so that the object to be delivered is an entire inheritance. 4

Nevertheless, he may alienate in particular cases,—

When all interested concur therein, 5 in which case he may infringe even the last fourth part; 6

When the testator's debts render it indispensable; 7

When the property would spoil by keeping, 8 in which case the value realized must be substituted in the place of the object sold; 9

When the H. F. is unable to grant a dower, or donatio propter nuptias, for his own benefit, without it, 10—and may, in this case also, infringe the last fourth share; 11

When the testator has permitted it, especially when he has permitted the surplus only to be handed over,—in such case the H. F. may freely dispose of three-fourths, nor can that which he has realized by sale of a species be demanded of him, nor that of a genus no longer in his possession.

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1 § 1162, h. op.
2 P. 36, 1, 22, § 3; v. Löhrl, Theor. culpae, p. 170.
3 P. 36, 1, 3, § 3; P. 36, 2, 88, § 14; C. 6, 4, 3, 1; Hellfeld, de F. C. fam. illustr. c. 3.
4 C. 6, 4, 3, § 2, 3; Archiv. d. C. P. 8 B. 1 Hft. p. 56-7; contra, Löhrl, Mag. 4 B. 1 Hft. p. 96.
5 P. 30, 1, 120, § 1; C. 6, 42, 11.
6 Nov. 108, 1; Reichardt. de F. C. ejus quod superfuturum erit Jen. 1785.
7 Lochner, Unterr. d. Fr. Bamb. 1795, 8; contra, Hellfeld, I. F. § 1587.
8 P. 30, 1, 114, § 14.
9 P. 36, 1, 22, § 3.
10 P. 31, 2, 70, § 3; Id. 71-2.
11 Vid. supra, 5, n. 5.
Obligations of the fideicommissary heir to the fiduciary heir: to pay debts; to give caution, for eviction; and suffer the quartan deduction.

§ 1353.

The H. F. C. must repay to the H. F. all extraordinary expenses incurred on the substance of the inheritance to be handed over, as well as for payment of the debts of the estate,\(^1\) for the costs of a compulsory administration.\(^2\) He must pay all the claims of the H. F. on the testator, in so far as this latter may have had no set off against them;\(^3\) bear the contingency of accidents;\(^4\) give security to the H. F. in the case of the eviction of whatever be assigned to him, be they farms, mancipia, or other things; and for that of objects which may be subsequently alienated by him;\(^5\) and lastly, as has been seen, he must submit to the deduction of the *quarta Pegasiana*, *Falcidia*, or *Trebelliana*, under whatever name it may pass.\(^6\)

§ 1354.

It is the duty of the H. F. to hand over the object in its entirety;\(^7\) and where the direction of the testator is imperative, everything must be delivered to which the disposition extends, with exception of such things as do not strictly pass under such disposition, but vest in the H. F. by virtue of other and superior provisions, such as a sepulchre and the like;\(^8\) but where the direction is generally to deliver *everything*, the H. F. must hand over even that which has accrued to him by a *titulus singularis*, including prelegacies\(^9\) received from others.\(^10\) If, on the contrary, he be merely directed to deliver the inheritance or an imaginary part thereof, such principal object of the inheritance or the part mentioned is only due together with the profits\(^11\) arising from it, and whatever has been added to it by the *jus accrescendi*. Hence he does not deliver objects not appertaining to the inheritance,\(^12\) or anything received by way of *donatio inter vivos* from the testator;\(^13\) neither does he deliver what he has received by *titulus singulari*, on particular grounds, in virtue of the will;\(^14\) nor prelegacies, in so far as he may have contributed to the same, except the testator have expressly decided otherwise;\(^15\) nor such profits as may have been fairly derived in virtue of the testator's will after administration.\(^16\)

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1 P. 12, 6, 40, § 1; P. 30, 1, 58; P. 36, 1, 19, § 2 et 22, § 3; Gottachalk, disc. form. T. 3, n. 5.
2 P. 36, 1, 7 & 11, pr.
3 L. 30, 1, 123; P. 36, 1, 27, § 11; Lauterbach, de conf. § 12, 13.
4 P. 31, 2, 58, § 6 & 77, § 18.
5 P. 36, 1, 69 & 72.
7 P. 36, 1, 78, § 12 & 16.
8 P. 36, 1, 42, § 1; Id. 55, pr.
9 P. 36, 1, 3, § 4; C. 6, 49, 6; P. 34, 9, 18, § 2.
10 P. 36, 1, 27, 1; Voet. ad ed. § 49.
11 Voet. 36, 1, § 38; contra, Cuj. obs. 12, 1, 2; Faber, err. prag. dec. 37, er. 5; Vinn. qu. sel. 1, 55; Rosberger, de jur. accresc. Ber. 1727, p. 213-16; Baumeister, Anwachungsrecht, Tub. 1829, § 121-5.
12 P. 31, 2, 77, § 12.
13 Voet. L. c. § 36.
14 P. 35, 1, 44, § 5, 6, 7.
15 P. 36, 1, 18, § 3; P. 35, 2, 86, 35, 2, 3; § 4; v. d. Plörken, de praleg. Erl. 1832, p. 47-52; sed vide Voet. L. c. 37; Nieto de praleg. c. 4, § 14; Pfeiffer, de eod. § 22; Hofacker, T. 2, § 1633.
16 P. 36, 1, 18 & 22, § 2 & 14, § 1.
nor objects accruing from inequitable judgments and the absurd acts of others. Lastly, he is not compellable to hand over objects alienated by himself, the sale of which is, in case of necessity, allowed him, in as far as they are not compensated by profits.

§ 1355.

In respect of third persons, the H. F. naturally stands in the full position of an heir before the restitutio and the H. F. C. is ignored. After the restitutio, however, an entirely new state of things arises. In consequence of the Scta. Trebelliana, Pegasianna, and constitution of Justinian, the H. F. C. is bound to take the burden of the inheritance on himself, in part or in whole, according as the fiduciary heir has retained certain objects or handed over a part. He pays the legacies only to the extent of the activa or property in esse of the inheritance; and if he has not made an inventory, he must pay the debts out of his own property as a punishment for his neglect, while the creditors have their subsidiary remedy against the H. F. On the other hand, the H. F. C. has his actio utilis to the extent of his share in the estate, and the same obtains as to F. C. successiva. But the H. F. cannot transfer the actions belonging to the estate to the H. F. C. for an excess, when he has handed over more than he ought to have paid, although it be an imaginary and not a defined part, as one-third or the like, but remains responsible to creditors to that extent, as well afterwards as before.

§ 1356.

The H. F. may be deprived of his deduction on certain grounds:—

On account of a privilege, when a F. C. is left to a charitable institution, and in the case of a military testament. As a penalty, when compelled to administer for neglecting to make an inventory for fraud, by voluntary renunciation, or by the testator forbidding the deduction. The Canon law, the hæredes necessarii can in addition deduct

1 P. 36, 1, 59, § 1.
2 P. 36, 1, 22, § 4.
3 I. 2, 23, § 1-7.
4 Id. § 9.
5 P. 36, 1, 1, § 17; Boehmer, de leg. ex F. C. præst. (Elect. T. 1, n. 7).
6 C. 6, 49, 2; P. 36, 1, 4 & 45; contra, Weber ad Hübner, l. c. § 602, n.
7 I. 2, 23, § 7, in fin.; contra, Voet, 36, 1, § 60.
8 P. 36, 1, 63, § 1 & 70, pr.; Faber, l. c. Dec. 65, § 9.
9 P. 36, 1, 1, § 8.
10 P. 36, 1, 63, § 3.
11 C. 1, 3, 39; Nov. 131, 12; Voet, 35, 2, § 16; Westenberg, præc. D. 35, 2, § 29; Conradi, pr. de Quart. Fals. leg. in don, deor. relicto deduc. Helm. 1747; Bardill. de leg. ad P. C. § 2; Thibaut, P. R. § 917, n. c. f.
12 P. 36, 1, 1, § 1; P. 36, 1, 4; I. 2, 23, § 7.
13 C. 6, 30, 22, § 14; Nov. 1, 2, § 2; Hofacker, 2, § 1541; Thibaut, l. c. § 877.
14 C. 6, 50, 15; Thib. l. c. § 917, & § 920.
15 P. 36, 1, 45.
16 Nov. 1, 2, § 2; Menzell in Lühr, Mag. 4, B. 2, 3 Hft. S. 354-62, as to a tacit prohibition.
their *pars legitima* in all cases, except in those where the *quarta Trebelliana* was due, nor can they be precluded by the testator from making the deduction, which is always taken from the substance of the property; they can, however, be forbidden to deduct it in all other cases.

§ 1357.

Justinian having assimilated legata with *F. C. universalis*, the provisions which apply to the one are equally applicable to the other; and it was seen that the whole inheritance could be left as a legacy in a codicil of which the intestate's heir had then the administration.

§ 1358.

When *uses* were introduced by the clergy into England to evade the statute of *Mortmain*, the *feoffeeto uses*, who was the *H. F.* of the Roman law, was the only owner recognized by the Common law; and all capable of taking an estate in land were capable of becoming *cestui que use* or *H. F. C.*, hence a forfeiture by the *feoffee* defeated the interest of the *cestui que use*; but, on the other hand, the *cestui que use* could not be reached by the Crown or creditors, because he had no tenure. To remedy the first inconvenience, the statute of Henry VI. was passed to protect the *cestui que use* from forfeiture by the *feoffee*; and that of Henry VIII., termed the *statute of uses*, consolidating and amending intermediate statutes, transmuted the equitable interest of the *cestui que use* into a legal estate of like nature or *into possession*, and rendered him, instead of the legal owner, liable to all the burdens to which he would as legal owner have been exposed.

In consequence, however, of it being decided at law shortly after the passing of the Statute of *Uses*, that a use could not be created on a use, as it could by the Roman law, if an estate were conveyed to *A* for the *use* of *B*, in trust for *C*, *C* took no interest, upon the principle that this would not be an executed use in his favor under the statute; and a use must consist like a Roman service, *in patiendo non in faciendo*; to remedy this, the courts of equity decided, that although *C* took no estate or interest at law under the statute, yet that *B* should in the Court of Chancery be deemed a trustee for *C*.

Since the statute, therefore, the person for whose benefit a trust is created, is termed the *cestui que trust*; the person for whom

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1 C. 6, 49, 6, pr.; X. 3, 26, 16-18; Boehmer, de lib. *F. C. onerat.* (elect. T. 1); Bauer, opusc. T. 1, n. 13; Puf. T. 2, obs. 83; Leyser, obs. 633-5; contra, Faber, E. P. Dec. 11, cr. 5, 7.
3 15 Rich. II. 2, 5.
4 1 Rich. II. 9; 4 Hen. IV. 7; 11 Hen. VI. 35; 1 Hen. VII. 1.
5 27 Hen. VIII. 10.
6 Tyrrell’s case, Dy. 155; 2 Bl. Com. 336; Gilb. us. Suld. ix.
the legal estate is vested, is termed the trustee: an *executory trust*
imposed some active duty on the trustee, an *executed* one suchasin imposed no such obligation, and was, in fact, equivalent toan use.

Testamentary trustees, called in English law executors, may,Testamentarylike an hares fiduciarius, be appointed by a will for the person therein named, and be directed to pay at once, or annually, a
certain thing or sum to another person, either contingent on a
certain event, on a certain day, or up to a certain day, or, infact, in any way the testator may have chosen legally to direct;but this office differs from that of the fiduciary heir (for theexecutor has, in fact, the same office to perform) in certainrespects; on the one hand, he has not the advantage of anythingresembling the Falcidian, Trebellian, or Pegasian fourth, hisoffice being purely gratuitous, except a legacy be left him, which,however, is by no means compulsory on the testator; should heon that account repudiate the trust, the testament is in factdistribute, and the deceased intestate, but the court grants adminis-
tration to his wife, next of kin, or creditor, with the will annexed,
which is the bonorum possessio secundum tabulas of the Romanlaw, whereupon he must execute the trusts of the will; but ifthere be none such, then the court will grant administration withthe will annexed to the nominee of the Crown, the estate havingbecome bonum vacans.

The executor is, however, not exposed to the perils to which aRoman heir was formerly subjected, for if the estate be insolvent,hares damnosa,— that is, if the debts of the testator exceed theassets— he is not bound *ultra vires hæreditatis*, and to an action atlaw being brought against him can plead his *pleni administravit*, oraccount of assets, in answer to a bill in Chancery. But if he
make no inventory, the court presumes he has sufficient assets ofthe testator in hand to pay all debts and legacies, and he maybe compelled to do so out of his own property, if solvent; and ifhe, having paid a legacy, finds the estate exhausted, he cannotrecover the sum so paid in error, although the *co-legatees* can, inorder to have it divided among them *pro rata*.1 Hence the
rule coincides with that of the Roman law, which forms, in fact,the basis of testamentary law in all Christian countries.

1 Ves. 193.
§ 1359.

THE privilege of testation, as has been remarked in the beginning of Title XI., was an exception, although, indeed, a very ancient one, from the old Roman law of succession, and in itself a restriction of the natural law of occupancy. Succession, according to the rules prescribed by the general law, was, nevertheless, left subsisting in its full vigor, in case of the deceased not having availed himself in a legal manner of the advantages allowed him by law of testation. Thus it may be said that occupancy ceded to two laws which successively yielded to each other,—succession by law yielded to succession by testament, occupancy to both; succession by testament failing, succession by law claimed its elder right; but on its failure, succession by occupancy, under the form of the succession of the fiscus, representing the state obtained.

The law of succession is twofold, based upon a testament, termed testamentarium, or regulated by the provisions of the law, and called legitima, or successio ab intestato. This succession may accrue in various ways,—either the deceased may have neglected to make a testamentary disposition of his property during his life, and consequently on his death the vacua possessio, if not appointed by law to some one, would become common property; or the deceased may not have had the right to make a will testamenti factio, a right confined to a peculiar...
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class, hence successio ab intestato est successio legitima qua defecte testamento defertur illis quibus natura et leges deferrit voluit. The term “intestate” indicates in its literal sense that no will was made, yet in a legal sense the expression is modified, and a will may exist, but one invalid by law; thus, if the deceased make a will invalid ab initio, he is held to die intestate, for as the law ex speciali gratia allows a man, contrary to natural law and to the general civil law, to direct the disposition of his property after he has ceased to have any physical control over it, so he on his part is expected to conform with the rules in such case made and provided, under pain of forfeiting the right by his testament being declared nullum or injustum. The same reasoning applies to a testament which, although good in the beginning, becomes ruptum, irritum, or destitutum, or is ultimately rescinded as inofficiosum, for here either a superior law governs the case, or circumstances over which neither the law nor testator has control destroys the testament. In all these cases, then, the deceased is said to die intestate. With respect to the latter part of the definition, natura et leges, by the former (natura) is implied the principle of natural law, viz., that in a natural state of society the nearest relations would inherit, and, this principle being established, the law of man (lex) recognises and confirms it,—nor is there any distinction to be made in the Roman law in respect of the descent of moveable or immoveable property, both following one and the same rule.

§ 1360.

The President de Montesquieu traces the law of succession to the division of land made by Romulus, the principle of which was that the property of one family should not pass into another; whence, two orders of heirs only are recognised in the Roman law, viz., the children, and all who descend from, and were under the power of, the father, termed sui bæredes, and, in their default, the nearest male relatives, termed agnati,—hence, heirs on the female side, called cognati,—hence, heirs on the female side, called cognati, can never succeed, because they would have transferred the property into another family, and for the same reason the children could not succeed to the mother, and hence their exclusion in the laws of the Twelve Tables. It matters not whether such suus bæres or proximus agnatus be male or female, because the relations on the female side did not succeed, that is, that although an heiress marry, her property on her death returns to her own family, and does not pass to the children. Thus the Twelve Tables make no distinction as to whether the person who succeeds be

1 Vide § 1198, b. op. et sq.  
2 I. 3, 1, pr.  
3 Dion. Hal. 2, 3; Plut. Num. et Lycurg.  
4 At si intestato mortitur cui suus bæres  
6 Ulp. Fr. 26, § 8.
SUCCESSIO LEGITIMA.

male or female; grandparents by the son would succeed to the grandfather, not so those by the daughter, the agnates being preferred to prevent the property passing into another family; the daughter succeeded to her father, but not so her children. Hence Montesquieu concludes, that originally the females succeeded among the Romans when such succession coincided with, but that they did not so when it was opposed to, the law respecting the division of lands, and consequently, that, this being their foundation, they were of ante-decemviral Roman origin, and in nowise referable to the Decemvirs,— in support of which theory Dionysius of Halicarnassus says, that Servius Tullius, finding the laws of Romulus and Numa as to the division of estates abolished, revived them, adding provisos still more stringent. The law of succession having been then established by a law of policy, was not to be disturbed by private interference; hence the inability of a citizen to make a will, but as it was hard to deprive him of this advantage in his last moments, the expedient of passing a distinct law by will made in the public assembly was invented.

The President is farther of opinion that the law respecting the partition of lands was that which restricted the number of such as could succeed ab intestato, and that the reason of the great extension of the rights of testation lay in the paternal power, for, as the father could sell his children, a fortiori, he could deprive them of his property,— hence different effects flowed from different principles, "such," says that great author, "is the spirit of the Roman laws."

By the law of Athens, no citizen was allowed to make a testament, until Solon conferred this privilege on such as were childless. In Rome the omnipotence of the paternal power interfered with this principle, and it must be avowed that the laws of Athens were more consistent than those of Rome. This permission to devise, ad infinitum, among the Romans, ruined, by degrees the politic provisions respecting the partition of lands, introducing the baneful distinction between opulence and poverty; many shares vesting in the same individual,— "thus some had too much, others nothing, and the people, continually deprived of the partition, demanded without cessation a new distribution."

Having traced the history of testaments till they had become established, Montesquieu remarks, that although a will was ruptum by the omission by the father to institute or disinherit a son, as involving an injury to the grandson, yet a similar neglect was of no consequence with respect to a daughter, as not affecting her children, who could in no case succeed to their mother, ab intestato, being neither heirs proper nor agnates.

1 Paul. R. S. 4, § 3.
2 I. 3, 1, § 15.
3 Liv. 4, p. 376.
4 Plut. de Sol.
5 Ulp. Frag. 36, 7.
Succession by law always presumed the heirs to be *sui juris*; but the succession of the *ingenui* or free born differed from that of the *liberti* or freed persons; and in this second category comes the succession of emancipated free born heirs, because they had been *in mancipio*, and emancipation was a liberation, according to Roman legal principle, from this qualified slavery, to which every free born man was originally subjected; hence, the first course of examination applies to such as become *sui juris* in the usual manner.

The basis of this succession is to be sought in the Roman conception of the *familia*, which consisted in an actual or feigned relationship with the person leaving the inheritance; hence, then, the legislators held that those succeeded in the first place who claimed by procreation, adoption, and manus, or paternal power, and such were termed the household heirs or *sui hæredes* of the deceased; grandchildren and more distant relations, whose fathers or grandfathers were dead or had been emancipated, succeeding into the place and portion of such.

Failing children of the house, or *sui hæredes* (for the term *hæredes sui* was never used), the law of the Twelve Tables called the *agnati* to the succession, the *proximus agnatus* being the first legal heir, which were the brothers and sisters of the deceased by the same father.

No advancing of the following degree was recognised when the next agnate did not serve himself heir to the inheritance; nor were female agnates, beyond a sister, capable of succession, until a more liberal interpretation of the law of the Twelve Tables was adopted and conceived in the same spirit as that which gave rise to the Voconian law. Lastly, failing the agnates, the inheritance fell among the *Gentiles*; but the *relictum* of an intestate vestal virgin lapsed to the State.

By the Hebrew law, the males succeeded first, the eldest receiving a double share, thus forming a sort of modified majority.

Intestate succession was adopted into the Twelve Tables, *si intestato moritur cui suus hæres nec escit (erit) agnatus proximus familiam (hæreditatem) babeto*, the relationship on the male side called *agnatio*, which was a positive civil right (*jura agnationis sunt civilia*), apart from natural right, but it did not extend to
emancipated children who had forfeited their claim on leaving the
familia, and inherited as sui, not as children. The family name,
sacred rights, and burial place belonged to the agnates, for which
reason the Decemviri probably thought it preferable to continue
the exclusion of the cognates, among whom there was no nexus
civilis, and to confine the provisions of succession at law to the
agnates alone among whom such existed; hence the tres ordines
of the Twelve Tables, Sui hæredes, Agnati, and Gentiles, taking
precedence in their order.

§ 1362.

The sui hæredes are the first in order of succession,1 and derive
their claim from the unitas persona, feigned to exist between the
father and his children, whose succession was regarded rather as a
continuation of the dominium,2 whence some deny they succeed by law.

Such are sui as may be in the family and under the power of
the deceased at the time of his death, in the first degree, such
are sons, daughters, grandchildren, of either sex; on the male side,
under the direct power of the grandfather.3

If the children be under power, they might be natural or
adoptive; even the wife in manu, the daughter-in-law in manu of
the son, as quasi filia familias and participators in the sacred
rights, are reckoned among the sui; according to Ulpian,4 however,
this appears to have ceased, probably because, in later times,
wives seldom came in manum, and therefore took advantage of
the edict, unde vir et uxor.

In a later age, children legitimated either by subsequent mar-
riage, by curia datione, or rescript, obtain the same privileges.5

Paulus tells us6 that posthumous children; those who return
from the enemy; those who have been emancipated once or
twice, cujus erroris causa probata, although they may not be in
the power of the father, are yet to be considered his sui hæredes.

By postbuni are understood such, who, had they been born
in the father’s lifetime, would have been under his power.

By those returned from the enemy, such as could claim the
benefit of the jus postliminis are meant.

By those once or twice emancipated, such as have been emanci-
pated to another with a view to total emancipation,— if such person
remains in the power of another for a certain time, he loses his

1 The law was not of Attic origin, for
then the daughters succeeded, failing the
sons.—Isaeus, Orat. 9.
2 I. Gothofr. ad Leg. xii. Tab. 5 ; Ant.
Fabo. de error. prag. Dec. 3, error. 1 ;
Cuj. obs. 25, 14 ; P. 28, 2, 11 ; I. 2, 19,
§ 2.
3 Gaii. 2, 3, 5 ; Paul. R. S. 4, 8, § 4,
seq. ; Ulp. Fr. 22, 14.
4 Ulp. Frag. 22, 14 ; Caius, apud Auct.
collat. Leg. Mosaic et Rom. 16, 2 ; Gell.
Noct. Att. 18, 6 ; Dion. Hal. 2, 95.
5 I. 3, 2, § 2.
6 Paul. R. S. 4, 8, § 7, post mortem
patris nati, vel reversi ad hostibus aut ex
primo secundove mancipio manumissi, cu-
juve errois causa probata, licet non essent
in potestate sui tamen patri hæredes efficie-
bantur.
suitas; but recovers it if manumitted the first or second time, for he must be thrice manumitted in order to emancipation, and although this first and second manumission breaks (rumpit) the father's will, yet it does not destroy the son's right of succession, ab intestato. Heineccius explains cujus erroris causa probata as alluding to a mesalliance or marriage between a citizen and a Latin, or the like, the issue of which would not be sub potestate.

§ 1363.

The sui heredes of equal in degree divided the inheritance in capita, for the succession into the place of the deceased is not recognised among the agnates; this takes place when the inheritance is divisible, viritim, among the number of persons destined to succeed and claiming in their own right as being of equal degree of kindred,—thus, the division of a father's inheritance among his four sons is in capita or individual; but it is in stirpes when, by a fiction at law, the children of such four sons come gregatim, by representation as a family, into the place of such sons so deceased, the members of such family dividing among themselves the share which the deceased would have had had he lived; suppose, therefore, one of the four sons to die before the father, leaving again four sons, their three uncles would succeed in capita, and each take one-fourth, and their four nephews divide their deceased father's share among them,—in which case each nephew would succeed to one-fourth of one-fourth, or one-sixteenth, in virtue of representation.

§ 1364.

Operation of the suitas is peculiarly privileged, for no declaration is required from a suus heres of his willingness to become heir; he is so absolutely from the moment in which the ancestor died, and in case of a will even before it was opened, and before he received notice of the death of the ancestor, nay, though he be an infant absent, or an idiot, the consent of the curator is not requisite for the acquisition of the heritable right; so also a will in which a suus is instituted cannot become destitute if such suus outlive the testator, for this reason, the suus, by intermeddling with the inheritance, si se immisset hereditati, is not for that the more heir; the act can only be looked upon as a declaration of his intention to keep the inheritance; if, however, it be patent by word or deed.

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1 Ulp. 23, 3. 2 Gaius, Inst. 2, 8, § 1. 3 I. 3, 1, § 6. 4 P. 29, 4, 7, § 7. 5 P. 40, 5, 30, § 10. 6 This immixtio of the suus heres is the same as the gestio pro herede of the heres voluntarius, and is governed by the same rule of evidence.—Boehmer, diss. de discrim. suor. et emancipator. in success. intest. § 24; in Elect. I. C. T. 1; Puf. obs. I. U. T. 3, obs. 1; Hofacker, princ. I. C. § 622.
that he do not intend to assume and accept the inheritance, he is said *delinquere hæreditatem* or *abstinere ab hæreditate*, while the word *repudiare* is applied to others, an expression considered too harsh for one in a natural position like his. Thus, not being bound by any declaration, he is not bound by any fixed term; consequently, a creditor of the father, in order to be in a position to sue a *suus hæres*, must prove an *immixtio* or intermeddling.

Those who support the contrary opinion assert, that though the *suus* is *ipso jure* heir, he must both declare and prove his declaration of refusal, because Justinian requires that a *suus* decline the inheritance *apertissime* within three months. But the answer to this is, that when a *suus* is sued and thereupon declines, his declaration is thereby made and is valid, because no term has been prescribed; for the Codex speaks of the case of a *suus* having prayed a *tempus deliberandi*, which implies a term. Perhaps he must prove that he has abstained during such term.

Again, for the like reason, if a *suus* die without any declaration or intermeddling as above; nay, although he be ignorant of the fact of his ancestor’s death, the inheritance has, nevertheless, vested in him, and conferred a transmissible right to his heir. Thus, if a father die abroad on the Kalends of January, and the son on the Nones, in ignorance of his father’s decease, his widow will take the inheritance of her father-in-law, because it had accrued *ipso jure* to her husband, and is as much her own as the rest of her deceased husband’s property.

§ 1365.

The *suus hæres* in the first degree, who succeed in *capita*, may be male or female; but those in the second degree, who succeed in *stirpes*, or by the right of representation, must derive such right through the male line, consequently a grand or great child by a son is a *suus hæres*—not so a grand or great child by a daughter, who is reckoned among the cognates.

The Voconian law agrees in a measure with this, but goes still further, excluding women from all succession to deceased persons,—it even forbids a father to institute his only daughter his heiress, or to leave his estate to her by a trust. According to Aulus Gellius, however, the practice of admitting women as legal heirs still obtained, but was restricted to the *consanguineae*, which appears a deviation from the spirit of the Voconian law.

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1. Bohmer, l. c. § 11.
2. Bohmer, l. c. § 25; Koch. dim. de exhaeredit. suis ad prob. abst. haud oblig. Giss. 1766; Walch, contr. p. 303, ed. 3.
3. Averan, interpr. lib. 1, c. 9; Finistres, de Avel. O. H. p. 291; Puf. T. 3; obs. 8; v. Steek, n. 13, p. 183.
4. C. 6, 30, 23.
5. Weber on the obligation oneris pro bandi in civil process, 6 Treat. n. 28 (Ger man).
7. N. A. 20, 1.
8. Paul. R. S. 4, 8, 22; I. 3, 1; § 15.
Valens, Theodosius, and Arcadius, thought proper to alter this rule,¹ and to allow grandchildren by a daughter to succeed to the maternal grandfather or mother, together with the sons and daughters of the deceased, with the proviso, however, that they should receive only two parts of the maternal portion, and that the third should remain to the sons and daughters; this was again changed by the 118th Novell., of which hereafter.

§ 1366.

Wives in manu succeeded to their husbands as suæ hæredes, κοινωνῶν ἀπάντων χρημάτων τε καὶ λειψῶν,² in their capacity of filiae familias, or daughters of their husband, by the fiction already frequently alluded to, and by which Laurentia succeeded her wealthy husband, Tarrutius.³ The frequency of such occurrences, however, diminished in proportion as the conventio in manum fell into desuetude, and the marriage by usus obtained; hence, in later times, wives were not admitted to the B. P. The praetorian edict, unde vir et uxor, however, came to their assistance, and gave such wives the B. P. as though they had been in manu, in cases where there was no one living who had a prior claim.

§ 1367.

The rights of the suitas were destroyed in three ways; by the maxima and media capitis diminutio, because the heir being thereby deprived of his civil status, was incapable of receiving property under the civil institutions of his country.⁴ Emancipation had a like effect, because the family bond was broken, and such children became civilly strangers to their family; in like manner, and for like reasons, the children of such conceived after their parent’s emancipation were disqualified.⁵

The praetorian edict, unde liberi, came, however, to the aid of the emancipated children thus excluded from the suitas by the Civil law, and gave them the B. P. as if they had been in their father’s power at the time of his death.⁶ This was even extended to the children of those emancipated, but not to those of such as had been adopted, who never could obtain the B. P. as quasi cognati;⁷ the prætor’s edict did not even extend to those who, though emancipated, had been adopted by others since, except they had been again emancipated before the father’s death.⁸

Adopted children, by a constitution of Justinian, were held to belong to the family, and to be under the power of their natural father, and only so far belonged to the family of their adopting

¹ C. 6, 54, 9.
² Dion. Hal. 2, 25.
³ Macrobr. Sat. 1. c. 1, 10; Plut. Quaest. Rom. 35. It is not clear, however, whether she succeeded by law or by testament.
⁴ Vid. § 402, h. op. et seq.
⁵ I. 3, 2, § 9; I. 7, 12, § 9; Paul. R. S. 4, 8, § 12.
⁶ P. 38, 6.
⁷ Paul. R. S. 4, 6, § 12.
⁸ Ulp. Frag. 28, 8, 10.
father as succession to his estate, together with his other children when he died intestate, was concerned.  

§ 1368.

The adgnati are said to be cognati per virilis sexus personas cognatione conjuncti quasi a patre cognati, a bond which might be natural by procreation, or civil by adoption;  
this definition distinguishes adgnati from cognati, but not from the gentiles, who nevertheless are also distinguished by the law of the Twelve Tables.

Failing the sui bæredes, from any cause whatever, the proximus adgnatus succeeded to the estate by the law of the Twelve Tables, and so strictly was this rule adhered to, that should the proximus fail by any accident, the inheritance would not pass on to the more remote adgnati; sex, on the contrary, was no impediment, provided they were adgnati or adgnatae, both being admissible by the law of the Twelve Tables; in the process of time, the lawyers laid down the rule that the adgnata should only inherit to the second degree, that is, sisters by the same mother and father, or at least of the same father, sorores germanæ et consanguinæ, should succeed the brother, thus the brother's daughter would not succeed her uncle, although the uncle would succeed her.

The praetor's edict of unde cognati admitted that class, however, to succession, on a principle of equity; the male adgnates succeeded both, whether allied by blood or civilly; nevertheless, the nearer excluded the more remote, and we have seen this latter was not advanced by the death of those before him; some are of opinion that the inheritance in such a case passed to the gentiles, others that it followed the rule of bona vacantia, and as such lapsed to the exchequer. The praetor changed this; permitting, in case the next adgnate declined the inheritance, or died, the more remote to succeed, not as adgnate, but as cognate; hence a nearer cognate excluded the adgnate. Justinian gave this a still greater extension, by a decree to the effect that the more remote adgnate should succeed as such, and not as cognate, and could, consequently, not be excluded by cognates of a nearer degree; although this decree is lost, its contents are preserved in the Institutes.

This exclusion of the more remote adgnate has been looked upon as a pedant adherence to expressions not intended to be interpreted in so strict a sense, but it is far from proved that such was the case; it is by no means improbable that the decemvirs meant what they wrote, and that their object was to distribute the property among the gentiles, or ingenious and free citizens of the same name and family, and that the decemviral intention was

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1 §§ 683, 693, 696, 704–5, h. op.
2 I. 3, 2, § 1 & 2.
3 I. 3, 2, 7; Caii Inst. 2, 8, § 4; Paul. R. S. 4, 8, § 23; Ulpian, Fr. 255, 5.
4 Schulting, ad Coll. L. L. Moss. et Rom. p. m. 794; Leger, dia. de suc. edicto.
5 Vinn. ad I. 3, 2, § 2; Balduinus et Hotomannus, ibid.; Orat. ad Cai. 2, 8, 4.
6 Vinn. l. c.
7 I. 3, 2, § 7.
8 Vid. § 370, h. op.
first to admit *sui*, that is, direct descendents, but to limit their succession by the exclusion of those not in the ancestor’s power; in like manner, to admit the *agnati* or collaterals, but to limit their succession to one degree only; for the whole object of these law commissioners was to unfetter, not to restrict, the disposition of property after death, and to this end they introduced the power of testation before unknown.¹

§ 1369.

As inheritances by the law of the Twelve Tables could not ascend, consequently, the father could not succeed his son; for if under power, the son had nothing of his own, and only acquired for his father; but if the son were emancipated with reservation of the *jus patronatus contractu fiduciae*, then the father could succeed him not indeed as son, but as *manumissor*, and thence as *quasi patronus* to his *quasi liberto*; but if he had not reserved this right, the fiduciary father acquired it; nevertheless, the praetor, in his equitable jurisdiction called the natural father to the *B. P. by the edict unde decem persona*.²

These ten persons were—the father; the mother; the grandfather of the male or agnate, as well as of the female or cognate side; the grandmother, as well of the agnate as of the cognate line; the son; the daughter; the grandson, born of a son or of a daughter; the granddaughter, born of a son or of a daughter; the consanguineous or uterine brother; the consanguineous or uterine sister.³

Mother and children reciprocally did not inherit from each other, because they were cognates to each other, nor could the mother be considered an *agnate*, nisi convenisset in manum; this, the praetor also extended, giving the mother administration by the edict *unde cognati*, and so the matter remained, until Claudius allowed a mother to succeed as a consolation for the loss of her children; the *Sctum. Tertullianum* again amended and enlarged this provision, but when and by whom it was introduced is a question of considerable doubt.

§ 1370.

In the Institutes⁴ we find that the *Sctum. Tertullianum* was passed under Hadrian, but no consul, Tertullius, appears in the *fasti consulares* of that reign; some suppose it was passed under Antoninus Pius, A. D. 158, *Tertullus et Sacerdos Coss* being mentioned in that reign, because that emperor had sometimes borne the praenomen Hadrian, acquired by adoption;⁵ under Hadrian, however, no such consul existed; but, as far as that is an objection, many consuls, probably *consules suffecti*, not found in the fasti

¹ de Colquhoun. *I. 3, 10, § 2.*
³ I. 3, 3, § 1; Suet. in Claud. 19.
⁴ I. 3, 3, § 2.
⁵ P. 36, 1, 93 & 58, c. 3; P. 35, 1, 91 & 93; P. 48, 6, 5, § 1; P. 5, 1, 37; Cuj. ad I. 3, 20, § 4; P. 46, 1, 26 & 49, § 1, but his view appears to be erroneous; Paul. R. S. 1, 21, 1.
consulares, are mentioned in legislative enactments; hence we must assume this Sctum. was passed under Hadrian as stated, because Tertullus et Maximus Coss are mentioned in the law, but that these were mere consules suffecti whose names have been lost.

According to this Sctum., a free born mother with the jus trium liberorum, or a freed mother with the jus quatuor liberorum, could inherit from her intestate legitimate and natural son or daughter, even though under power; this provision did not, however, extend to the grandmother, whom Justinian admitted subsequently; now, if the mother were still under power, she could only succeed on order of the father, as is the case with a filius or filia families.

The conditions, then, were—
That the mother should have the jus liberorum;
That the child should have died intestate;
That no relations should exist who had a precedence over her; for if the deceased left children or grandchildren, father or fratres germanos aut consanguineos of the deceased, such excluded the mother; if, however, these were only sisters, the mother shared with them.

The children of the deceased being sui, or those in their place, of the first or a more remote degree, precede the mother.

The son or daughter of a deceased sua filia precede the mother of the deceased daughter.

The father of both, but not the grandfather or great grandfather, precedes the mother, when it is a question between these two.

1 P. 48, 5, 29; § 5; Zonaras, 12 (C. 1, T. 1), p. 593.
2 Paul. R. S. 4, 9, 1 & 7, 8.
3 Nov. 118. 4 C. 6, 54, 4; C. 6, 56, 11.
The brother by blood of son or daughter excludes the mother.

The sister by blood inherits with the mother.

If there be brother and sister by blood, and a mother with children, the brother excludes the mother, and the inheritance is equally divided between brothers and sisters.

By Justinian's former decrees the mother succeeded with the brothers and sisters of the deceased; if brothers only, she had a *portionem virilem*, that is, as much as a brother,—but if sisters only, she got half the inheritance: this was again altered by the Novell. 118.

§ 1371.

The law of the Twelve Tables did not give the inheritance of an intestate mother to her children, upon the principle of women being incapable of having intestate heirs; neither could relief be sought in the *B. P.* under the *edictum unde liberi*, which applied only to *sui*, or to such as would have remained *sui* had they not been emancipated. Still, it was possible for children to sue for the maternal inheritance, or to institute the *querela inofficiosi testamenti*, even before the reign of Marcus Antoninus, the philosopher, for when mothers were emancipated by their fathers, and then had no longer any agnates, the children obtained the *B. P.* under the edict *unde cognati*,—on obtaining which, it was not competent to them to impugn the testament of the mother, as was permitted to others to whom this *B. P.* had been granted. If, on the other hand, the mothers were *in manu*, they were in the position of *consanguinei*, or relations by blood to the children,—hence the children, being as it were next heirs, could, on administration, doubtless impugn the maternal testament as inofficious; indeed, examples of such suits being brought are mentioned by classical writers.

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1 C. 8, 59, 43, ult.  
2 Nov. 22, 47.  
3 Ulp. Fr. 26, 7.  
4 P. 38, 6, 1, § 6.  
5 P. 5, 2, 6, pr.  
6 P. 5, 2, 7.  


§ 1372.

The Scctum. Orphitianum, which was passed under Marcus Antoninus, A.U.C. 931 and A.D. 178, during the consulate of Vettius Rufus and Cor. Scipio Orphitus, gave the children the same description of right in succession to their mother as the foregoing Scctum had to this latter, for, generally speaking, the rights of succession were reciprocal, depending upon which died first,—hence the sons and daughters of a liber or libertina, legitimate or otherwise, whether sub potestate or sui juris, nay even those who had suffered the capitis diminutio minima by change of family, succeeded to their mother in preference to her consanguinei and adgnati; the jus accrescendi or cretio was, moreover, given to the heirs of such as had died previously. By this Scctm. the son could also acquire the inheritance of the mother by gestion.

Valentinianus, Theodosius, and Arcadius, extended this privilege to grand and great grandchildren; and Justinian still further, to the issue liber vulgo quesiti or mothers, who were neither of gentle blood (illustres), nor had legitimate children,—but the provisions of this Scctm. became obsolete, and we find the children succeeding to both father and mother under the same law.

§ 1373.

Cicero calls those gentiles, qui inter se ejusdem nominis sunt, qui ab ingenius oriundi sunt, quorum majorum nemo servitutem servivit, qui capite non sunt deminuti; the reason of the addition qui ab, &c. is, probably, that liberti often assumed the nomina and cognomina of their patrons; Cicero, then, wishes to exclude this class, as he truly ought, for between the libertus and his patron there is nothing more than a civil bond, and none by blood.

When no adgnati existed the gentiles succeeded, to the exclusion of the cognati; gentiles were such as bore relationship to the deceased, but could not prove the degree; hence the law of the Twelve Tables, si adgnatus nec escit gentilis familiae hares nancitator, who, as they could prove no degree, inherited together; hence, in later times, this became obsolete, as every heir was obliged to show his degree of relationship; and the gentiles having lost sight of their connexion, the adgnates, properly so called, alone remained.

2 P. 32, 17, 6 & 7; P. 50, 16, 230. Julianus Rufus, and Gavius Orphitus were to have been consuls, A.U.C. 930, according to the fasti, Hab. Golzii; they are doubtless the same persons, however.
3 I. 3, 4, § 3.
4 I. 3, 4, § 2.
5 Paul. R. S. 4, 10, 4, et ibi Cujacius.
6 C. 6, 57, 3; vide et § 1267 & 1271.
7 I. 5, 4, § 3; Stockmann (resp. Fühlau diss. de Sccto. Orphit.), Lips. 1798; Glück. P. R. § 62, etc.
8 C. 6, 57, 5.
9 Nov. 118, 3.
10 Top. 6, vid. § 368-370-3, 618, h. op.
11 Chladenius de gent. vel. rom. c. 6; Glück. l. c. § 57.
§ 1374.

Now, when the sui and adgnati failed, it being impossible to ascertain the degree of the gentiles by sufficiently satisfactory proof, the praetor admitted the cognati, who were not acknowledged, however, as capable of succession by the law of the Twelve Tables; but which were, on the contrary, opposed to the whole principle of cognate succession. This praetorian edict was termed unde cognati, by which the praetor let in those adgnati who had experienced the lowest degree of capitis diminutio, viz., by a change of a family, such as emancipated children, together with the adoptivi, whose rights were agnate and civil. Vulgo quasiti and spurii, on the other hand, could possess cognate rights, though they could not have adgnate ones; slaves, however, could not possess such rights, because their cognatio was not recognised, nor could they acquire it by manumission.

Though A be a bastard, yet he succeeds his aunt B.

The adgnati were considered as cognati when they had experienced the minima capitis diminutio, except emancipated brothers and sisters, but not their children, who, remaining under power, succeeded to half shares.

Now, since the cognates of the nearest degree only were summoned to the succession, the praetor extended the privilege to the seventh degree (sobrini sobrinæve nati natæve), that is, such only as were related to the intestate in the sixth degree, but the adgnati still inherited ad infinitum.

Then B dies, and A obtains the B. P.; but if B die, C does not succeed, though in the seventh degree.

Justinian equalised the rights of the adgnati and cognati, giving both a right of succession ad infinitum, which superseded, while it rendered unnecessary, the praetorian edict.

§ 1375.

In the Institutes, a separate title has been assigned to the degrees of cognition.

Gradus are so termed from the rounds of a ladder. The linea is directa, up and down, termed respectively superior and inferior; or it is transversa, every person forming a new step.
In the first, *linea directa superior*, were—the father and mother, *pater et mater*; in the second, the grandfather and grandmother, *avus et avia*; in the third, the great grandfather and grandmother, *præavus et præavia*; in the fourth, the great great grandfather and grandmother, *atavus et atavia*; in the fifth, the great great great grandfather and grandmother, *tritavus et tritavia*; and expressions are wanting for the remaining degrees, called, by the generative term, *majores*.1

In the first, *linea directa inferior*, were—the son and daughter, *filius et filia*; in the second, the grandson and granddaughter, *nepos et neptis*; in the third, the great grandson and granddaughter, *prænepos et præneptis*; in the fourth, the g. g. grandson and g. g. granddaughter, *abnepos et abneptis*; in the fifth, the g. g. g. grandson and granddaughter, *atnepos et atneptis*; in the sixth, the g. g. g. grandson and granddaughter, *trinepos et trineptis*; the more remote were generally termed *posteri et posteriores*.2

In the *linea transversa* were, in the second degree, brothers and sisters, *fratres et sorores*; in the third, brother’s and sister’s sons and daughters, *fratris sororique filii et filiae*,—paternal uncle and aunt, *patruus et amitæ*;—maternal uncle and aunt, *avunculus et matertera*; in the fourth, brother’s and sister’s grandchildren, *fratris sororum nepotis, neptis*,—brothers and sisters of the paternal uncles, *fratres patruæ et sorores patruæ*,—cousins of uncles and aunts on the father’s side, *consobrinæ et consobrini amitini et amitæ*,—great uncle and great aunt on the father’s or mother’s side, *patruus magnus et amitæ magna*, *avunculus magnus matertera magna*; in the fifth, great grandchildren of brother and sister on the father’s or mother’s side, *patris et sororis prænepotes et præneptes*,—fratres patruæli sororius patruæli amitini amitiniæ,—the children of cousins, *consobrinorum filii filiæ* (sobrinos sobrina),—great granduncle, *propatruus*, on the father’s or mother’s side, *proavunculus*,—great grandaunt on the mother’s side, *promatertera*; in the sixth, the great great grandchildren of brothers and sisters of the paternal or maternal brother or sister, *fratrum sororumque abnepotes et abneptis fratris patruæli sororius patruæli amitini amitiniæ consobrini consobrini nepos neptis*,—the grandchildren of greatuncles and greataunts on the father’s or mother’s side, *patruæli magnæ amitæ magna avunculi magnæ materteræ magna nepos neptis*,—the children of great granduncles and great grandaunts on the father’s and mother’s side, *propatruæ, proamitæ, proavunculi, promaterteræ filii filiæ*,—great great granduncle and great great grandaunt on the father’s and mother’s side, *abpatruæ, abamitæ, abavunculi, abmatertera*. The other degrees have no technical names.3

1 P. 38, 10, 10, § 7.  2 Ibid.  3 L. 3, 7, § 7; Paul. R. S. 4, 11, 1, seq.
<table>
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<th>Table of the Degrees of Consanguinity.</th>
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**TABLE OF THE DEGREES OF CONSANGUINITY.**

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**SUCCESSIONS**

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<tr>
<th>Ego</th>
<th>Mother</th>
<th>Father</th>
<th>Wife</th>
<th>Daughter-in-law</th>
<th>Son</th>
<th>Grandson</th>
<th>Great grandson</th>
<th>Great great grandson</th>
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Note: The table represents relationships and powers under certain conditions, with terms such as 'inter se consanguinei', 'non existit', and 'potestas'.
Hence, when the *sui* and *adgnati* failed, however reckoned, the prætor introduced the *cognati*; but Justinian reformed the whole.\(^1\) The computation of degrees has already been discussed in respect of marriage\(^2\) under that head.\(^3\)

### Comparative Table of Succession According to the XII. Tables, the Edict, and the 118th Novella.

<table>
<thead>
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<th>ORDINES.</th>
<th>CLASSES.</th>
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<td>XII. Tabula.</td>
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<tr>
<td>I. Sui.</td>
<td>I. Unde liberi sui et emancipati.</td>
</tr>
<tr>
<td>II. Adgnatus proximus.</td>
<td>II. Unde leg:timi (adgnati et qui cognati et privilegiati).</td>
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<td>III. Gentiles.</td>
<td>III. Unde cognati.</td>
</tr>
<tr>
<td></td>
<td>IV. Unde vir et uxor.</td>
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</tbody>
</table>

Regula est nec successio ordi-num nec successio graduum. Regula est successio ordinum sed successio graduum tantum in ordine cognatorum. (IV.) Regula est successio ordinum et graduum in omnibus descendentibus.

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\(^1\) Nov. 118.

\(^2\) The following are the solutions of riddles there given under § 615, b. op. n. 4:—

The sister of my aunt, who is not my aunt, is my mother.

This man, whose father is my only son, is my son.

This child born of my mother, who is neither my brother nor her son, is my sister.

These children our children are, Their fathers our brothers are (in law), In lawfull wedlock wedded we, Now tell us what the kindred be?

This is explained by the following tree:—

The women B & D can say of their respective children E & F that their fathers A & C are our brothers.*

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* Koch de succ. ab intest. p. 289.
§ 1376.

The Mohammedan law recognises three categories in matters of succession, whom Baillie\textsuperscript{1} terms sharers; the second, residuaries usubat, or heirs; and the third, distant or uterine relatives zuweer-al-urham. The first, he supposes to have been grafted upon the old law of the pagan Arabs by Mohammed.

With respect to the usubat, or heirs, he justly remarks the great similarity which exists between their succession and that of the Twelve Tables, by which the female line was studiously excluded, with a view to the preservation of families. The descending male line inherited \textit{ad infinitum}, thus Khuleef Allee says, that the children of his sons are his own sons. The females were, consequently, left dependent on their male relations, and their natural rights of succession were disregarded. At the same time, the author finds no trace of the \textit{patria potestas} among the ante-Mohammedan Arabs; something very like it, however, existed among the patriarchs, from whom the Arabs delight to trace their descent; and no one can read their history, or recollect the commandments, without suspecting that it existed effectively in a very similar form.

The descending male line being exhausted, the inheritance ascends, which is, certainly, as contrary to the old Roman law as it was foreign to the feodal succession to land in England; but here, again, the male line, unadulterated by female blood, is strictly adhered to; the same is the case in the collateral lines.

§ 1377.

The introduction of sharers is attributed to Mohammed, who relaxed the old law of adgnate succession, as did the praetors, and, finally, Justinian, by his sweeping reform of the law of inheritance. First, he admitted females of equal degree to the succession with the males, in all the three lines. By his system of shares, he gave simultaneous right of inheritance to all relations distant in an equal degree from the deceased, and who, for that reason, may have been supposed to have been more or less dependent on him; whereas Justinian required the exhaustion of one line before he admitted another to a participation in the inheritance, which was divided into six not twelve parts, like the Roman inheritance. There are twelve classes of persons to whom they are appointed, whereof four are male,—the father, the agnate grandfather, the half-brother by the same mother, and the husband; the remaining eight are female, viz.—the wife, the daughter, daughter of a son however remote in the male line, sister of the full blood, or by the same father or the same mother only, the mother, and the agnate grandmother.

\textsuperscript{1} \textit{Moohammadan Law of Inheritance}, p. 12.
These persons do not succeed simultaneously, nor are their
shares always the same,—for some are, in most ordinary cases,
entirely excluded; and the shares of the others, though they are
always entitled to some participation in the inheritance, are liable
in certain circumstances to reduction. The latter class includes
the husband and wife, father, mother, and daughter; and the
former, the agnate grandfather and grandmother, the daughter of
a son in the agnate line how remote soever, the full sister and the
half-sister on either side, and the half-brother by the same mother.
The exclusion of these persons, the author remarks, is founded
on and regulated by two general principles, applicable alike to
sharers and residuaries. The one is, that a person who is related
to the deceased through another has no interest in the succession
during the life of that other, with the exception of the half-
brothers or sisters by the mother, who are not excluded by her;
and the other principle is, that the nearer relative to the deceased
excludes the more remote.1 Thus, a grandfather is excluded by a
father upon both principles, being more remote, and also con-
connect ed with him through the deceased; and a grandson is excluded
by a son upon both principles, when that son is his father; and
upon the second principle, when he is his paternal uncle.

§ 1378.

The distant kindred are, "all relations who are neither sharers nor
residuaries."2 Their classes are four:—

The first comprehends the children of daughters and of son's
daughters, how low soever, and whether male or female.

The second comprises excluded or cognate grandfathers, how
high soever, as the maternal grandfather and his father; the ex-
cluded or cognate grandmothers, how high soever, as the mother
of the maternal grandfather, and the mother of the maternal
grandfather's mother.

The third class comprehends the children of sisters, whether
male or female, and the daughters of brothers, how low soever,
and whether the sister or the brother, from whom they are
descended, was connected with the deceased through both parents
or only through one; also the sons of the half-brothers by the
mother, how low soever.3

The fourth class comprises the paternal aunts of the deceased,
that is, the sisters of his father, whether of the whole or half-
blood; his paternal uncles by the mother, that is, the half-brothers
of his father by the same mother; his maternal uncles and aunts
of whatever description; and the children of all these persons,
how low, and of which soever sex.

The author of the Sirajiyyah, in summa, says, "that all who are

1 Sirajiyyah et Shureefeea App. l. c. No. 115.
2 Bailie, l. c. ch. 9, p. 127.
3 Shirajiyyah et Shureefeea App. No. 217.
related to the deceased through these are among the distant kindred”; but remarks, “that this is still imperfect, not extending to many persons, who are likewise included among them.”

§ 1379.

It has been before remarked, that relationship by blood, serviles cognationes, among slaves are so far acknowledged as to be an impediment to their cohabitation;¹ for a slave, though not a persona, is a homo, nevertheless their contubernium is no marriage, and confers no right of succession on them; and even after manumission the slaves have no right of succession to their children,² or vice versā, by the civil or prætorian law, but the patron is his next adgnate as it were, or his children failing him.

The words of the Twelve Tables are si libertus intestatus moritur cui suus hæres nec est ast patronus patroniue liberi escint, ex eâ familiâ (nempe servi) in eam familiam (nempe patroni) proximo pecunia addicitor (addicitor),³ that is, the freedman’s property passes into the patron family, and is inherited by the nearest heir thereof.

§ 1380.

The use of the word intestatus, in the above, induces the presumption that the libertus had a right before that period to make a will; the liberti among the Romans were often very rich, hence it was an important question as to who should succeed to their property when they had neglected to make a will; and although in the earlier periods they became Roman citizens at once on manumission, yet the rules by which their succession was governed differed from those applicable to the ingenui, to whom first sui hæreses succeeded, and, failing such, adgnati, but in the case of freedmen, the sui hæreses; and secondly, in default of such, the patron, and failing him, his children were called to the succession, but not jure representationis, which here fell away, they were considered as his adgnati,⁴ although not ingenui, which may account for the liberti assuming their patrons nomina;⁵ hence the patrons often left them a legacy on condition of their not quitting his name.⁶

§ 1381.

The patron was excluded by the sui of the freedman, or by his wife si convenerit in manum, or by his children, whether

¹ § 617, h. op.; I. 1, 10, § 10; P. 23, 2, 14, § 2, 3.
² P. 38, 10, 10, § 5.
³ Ulp. 27, 1 & 29; I. Gothofr. Legg. XII. Tab. tab. 5.
⁴ Cuj. obs. 20, 34.
natural or adopted. The freedman, moreover, could, if such last-mentioned persons failed, pass over his patron in his will.

§ 1382.

The prætors considering this unjust, gave the patron by their edict at least one-half of the deceased freedman's property; and in case he had left his patron less, this latter obtained bonorum possessionem contra tabulas to that amount, which was even granted in the case of the existence of such sui hæredes as were adoptivi or the wife in manu; hence the natural children were the only persons who absolutely excluded the patron, whether sui, emancipati, or adoptivi, provided they were merely instituted as heirs to any portion, or petitioned for the bonorum poss. contra tab. since they were otherwise looked upon as disinherited, and as such did not exclude the patron. But if sui, emancipated, natural, or adopted, or a wife under power were wanting, the patron and his children succeeded to the inheritance in capita to the exclusion of the more remote degrees; hence, if the patron was alive but the son only of another patron, the entire inheritance fell to the patron alone.

The grandchildren of patrons were also excluded if the son of another patron was in being, and thus in like cases.

§ 1383.

The liberta, or freed slave woman, the patron invariably succeeded, for the very obvious reason, that he was her quasi proximus adgnatus; the law of the Twelve Tables did not allow a woman's property to pass on because she entered another family,—it therefore reverted to her original family, and this, by the fiction of patronage, was the family of her patron; thus, Ulpian informs us that the patron derived none of his rights from the praetorian edict, in bonis libertæ patrono nihil juris ex edicto, the patron had no necessity for praetorian equity in the case of a freed woman who had no sui hæredes who could exclude him; moreover, the patron being their legal tutors, the liberta could neither contract marriage nor make a will without his consent and concurrence.

§ 1384.

When, however, the lex Papia Poppæa before alluded to was passed to encourage a more wholesome and extended system of legitimate procreation, a clause was inserted making it lawful for freed women to exclude the patron; thus libertæ, who had borne four children, or who had received the jus quatuor liberorum

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1 Ulp. Frag. 18, 3.
2 I. 3, 8, § 2.
3 Paul R. S. 3, 21, seq.; P. 38, 2, 23, § 1.
4 Ulp. Fr. 29, 2.
5 Ulp. Fr. 29, 3.
6 Ulp. Fr. 11, 27.
7 Ulp. Fr. 29, 3.
SUCCESSIO LEGITIMA—SUCCESSIO LIBERTORUM.

from the emperor, were freed from their patron's guardianship, and could make wills in which they could, moreover, exclude such patron from any part of the inheritance; to protect the patron, however, from being defrauded of his patronal rights, the same law provided that the patron should take a pars virilis with the surviving children. If a libertus dying left 100,000 serterces, which was held to be equal to 100 aurei, and less than three children, whether he died testate or intestate, the patron or his male children received a virile share, but nothing if the freedman left three. If the libertus, however, did not die worth the above sum, the possession of which was looked upon as constituting wealth in the Augustine age, he had the free power of testation, and could exclude the patron, for it was probably not thought worth while by the patron to become co-heir if the whole estate was under that sum; but if the libertus neglected to make a will, and died without issue, the law of the Twelve Tables still governed the case, and the patron became intestate heir to the whole, irrespective of the sum.

Now, as the edict of the praetor had restricted the power of the testation of the libertus to half his property, assigning the other half to the patron, the lex Papia Popaeae extended the same right to patronesses, being ingenuae and mothers of two children, or being libertinae, who had borne three like rights, viz., bonorum possessio contra tabulas liberti or ab intestato was granted against such as were not natural heirs; and this was extended to the children of an ingenua, who had the jus trium liberorum.

§ 1385.

As in the earlier times of the Twelve Tables, all liberti became cives Romani, but subsequently, the great number of manumitted slaves induced restrictions of their privileges; they recovered some of them again at a later period by the lex Papia Papaea under Augustus, which placed them on manumission in the category of the Dedititii, whence they were transferred into that of Latini Juniani, which class was introduced under Tiberius; none of which, however, had the right of testation, their patrons retaining their property as they would have done the peculia of their slaves.

The Sctm. Largianum, passed A. u. C. 794 (A. D. 41) under the consulship of T. Claudius Drusus and A. Caecina Largus, now provided that the children of the manumittor, if not disinherited by succession or right of the freedmen to testate again restricted.

Rights of the freedmen.

The Sctm. Largianum regulates the succession of freedmen.

1 Suet. Claud. 19; Grut. Inscr. p. 631, 2.
2 Ulp. Fr. 19, 3; I. 3, 8, § 2; Heinec. ad I. 1. et P. P. 2, 11, p. 242.
4 Ulp. Fr. 29, 7; Heinec. I. c. 2, 22, p. 357.
5 P. 38, 15, 7, pr.
6 I. 3, 8, § 4.
7 Diss. Cass. 40, 10. Claudius only held the consulate two months,—Largus the whole year; hence the Sctm. was named after this latter.
name, were to be preferred to extraneous heirs, that is, those not related to the testator, when such were instituted by a Latinus to the heir; and Trajan decreed that liberti Latini, who obtained the right of the Roman citizenship without the knowledge or against the consent of their patrons ex beneficio principis, should be esteemed citizens during their life, but be accounted Latins on death; the treatment, therefore, of these classes was very severe, for the patron could thus never be deprived of the inheritance.

§ 1386.

Justinian left no remnant or trace of this law; but in the Greek Basilikos (βασιλικός) it was directed positively that if a libertus or liberta die testate leaving property under 100 aurei in value, the patron should have no right of succession; but if they die intestate, and their issue fail, the law of the Twelve Tables still retains its effect; on the contrary, if the property exceeds 100 aurei, the patron is still excluded, if the libertus leave heirs or bonorum possessores; but if he die intestate, and without issue, the patron or patroness has a right to the whole as heirs-at-law: if he leave a will in which he passes his patron or patroness over, these latter can demand bonorum possessionem to the extent of one-third, free of all burdens, legacies, or fidei commissa, to legatees or children of the deceased, instead of one-half, to which he or she up to that time may have been entitled.

Justinian, moreover, extends the right of succession to the estate of libertus, to the collateral cognates of patrons, down to the third degree. When, however, all distinction between Latin and dedititii was removed, all libertini acquired the full right of citizenship, and consequently of testation, which materially restricted the rights of the patrons.

§ 1387.

As children inherited rights as well as property from their parents, these latter could assign to any child under power the patronage of a libertus; this could be done by: — 1, testament; 2, codicill; 3, the form of a contract; 4, donatio inter vivos; 5, mortis causa; 6, any words; 7, letters; 8, chirograph; 9, purely; 10, conditionally; or 11, even by simple assent, and be again revoked according to mere will and pleasure.

To be capable of assignation, the patron must have two or more children in his power; for if the child to whom such libertus was assigned was emancipated subsequently, the assign-
tion was void, although a libertus could be assigned to one already emancipated.

The words of the Sctm. Claudianum which introduced this practice, passed A.U.C. 798, A.D. 45, under the consulship of Velleius Rufus et P. Ostorio Scapula, have been preserved by Ulpian, and are as follows:—*Si qui duos pluresve liberos justis nuptiis quaesitos in potestate haberet, de liberto libertâve sua significasset, cujus ex liberis eum libertum vel eam libertam esse velit, is eave quandoque is, qui eum eamve manumisit inter vivos vel testamento in civitate esse desisset, solus eo patronus solave ei patrona esset, perinde ac si ab eo eâve libertatem consequatus, consequaturae esse, utique si ex liberis quis in civitate esse desisset, neque ei liberisulli essent, caeteris eiusmodis qui manumisit, perinde omnia jura servuntur ac si nihil de eo liberto eâve libertâ is parens significasset.*

The assignation then could be made to any child, who, if under power, suus, then alone succeeded to the libertus, and exercised the patronal rights; but if such patron suffered the media capitis deminutio, the right thus vacated appears to have accrued to the other children as it were by a right of cretion, together with the succession to the libertus thus deprived of his patron.

It may be a question whether this *jus accrescendi* of assigned patronatus, took place under such circumstances, if the assignation was to a child already emancipated, emancipatus.

§ 1388.

The continuance of the patronal rights, guarded by so many succeeding legislative provisions still existent at an age when other rights founded upon the same legal basis had disappeared, proves that there must have been something more tangible in these rights than that arising from the obsolete fiction of early Rome; the explanation may probably be found in the increasing wealth of the freed class, who became in many cases a more valuable property to their patrons in that capacity than as slaves; the feudal-like services, the gifts, largesses, loans, and aliment in which they were obligated, rendered them a valuable appendage, and their inheritance therefore became a matter of importance to the rich, on account of the consequence and influence it gave them, and to the poor in a more material point of view. As, then, the importance and influence of the feudal nobility of the middle age depended upon the numbers and wealth of their vassals and those who owed them fidelity or fealty, so those of the Roman depended on that of their clients, who were, in fact, the prototype of the feudal retainer.

1 P. 38, 4, 1, § 8. Hasterius, Austerius, Austerus Scapula,
3 These names are variously stated,—P. Sullius Rufus, and P. Osterius, Asterius,
4 P. 38, 4, 1, pr.
5 Ulp. Frag. 27, 1.
6 Ulp. Frag. 17, 5.
7 Vinn. ad I. 3, 9.

Why the patronal rights of succession to freedmen were so long maintained, and their resemblance to the later feudal institutions.
§ 1389.

The bonorum possessio, which properly belongs in this place, is referable to the equitable jurisdiction of the praetors; the origin of the jus edicendi, however, still rests on conjecture, and must be inferred by deduction from the constitutional state of the Roman commonwealth. The explanation of the origin of the edict is not difficult where it can be referred to a fiction, which gave a remedy by a side wind; but it is far less easy to account for the fact of the provisions of the edict being diametrically opposed to, and overruling the provisions of, positive law. The first legitimately belongs to the province of the judge, and is a convenient mode of extending the law to do equity; whereas the latter infringes that of the legislator, and is therefore beyond the power of mere administration.

The explanation must therefore be referred to the regal period. It has already been seen that Romulus established the senate to protect himself from the consequences which would have resulted, under the then state of society, from the enactment of laws which, while they were necessary to the maintenance of public order, and the safety of property, must often have been most unpalatable to the heterogeneous mass over whom he exercised the power of governor. It is said that he was in the habit of consulting this body in matters of legislation, but the sovereign power of imposing laws on the nation was vested in himself; to use a modern term, Romulus promulgated laws “by and with the advice of the Lords spiritual and temporal and the Commons.” Legislation originated with himself, nor was it till later that the right of veto was asserted by the Commons, at least with a sensibly practical result; thus, the similarity existed between the legal power of Romulus and that

1 Vid. § 3, h. op.
1 Vid. § 3, h. op.

It is worthy of remark, that the modern principle is the converse of this. The par-

liaments propose the laws (except where the measure is ministerial), and the Crown pos-

sesses the right of veto.
of the English kings before, and even since, the Commons usurped their present power. Nay, even in the present day, legislative acts run by a fiction, like writs, in the name of the sovereign; notwithstanding the shadowy interference the queen exercises, the ministers are, de jure, styled her majesty's, although, de facto, they are those of the parliament or nation. Romulus then enacted laws, in fact, of his own motion, but these laws were always supposed to have been approved by the senate or aristocracy of the nation, and it is not likely that they would often oppose the wishes of their chief, with whom it was their interest to make common cause; nor can we sufficiently admire the truly regal policy of Romulus in creating an aristocracy for his own support, and of conferring upon it that almost unlimited jurisdiction which its component parts possessed individually over their own families and clients, based on the same principle as the feudal system, with the additional tie of consanguinity, real or feigned. To keep any individual of the senate in check, who showed a disposition to be unruly, was for him no difficult matter, sure as he must have been of the support of the rest. The senate again exercised its influence over the general assembly, so that nothing but the coalition of a large majority of the senate could endanger the supreme regal power. That the growing power of this body, and its impatience of supreme control, produced at last the coalition which was fatal to the monarchy, cannot be doubted; but many years elapsed before this effect took place, aided and hurried onward by the vexatious and ill-advised stretches of authority and absence of true dignity in the kings, and the injuries inflicted by them on influential members of the senate, to whom the injury itself was perhaps welcome, as their excuse for usurping the supreme command.

The monarchy fell, but its attributes remained. Though vested in other individuals under a less ostentatious name, they were found still more onerous, for Rome, except perhaps momentarily during periods of internal revolution, was never a democracy such as existed at Athens, the absurdity of which is so pungently satirized by Aristophanes. From a monarchy it passed into a duarchy, and then relapsed into a monarchy, under the pleasant fiction of a dictator or lawgiver. The duarchy was again established, but soon ceded to a decarchy, which speedily relapsing a second time into duarchy then became the permanent form of government, daily diminished in power by the constantly increased assumption of authority in the senate, so that the consuls became at length little more than the executors of the decrees of this sovereign council. That the nation judged some six hundred princes worse than one, must account for the re-establishment of royalty under the emperor, the salutary policy of which measure is evidenced by the saying, “that Augustus found Rome brick,
and left it marble.” Under him the old regal authority in legislation revived, and leges regiae were in fact re-enacted under denominations against which the disadvantage of a traditionary prejudice did not exist.

§ 1390.

The consuls, then, who succeeded the kings in office, inherited at first almost identically their legislative and executive functions; but the religious supremacy was transferred from them to other officers, of whom, the rex sacrificulus was the only one who retained the regal title; the press of business soon rendered the institution of judicial officers necessary, and their functions, consequently, devolved upon the prætors.

The prætorian edict may be described as triple in its nature, when it promulgated a rule of court; and, perhaps, where a fiction was used to do equity or supply an unprovided remedy by law, the jus edicendi was exercised by the prætors judicially only; but when it altered or superseded an existent law, then it was legislative; in later times, at least, it is presumable that the prætors did not venture upon these direct innovations until the want of them had become universally apparent and admitted; nay, perhaps practically carried out in defiance of law, so that their power was not questioned or interfered with by the senate, of the tacit consent of which, as members, they were assured, and whose feeling they had the power of ascertaining on the point without recourse to a formal decree; the inconvenience attending this latter must, doubtless, have been ever great, although not to the same extent as at present in England; every senator was, as a patrician, ex officio an educated civil lawyer, whereas the only semblance of even practical law in the British parliament must be sought among the knights of the shire, being justices of the peace, and that extending to nothing beyond trivial cases of summary criminal or semicriminal jurisdiction, or the incepting step in more serious offences; and it is notorious that none can talk so long on a subject as those who are the most ignorant of its principles, and since the Reform Bill Act, few lawyers can gain admittance into parliament.

§ 1391.

The prætors, it will be remembered, presided over the centumviral court, and were invested with the power of suspending the common law by their edict with respect to matters within their jurisdiction; the power of this court in certain matters must have been very extensive according to Cicero's recapitulation of the questions over which it had cognizance,—usuaptionum, tutelarum, gentilitatum, agnationum, adluvionum, circumluvionum, nexorum,
BONORUM POSSESSIO.

mancipiorum, parietum, luminum, stilicidiorum, testamentorum ruptorum, aut ratorum, jura versari.1

Now, it will be remembered that there were two sorts of edicts, the relatiūm or tralatitiūm,2 or those adopted from predecessors and the perpetuum or the whole body of rules, fixed for the duration of the edicting magistrate's office. The centumviral court was suggested by the abolishment of monarchy, before which no judge could promulgate any edict beyond the rules of court; but after its institution, what individual officer, however high his rank and however unquestioned his power, would have ventured of his own sole authority to introduce rules so diametrically opposed to the established law as the bonorum possessiones secundum vel contra tabulas? This was one of the questions in which Cicero tells us the centumviral tribunal had jurisdiction; hence we must presume that alterations in the hitherto existing law must have been made in that tribunal, and that the praetors sitting as single judges promulgated mere rules of court, that is, rules as to the manner and form of administration, adopting, as a matter of course, the principles of the college termed "of the hundred" as their basis, and this will account for the edict having gradually increased to such a volume as to constitute a considerable proportion of the law. Again, some of these court rules must have necessarily been standing rules, such as the order in which plaintiff and defendant were to be heard; but others, as to time, &c., must have varied with the occupations of the judge and the custom of the epoch. The centumviral tribunal was then the old regal legislative power in commission, as also a court of appeal, set in motion when a single praetor did not think fit to incur the responsibility of deciding a doubtful case.

The Censorian and Ædilitian edicts were clearly of little importance in a legal point of view, regarding evidently mere matters of morals, and correctional police, of the same nature, though of far more legal and respectable authority than that by which streets are now closed and commerce interrupted for the remnant of some miserable pageant, aped from a by-gone age BY ORDER OF THE LORD MAYOR !!!!

§ 1392.

The law of succession has then two different origins,—that derived from the civil law, and that arising out of the praetorian jurisdiction; the first of these two has been already discussed; it now remains to examine in what cases the praetorian court either interpreted doubtful and obscure passages in the civil law, or otherwise altered it indirectly by the edict in order to meet the requirements of equity, and extend the ancient law of succession which we have

1 Cic. 1, De Orat. c. 38. 2 Cic. ad Att. 21; Ad Divers. 3, 8, in Verr. 1, 14 & 43. §§ 324, 323, 327, 328, h. op.
seen was much restricted; this prætorian jurisdiction was called \textit{bonorum possessio} in contradistinction from the \textit{hæreditas, jus hæreditarii} or \textit{jus sucedendi}; in like manner the administration of the bonorum possessor was termed \textit{agnitio sui hæredis}, or recognition of the heir, as distinguished from the \textit{aditio sui hæredis}, or administration of the heir by strict law. In the process of time, many cases in which the prætors had exercised equitable jurisdiction were, at a later period, made, under the same denomination, the objects of special enactments by means of constitutions of the emperors.\footnote{Koch, B. P. Maranus, in Paratit. ad Pand. § 7, 4.}

\section{§ 1393}

\textit{Bonorum possessio} differs from \textit{possessio bonorum}, being one word like \textit{jurisdiction}, and giving not only possession, but also a right; whereas, the latter implies simple possession only. B. P. is defined\footnote{I. Richtei vind. Praet. Rom. § 10;} to be \textit{jus persequendi retinendique patrimonii sive rei, quæ cujusque, cum moritur, fuit}, and such \textit{bonorum possessor} differs in nothing from an heir, save that he derives his right from the grant of the prætor, and the heir from the civil law, \textit{praetor bonorum- possessionem hæredis loco in omni causâ habet.} \footnote{P. 37, 3, § 2.}

\section{§ 1394}

The B. P. may be considered as three-fold,—firstly, \textit{edictal} or \textit{perpetual}, granted by the prætors on equitable principles where the law demanded a more benign interpretation, and is granted to persons in a certain degree without judicial hearing,\footnote{P. 50, 17, 103.} as when conferred on emancipated children, since such had by emancipation forfeited their strict claim, and this is an actual hereditary right; secondly, these same principles, acknowledged and confirmed by an express enactment \textit{ad hoc} when it became part of the civil law, and was termed \textit{extraordinaria};\footnote{P. 29, 2, 30, § 1.} thirdly, \textit{decretal temporali..}
BONORUM POSSESSION ORDINARIA.

or repentina, to meet the exigencies of a particular case subject to judicial hearing at some future period.

§ 1395.

That B. P. arising out of the prætorian edict is termed ordinaria, whereas those are termed extraordinaria which result from some new imperial law in imitation of the prætorian edict, thus Hadrian granted the relations of a soldier condemned to death for a military offence their B. P.; there are also others,—ex lege Papia, ex lege Cornelia, ex Sc. Apronianio. Justinian enumerates ten prætorian B. B. P.,—viz., contra tabulas, secundum tabulas, unde liberi, unde legitimi, unde decem personæ, unde cognati, tanquam ex familia, unde patroni, unde vir et uxor, unde cognati manumissoris,1 and calls them ordinaria, terming those auxilia extraordinaria which are ex legibus, senatus consultis, constitutionibus principum; hence the temporalia also, such as those ex edicto Carboniano, ventris nomine, &c., must be classed under the extraordinary.

Although the B. P. was originally introduced for the relief of such as had no civil law claim to the succession, the prætors converted the edict into a general rule or law for the distribution of inheritances,2 hence the civil heir can, if he please, adopt this as a more ready mode of obtaining the recognition of his claim, and thereby partake of the peculiar advantages connected therewith; thus the B. P. is said to be necessaria with respect to those who, without it, have no means of making their claim available; or utilis, when both are open also to those who, without its intervention, possess a civil right.3

§ 1396.

The B. P. called ordinaria was granted in cases where a testament was left, in which case it was called B. P. testamentaria, facto testamento; but when the prætor granted it in the absence of a will, it was termed B. P. ab intestato. The B. P. testamentaria was granted either according to the provisions of the testament, secundum tabulas, or in opposition thereto, contra tabulas, sometimes termed contra lignum.4

But it may occur that the B. P. is of none effect sine re est, as when the right of such B. possessor is questioned by another on a provision of the civil law—when he has obtained it under a condition not then fulfilled, or—when a disinherited non suus has obtained B. P. litis ordinandæ gratia, and thereupon failed in his querela inofficiosi testamenti.

The bonorum possessio, contra tabulas, or ex edicto unde liberi is prayed by emancipated children in order to enable them to impugn the testament (i.e. to bring the querela inofficiosi testamenti), but

1 I. 3, 10, § 2 & 3; Vinn. ad id.
2 I. 3, 10, pr. & § 3.
3 Koch, l. c. § 18 & 29.
4 P. 37, 4, 19.
this is only mentioned by Ulpian quoting Papinian; for inasmuch as an emancipated child, strictly speaking, possessed no civil law right of inheritance, it was necessary to confer one upon him in order to qualify him to bring his suit.

Where the praetor grants the B. P. to the instituted heir, it is said to be secundum tabulas. The praetor will, in the first place, grant B. P. c. T. to certain persons; but if he who have such claim do not put it forward at all, or at least within the proper term, the praetor then grants the heirs instituted B. P. s. T. Thus it may occasionally happen that the B. P. is without effect, sine re, for instance, when the right of such B. possessor is questioned by another or a provision of the civil law. It was granted to legally instituted heirs in cases where there was a defect in the legal form prescribed for making a valid testament, but of the authenticity of which no doubt existed; thus B. P. was granted in case of a will sealed by seven witnesses, properly such wills should have been made per æs et libram; Cicero says, — si de hæreditate ambigitur, et tabulae testamenti, obsignatae non minus multis signis, quam e lege oporteat ad me proferentur secundum tabulas testamenti potissimum hæreditatem dabo; and in like manner, Ulpian, — si septem signis signatum sit testamentum; licet jure civili ruptum vel irritum factum sit, praetor scriptis hæreditibus juxta tabulas bonorum possessionem dat, si testator et civis Romanus et sua potestatis, cum moreretur, fuit; quæ bonorum possessio cum, re id, est cum effectu habetur, si nemo alienus juræ hæres sit; and again, — bonorum possession aut cum re datur, aut sine re. Cum re, si quis acceptit, cum effectu bona retineat; sine re, cum alius juræ civili evincere hæreditatem possit. Veluti, si suus hæres intestato sit, bonorum possessio sine re est; cum suus hæres evincere hæreditatem jure legitimo possit, that is, the B. P. ab intestato was granted without further examination to any one who could show any colorable title at all; but if after such grant another party proved either that the first party was not an intestate heir at all—not the next in order according to the edictal requirements—or that he was at least as near as the first, then the B. P. was in whole or in part without effect.

Again, the praetor will grant B. P. facto testamento and s. T. as has already been seen, so soon as a testament signed and sealed by seven witnesses be produced, and it be proved that the testator at his decease was a Roman citizen and pater familias; notwithstanding which, another may come and contest the will on civil...
law principles, either as being *nullum inofficiosum ruptum* or *irritum*; and the question arises, hereupon, as to how far the prætor will perform the promise of assistance held out by his edict as in favor of a testament invalid by the civil law. Now, should this be a case of a *posthumus*, who by his birth had rendered the will *ruptum*, dying before the father, or of a second will, since destroyed, superseding a first,¹ the *B. P.* is operative, but it is otherwise not.

*B. P.* might, secondly, be obtained under a condition then not fulfilled, or before the inheritance has accrued in law, since another may ultimately be found *stricte juris* nearer in degree; or by a *substitutus*, notwithstanding the existence of an instituted heir, who, from some cause or other, does not administer. Again, *B. P.* will be granted in the case of a *conditio pendens*, *casualis*, or *mixta*, on caution being given to surrender the estate failing the performance or accretion of such condition. The petitioner must likewise give security for the performance of an affirmative possible condition, which it is not in his power to fulfil immediately.² In all these cases the *B. P.* will be *sine re* if such petitioner be subsequently ousted, by another claimant showing a superior title, or by non-fulfilment of the condition, but *cum re* if otherwise.

Lastly, when a disinherited *non suus* had obtained *B. P. litis ordinanda gratia*, and had thereupon instituted and lost his *querela inofficiosi testamenti*;³ here it is a mere preparatory process, and all depends upon the result of the suit, which, if he gain, he is a civil rather than a praetorian heir; but pending the dispute he is certainly *ab initio cum re*, but if he lose it *ab initio sine re*.⁴

§ 1397.

The *B. P. s. T.* is either *necessaria* or *utilis* only, and was granted—

1. On a will such as just before mentioned,⁵ duly executed before seven witnesses by a *pater familias*, being a Roman citizen; notwithstanding the strict legal style required the observance of the old form, *per æs et libram*; but it must be remarked that it is here only a question of written wills, for no *B. P. s. T.* was formerly given in cases of nuncupative testaments.⁶ The form of wills being, however, more recently settled by later enactments, this *B. P. s. T.* became obsolete.⁷

2. When a *posthumus suus* (one who has come under the testator’s power after will made) who, nevertheless, died before the testator, and so rendered the testament *ruptum* by the civil law, has been passed over, the testament still remains *ruptum*. The prætor thereupon grants *B. P. s. T.*, for the party in whose favor it is vitiated no longer exists; but should such *posthumus* outlive the testator for ever so short a time, the prætor

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¹ *Vid.* § 1318, h. op.
² § 1365, h. op.
³ *P.* 37, 11, 2, § 1 & 5; *Averan, interp. lib.* 1, c. 8, n. 17.
⁴ Glück, l. c. § 71, 6.
⁵ *VOL. II.*
⁶ § 1397, h. op.
⁷ *C.* 6, 13, 1. It would be an error of speech to pray administration as *written of an oral will*.

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grants no relief. The *posthumus*, quod the testament, must be born and die in the lifetime of the testator; for the prætor does not support the testament for one who dies after the testator's death, nor when such *posthumus* is born in the testator's lifetime and dies after him, because the *posthumus* is then *ipso jure* heir, and transmits the inheritance to his heirs.¹

3. A will is *nullum*, if a son, born at the time it was made, be passed over; and it remained so by the civil law, if the son abstained from his paternal inheritance; the prætor, however, promises B. P. s. T. ²

4. A testament was also *nullum*, even though a son passed over in it agree thereto, such agreements being illegal, hence no inheritance can be renounced in the testator's lifetime; here, the prætor gives the B. P. s. T. ³

5. A will once *irritum* remains so in almost all cases; but the prætor declares, that if the testator have suffered *capitis dimutio*, and subsequently and before his death be reinstated in his civil rights, or become again *sui juris*, the testament shall revive by B. P. s. T. ⁴

6. A subsequent testament revokes a prior one; nor will the destruction of such latter instrument revive it; in such case the prætor gives effect to the testator's evident intention by B. P. s. T. ⁵

7. Where two wills bear the same date, and it is not possible to discover which is the more recent, the civil law declares both void; but the prætor gives B. P. s. T. by both.

8. If an heir be instituted under an affirmative condition, to which he cannot at once conform, or which is not within his power, he can pray B. P. empowering him to administer as curator in the mean time, on giving caution or security to redeliver, if the condition be not fulfilled.

Where the Roman law is now administered, all these are practised except the fifth. ⁶

§ 1398.

*Bonorum possessio contra tabulas* is also necessaria and utilis, and is granted—

1. To children passed over in the will of their parent, but not formally disinherited; to *sui* (i.e. males) it is generally of no advantage, the civil law supplying a remedy; and by the Novella,¹ the *emancipati* are not confined to this remedy alone.

2. The patron in case of his *liberus*; ⁷ and

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¹ Vinn. ad I. 3, 10, § 6, n. 2.
² P. 28, 3, 12, n. 7; Vinn. ad I. 2, 13, n. 7; Averan, l. c. c. 10, 11; there is no trace of the B. P. s. T. being granted to a son passed over, who died before the testator; Struve, rechtli. Bad. 1, B. 313, 8; Koch, B. P. p. 362, 373, 448.
³ P. 37, 11, 2, pr. No case occurs in which the son did so agree, and in which the prætor supported the will, vid. Höpner ad Hein. § 660, n. 9. And this is reasonable, for he would be taking advantage of his own illegal act.
⁴ P. 2, 17, 6.
⁵ Contini, tract. de H. et B. P. in opp. p. 281; Stryker, l. c. § 1, seq.; Reinhardt ad Christian. vol. 4, obs. 1, seq.; Turin, diss. de B. P. § 7, seq.
⁶ Nov. 115, 4.
⁷ P. 38, 2, 1, § 2; P. 38, 2, 2, pr.; P. 38, 2, 3, § 10.
3. The father, in the case of his emancipated sons passing him over as their emancipator, can demand and obtain the B. P. c. T.

If the son have instituted an infamous person, the father can upset the whole testament; but if otherwise, then only so far as his pars legítima is concerned; nevertheless, it would seem that the querela inofficiosi testamenti is competent to the father in his paternal capacity, and in such case the B. P. c. T. is superseded by the Novella 115, 4, which gives the remedy by a suit of nullity or inofficiosi testamenti, at choice.

Now, if a son who is passed over in a will against which another son is instituted together with a stranger, decline to bring his querela I. T., the son who is instituted can, in his brother’s name, demand the B. P. c. T. to exclude the stranger instituted with him, and so acquire the whole inheritance.

Again, if a father institute his two children and a stranger, and then have a posthumus, the testament is ruptum; but if such posthumus die before the testator, the children instituted must, nevertheless, demand the B. P. c. T. in order to exclude the stranger. In both these cases, the prætor grants B. P. s. T.; but he also grants it c. T. for the benefit of the children, but if they do not pray it, or have let the legal term elapse, the stranger instituted, conjointly with them, may have his B. P. s. T.; because, if a testator leave two wills, whereof in the first, jure factum, he disinherits his son in due legal form; and in the second, which is imperfectum, he pass him over; such son may obtain B. P. c. T. against the second testament, but only when the heir instituted is capable of the inheritance remoto filio, for in that case, the first will is considered as superseded by the second: and this is true, if a relation be instituted, who, failing the son, would inherit ab intestato, for the valid testament would not be superseded by the second and imperfect one; consequently, the disinherition of the son would subsist.

§ 1399.

Justinian, in addition to the B. P. secundum and contra tabulas just mentioned, which refer to testamentary successions, enumerates eight other ordinary kinds referring to intestate inheritances, of which the first four alone were allowed by Justinian to remain in force; these are—

1. Ex edicto unde libere. 2. Unde legitimi. 3. Unde cognati.
4. Unde vir et uxor.

Those no longer in use are—

1 Nov. 115, 4.
2 Nov. 113, 134, h. op.
3 P. 37, 3, § 10 & 11, § 4; Id. 10.
4 P. 37, 4, § 12 & 4, § 3.
5 P. 37, 4, § 12, § 1.
6 P. 38, 6 ; C. 6, 14.
7 P. 38, 15.
8 P. 38, 15.
9 P. 38, 15.
10 P. 38, 15, 15.
11 P. 38, 15, 15.
12 P. 38, 15, 15.
13 P. 38, 15, 15.
§ 1400.

B. P. ex edicto unde liberi, can be taken advantage of by the emancipati and the sui, if they wish it; for although they have no need of it, yet the praetor gives it them if they prayed it; and as, according to the Novella, the emancipati inherit as well as the sui, they now require no B. P. except when—

1. A grandson repudiates his father's inheritance, and yet wishes to succeed to the grandfather, who died before his father; or,—

2. When a grandson wishes to succeed to his grandfather, whose father had repudiated the grand-paternal heritage. The effect being to release the grandchildren from the paternal debts.

§ 1401.

B. P. ex edicto unde legitimi. By this edict the agnates and all others who, although they had a civil law right of action, or successio civilis, are allowed the B. P. utilis: why, the commentators are not agreed; some supposing, that as the sui have it, the legitimii should not be excluded from it; others, because more than one recourse ought to be open to them; others, again, because the remedy is more speedy and simple by interdicto quorum bonorum than the mode by cretion, or quia justius possidere videtur, qui auctore prætore possidet; perhaps, also, because B. P. gives a tempus utile within which they can sue.

§ 1402.

B. P. ex edicto unde cognati gave the cognates a remedy, failing agnates within the sixth degree, and arises out of Justinian's decree, because the cognates are not hæredes necessarii.

The praetors published, in addition to all these remedies, an edict called successorium, comprising the whole law of praetorian succession generally, but particularly promising succession to those to whom he granted the B. P. The order of succession we have seen was ordo graduum or de capite in caput; in the first

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1 Ulp. Frag. 27, 7.
2 C. 6, 13.
3 Basil, tom. 6, p. 595.
4 I. 3, 10, § 3.
5 Cn. Papyrius Carbo was the colleague of C. Caccil. Metellus Caprarius in the consulship, A. u. c. 640, and again in 668 and 669, of L. Cornelius Cinna, vide Fasti Cons. et Val. Max. 5 & 6, 1, 13.
6 C. 6, 14, fn.; P. 38, 6, 5, 2; C. 8, 18, 5; Höpfner ad Hein. § 665, n. 1, 2, § 4 & 3.
7 Hoppius ad I. 3, 10, § 1; Koch, B. P. § 13; Pothier, Pand. Just. tit. unde leg. n. 1; Glück, Intest. Erb. § 77.
8 Baldunius Merillius, Vinn. I. 3, 10, pr.; Huber, prat. ibid; Koch, B. P. § 29.
9 Koch, l. c. § 14, 157; Glück, § 9.
of these, if the person to whom the succession is granted will not pray the B. P., or do not do so within the time allowed, the next class is admitted, sequens ordo succedit in locum prioris; and this may happen, firstly, when in the previous ordo no one capable of succession is found; or, secondly, when the previous ordo declines the inheritance, or dies before transmission to his heirs. The first case is acknowledged by the civil law, but not the latter; for if a suus decline, neither the adgnati nor the gentiles, if the agnati decline, succeed, but the ararium or fiscus, for in legitimis hereditatibus successio non est. Hence the remedy supplied by the prætor in a succession of classes, by a claim of P. B. ex edicto unde liberi; and if this be refused, then ex edicto unde legitiimis, and so on; by these means a man could, moreover, succeed, as it were, to himself, defunctis suis existantibus hereditibus et abstinentibus vel repudiantibus hereditatem frater jure consanguinitatis succedere potest; thus, if a suus make an error as to the term for demanding the B. P., he can succeed as a legitimus or adgnatus; and if he have let this term also pass, as a cognatus. The successio graduum consists in the power the next in degree has of claiming, as of the degree next in order, when he has allowed the term for claiming the B. P. in virtue of his own degree to pass, on the principle, that sequens gradus succedit in locum prioris.

The old law did not recognise this, though the prætor admitted it; but it is erroneous to suppose that he adopted as his rule the ordo intestati. For the prætors made no alteration as to the first class of children, nor indeed in the second, ordo adgnatorum, in fact; for the next agnate was admitted, nevertheless, not as agnate, but as cognate: but in the third, that of the cognates, if the next heir do not pray B. P., the next in order to him had the successio graduum; but by Justinian’s decrees, the B. P. is admissible in all the classes of legal heirs.

The prætor then extended the old law of intestacy in giving such persons the B. P. as could not inherit at all by law; or, setting the law aside, by this edictal succession.

§ 1403.

B. P. ex edicto unde vir et uxor is given, in default of relations of the deceased, to the surviving husband or wife duly married, and continuing so up to the testator’s death.

§ 1404.

Let us now review the difference between the civil and praetorian succession.

First. They differ from each other in respect of the order. By the praetor the order of succession was altered in cases of intestacy, the suus was next to the cognatus, and the cognatus to the adgnatus. But Justinian’s decrees, P. 38, 9, 3, § 10, admit the B. P. in all the classes of legal heirs. Hence the remedy supplied by the praetor in a succession of classes, by a claim of P. B. ex edicto unde liberi, and if this be refused, then ex edicto unde legitiimis, and so on; by these means a man could, moreover, succeed, as it were, to himself, defunctis suis existantibus hereditibus et abstinentibus vel repudiantibus hereditatem frater jure consanguinitatis succedere potest; thus, if a suus make an error as to the term for demanding the B. P., he can succeed as a legitimus or adgnatus; and if he have let this term also pass, as a cognatus. The successio graduum consists in the power the next in degree has of claiming, as of the degree next in order, when he has allowed the term for claiming the B. P. in virtue of his own degree to pass, on the principle, that sequens gradus succedit in locum prioris.

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The four obso- 

lete edicts:—

§ 1405.

B. P. ex edicto unde decem personae, meaning those persons who followed next in order after the legitimi. Under these circumstances, the liberi, we have seen, had the first claim, then the

1 C. 6, 9, 9. 2 C. 6, 14, 3.

3 Constantine abolished the solemn form, C. Vinn. ad I. 3, 10, § 7; judicial agnitor appears necessary, Koch, B. P. § 6, p. 68, etc.

4 Koch, l. c. § 20, p. 338; et vide Donell, in Com. I. C. l. 7, c. 14, whence the above is abstracted, vide original, in extenso.
BONORUM POSSESSIO AB INTESTATO.

Legitimi, or agnates, by the law of the Twelve Tables. Now, these were not only the agnates by blood, but might be an extra-
neus, in his capacity of manumittor of a son sold per as et libram,
where no fiduciary agreement was interposed by the natural father;
by which neglect the extraneus would acquire the jus patronatūs.
Now, as it was considered unjust that such person should have
preference before blood relations, the prætor interposed by this
edict, preferring ten persons before him; who were the pater,
mater, avus, avia, on the paternal and maternal sides; the filius,
filia, nepos, neptis, by a son or daughter; the frater and soror,
either consanguinei or uterini. There is no mention of this edict
in the Pandects, the form of manumission having been changed
by Justinian, which renders it obsolete.

§ 1406.

B. P. ex edicto tanquam ex familiā, otherwise tum quem ex familiā, by which are meant the agnati patroni, who, by the
Twelve Tables, had no succession in the goods of the libertus. 2

§ 1407.

B. P. ex edicto pro patronis granted succession to the liberi
emancipati et in adoptionem dati nec non patronorum parentes; 3 this
also the new regulations of Justinian rendered unnecessary.

§ 1408.

B. P. ex edicto unde cognati manumissorīs. The emperor, in the
constitution de successione libertorum, 4 decrees that the manumittor
of the father, together with his agnates and cognates, ergo the
patron of a patron, although he was a libertinus, should succeed
to the goods of the son.

§ 1409.

The original sequence, then, of the ante-Justinian edicts 5 was,—

Ex edicto unde liberi.

undetanquam ex familiā.

undepro patronis.

undecognati manumissoris.

The benefits granted by the prætor extended, therefore, formerly
to the eight cases here above detailed, and failing provisions of law
and these prætorian extensions; or in cases where no advantage

1 Val. Max. 2, 75, 5.
2 Ulp. Frag. 28, 7.
3 Theo. ad I. 3, 10, 2; Schulting, Jurispr. vet. antijust. p. 673.
4 Bas. tom. 6, p. 595.
5 Those in italics are existent, the others are superseded and obsolete.
THE ROMAN CIVIL LAW.

was taken thereof, the hæreditas was caduca, and fell first to the licitum collegium, if the deceased was a member of one, and failing such quasi heir, to the ærrarium, or public treasury, which represented the nation at large, but which was, nevertheless, bound to pay all creditors. In later times, especially those of Hadrian, the fiscus took many bona caduca; an example of one of the modes whereby the emperors gradually increased their autocracy, by transferring the public revenues to their own private account. This half measure Antonius Bassuinus Caracalla rendered a whole one, claiming all bona caduca for the fiscus, or private imperial exchequer.

§ 1410.

The B. P. decretalis is granted by the prætor sometimes, upon hearing the cause whereupon he doth decree; not that any one shall succeed to the inheritance of the deceased, but only that he shall have a temporary right of possession, hence called temporalis, till it can be ascertained whether the case alleged be true or not. Thus, if one die leaving his widow in fact, or supposed to be, with child, whose issue would, had he been born before the father's death, have been legally the heir, the widow obtains B. P. ventris nomine until it be seen whether she be with child or not, and whether the factus in utere be born alive, or otherwise. Hereupon a curator ventris is appointed, who makes his inventory of the inheritance, administers the property, supplies the widow with necessaries, in the shape of board and lodging, until she be delivered, or prove not to be with child. Or, if one dying leave his child a minor, generally reputed to have been legitimate, but which feet is now questioned by the relations, such child may pray the possession of the paternal property until it be of age, offering to join issue on the point of fact with the claiming relations so soon as it shall come of full age; or an emancipated son, who is either disinherited or passed over, that he may have time to try the testament as inofficious,—this is especially termed ex Scto. Carboniano.

§ 1411.

It has been premised that the emperors in later times, imitating the example of the prætor, gave B. B. P. P., called extraordinary; thus Adrian, by a constitution, granted relief by these means to the relations of a soldier who had been condemned to death for a military offence. Thus, the difference between these and the

1 C. 6, 62, t.t.
2 Ulp. Frag. 28, 71 P. 49, 14, 21; P. 49, 14, 13 pr. & 15, § 3.
3 P. 49, 14, 11.
4 P. 5, 3, 20, § 6.
5 Schulting, Jurispr. vet. anteujust. p. 617.
6 Ulp. Frag. 27, 2.
7 P. 37, 9, 1 & 5.
8 Stryk. tract. de succ. ab intest. diss. ix.
9 Sed quaere, is there any difference between B. P. edictalis and decretalis? P. 38, 9, 1, § 7; P. 38, 6, § 4; P. 29, 2, 30, § 1; P. 37, 10, 1 & 8. Some assert the first is sine causa cognitio before, and the latter cum causa cognitio after hearing, Vinn. ad I. 3, 10, § 3. But Heinec. ad Vinn. 1. c., Koch, B. P. § 6, Glück, intest. succ. § 70, thinks edictal means perpetual, and decretal temporal, vide et Gibianius, in expl. diff. LL. eod. tom. 2, p. 16 (Colom. 16, 14, 4); P. 37, 10, 3, § ult.
praetorians B. P. consisted in this, that the praetorian applied to all cases, and to the whole genus, being a general extension of the law of succession applicable to all persons, the imperial and legal B. P. merely to certain cases and classes of persons.

§ 1412.

A tempus utile, which, in cases of parents and children, is a year, and for other persons one hundred days, is allowed for applying for the B. P.; if, however, they respectively let these periods pass, the next in order can pray possession. The term is divided into tempus utile and tempus continuum. The latter is reckoned from the period at which the circumstance occurred, which gave the right to petition, whether the party were then cognizant thereof or not; this is termed tempus continuum ratione initi. The former date only from the time at which the party was cognizant of the fact, and in a position to prosecute his right; called tempus utile ratione initi.

Thus, the hæreditatis petitiio civilis has thirty years to run from the day of the testator's death, when the inheritance falls into the heir, whether he be aware of these facts or not; these thirty years form a tempus continuum ratione initi. On the other hand, the term within which the B. P. must be prayed is tempus utile ratione initi, because it begins to run from the death of the deceased, and the fact that he has a right to the B. P. becoming known to the claimant; whence it results that recourse may be had to B. P. when the term for bringing the hæreditatis petitiio by the civil law has elapsed. On the other hand, if one obtain the B. P., and the civil heir have let the term pass, he may claim the inheritance by B. P., and the B. P. of the former party becomes sine re.

In the tempus continuum ratione cursus all days are included, whether fasti or nefasti, business days, holidays, or days of absence; but tempus utile ratione cursus included only business days. Now, an actio de hæreditate petenda must be brought within thirty years, 365 days being reckoned to the year, and all days, business or holidays, or days of absence, are included. This, then, is a tempus continuum ratione cursus, or time continuous in its lapse; but the 100 days within which B. P. must be prayed is a tempus utile ratione cursus, or time incontinuous in its lapse, because court days only are available. Hence this latter is doubly utile; firstly, in respect of its initium, and secondly, in respect of its cursus; but these may be combined, for a tempus may be utile as to its commencement, and continuum as to its lapse, or continuum as to commencement, and utile as to lapse.2


2 P. 44a 1, 2; P. 38, 15, 2; pr. 1 & 2; P. 37, 1, 10; C. 6, 9, 63; Glück, Pand. vol. 3, p. 496; Koch, succ. ab intest. § 128-9; Glück, ibid. § 82; I. 3, 10, 53; Koch, B. P. § 6, p. 71.
Koch's view of the jussucces-
sorium haeredi-
tarium.

Koch proves that the more recent constitutions of Justinian did not supersede the B. P., but merely transferred it to the juss suc-
cessorium haereditarium in some respects; it, therefore, still forms a part of the Roman law in complexu, and is consequently applicable in countries where the Roman law and system is yet preserved.1

§ 1413.

The jurisdiction over wills in England before any ecclesiastical jurisdiction existed, belonged to the County Court, or to the Court Baron of the Manor where the testator died, as all other matters did; and the power of the probate still exists in certain manors, as in those of Mansfield, and of Cowle and Caversham, in Oxfordshire, where it has been enjoyed time out of mind and uninterruptedly; it is still held to be valid, and precludes the bishop from interference.

The earl was the president of the County Court;2 but when Christianity was introduced into Britain, the bishop sat with the earl. William I., however, separated the jurisdiction; after which time the bishops appear gradually to have usurped authority over wills, though deprived of their seat in the County Court.

The Roman law—although it enables bishops or their superiors to maintain suits for legacies left in pios usus, such as the support of the poor, the redemption of captives,3 &c.—prohibits them from proving or registering wills, whence it appears that they had even then endeavoured to usurp that jurisdiction.4 In like manner, the collegium pontificum of Rome, in the ante-Christian times, could compel an heir to perform the will of the deceased in the case of a monu-

Administration of the goods of the deceased in England re-
sembles B. P. usurpation of the clergy.

1 Koch, succ. ab intest. § 131, et B. P. § 30, quem vide.
2 § 119, b. op. for origin of County Court.
3 C. 1, 3, 28.
4 C. 1, 3; 41; C. 6, 23, 33.
5 P. 5, 3, 50.
6 Before 12 Ed. I. st. 1, c. 19—Whereas, after the death of a person dying intestate, which is bounden to some other for debt, the goods come to the ordinary to be dis-
posed; the ordinary from thenceforth shall be bound to answer the debts, as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden, if he had made a testament.

The Magna Charta of John, the object of which was to protect the barons against the priesthood as well as against the king, also provides against this clerical robbery.
fiction that he disposed of them *in pios usus pro salute animæ defuncti*; thus defrauding widows and orphans of their patrimony, and creditors of their due rights.

The king, however, had a first lien before all other creditors, but, it would appear, no more; at present the ordinary must, by the above statute, depute to the next and most lawful friends of the deceased to administer his goods, such being his next of blood, who are not attainted of treason, felony, or have other lawful disability.

Where a man dies intestate, or his executors refuse to prove the will, administration is granted "to the widow of the same person deceased, or to the next of kin, or to both, as by the discretion of the same ordinary shall be thought good:" thus, where there are claimants of equal degree, the ordinary may elect; but if not of equal degree, then the widow, and whom of the petitioners the ordinary may please. If the next of kin refuse, administration is grantable—not by statute, but by the old law—to the creditor; on which account, the ordinary may insist upon whatever bond he please, as between such and other creditors.

The goods of bastards, dying unmarried and without issue, fall to the king, and the ordinary must grant his patentee probate; but here, a sort of B. P. is practised: he who would have been the next heir, if the deceased had been legitimate, procures a grant *ex speciali gratiâ* from the crown, and the ordinary grants administration, as of course, to such person.

Where the executors refuse to administer, the ordinary grants administration *cum testamento annexo*, or with will annexed; this is a B. P. s. T. to prevent the will becoming *destitutum*.

The B. P. c. T. has hardly any parallel in England, the *pars falcidia* not being recognised, save in the case of dower; it therefore can only be granted by Chancery, which will upset a will as inofficious, for some inherent vice, founded upon a real, but not on a fictitious insanity, such as that upon what the *querela inofficiosi testamenti* was granted. If the deceased before his death have alienated his property by a valid deed, the will is, of course, of none effect, for the deceased had nothing to leave; therefore, the only true B. B. P. P. in England are those *ab intestato* above mentioned, the claimants for which are regulated by the statute of distribution, and by the foregoing statutes.

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1 9 Co. 36; Mad. Exch. 237; Mag. Ch. c. 18; 2 Bac. Abr. 398.
2 9 Co. 40.
3 21 Hen. VIII. c. 5.
4 3 Peere Will 33.
5 22 & 23 Car. II. c. 10.
§ 1414.

Acquisition of property by arrogation is the third modus adquirendi universalis,—the nature of arrogation itself has already been treated of in a preceding part of this work,¹ and consists in adopting a pater familias, or a man sui juris. A filius familias possessed no property of his own except his peculium, and all he acquired was acquired for his father; in like manner, a pater arrogator acquired the entire property of the arrogatee, nay, even also the possession of it, ipso jure, in virtue of the arrogation.² The arrogatee, however, could not transfer all his rights; inasmuch as some of them, called personalissima,³ were utterly lost by the capitis diminutio implied in the arrogation, and therefore fell to the ground.

Among these were—

1. The rights which the arrogatee had before arrogation in his capacity of patron to the operae officiales of his liberti, but not those termed operae artificiales or fabriles, which the patron acquired by promise confirmed by oath on the part of his libertus; for these latter are not among the natural duties of a libertus to his patron, who could sue him for non-performance, the only case in which an action could be brought on a promise made on oath by the defendant; and it may here be useful to repeat that operae officiales were such as contributed to the dignity of the patron, operae fabriles or artificiales such as brought the patron profit.

2. The jus agnationis does not pass with the arrogatee to the arrogator, that is, the right of succession which the adrogatus had as an agnate of his natural family.

3. The jura usus et usufructus belonging to the adrogatus did not pass to the adrogator⁵ by the old law. Neither did the

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¹ § 668, h. op.
² Vinn. ad I. 3, 11, § 1, n. 1.
³ I. 3, 11, § 1.
⁴ Brissonius, de verb. sig. voc. stipulari.
⁵ Paul. recept. gent. 3, 6, 39; P. 4, 5; 7; P. 7, 4, 1 I. 3, 11, § 1.
adrogator assume the liabilities of the adrogatus, such being a personae-
lissimum quid; and no one could be made responsible, actione personale, but he who contracted the obligation or his heir.

§ 1415.

Justinian thought proper to change much of this, and consequently decreed that the arrogator should only acquire an usufruct in the property of the arrogatee, who retained the dominion; for, inasmuch as the natural father had no longer any claim on the peculium adventitium of the son under power, such privilege cannot be given to an adopting or arrogating father; secondly, he gave power to creditors of the arrogatee, to compel the arrogator to deliver up the property of the former to them, in satisfaction of debt.

§ 1416.

The fourth modus adquirendi is per bonorum addictionem libertatum servandarum causa, originally, as has been already seen; if a will in which liberty was conferred on a slave became destitutum by the heirs repudiating, or from other cause not administering thereto, such slave lost the liberty intended for him.

To remedy this inconvenience and injustice, Marcus Antonius published a rescript, to the intent that, in case there should be no testamentary heir or heir-at-law, the inheritance should be addicted over to one or more of the slaves of the deceased to whom their liberty had been left directly or in trust, as quasi bonorum possessori, upon such addicted heir undertaking and giving security to pay the creditors of the deceased capital and interest, whereby the character of the deceased was rescued from obloquy. As regarded those whom the heir was requested to manumit, they obtained such liberty from the slave to whom the goods had been addicted, who, if he had previously agreed with those fideicommissary freedmen that he would administer, on condition of retaining over them the jus patronatūs belonging to the fiduciary heir over others freed, directly or in trust, such agreement by him was to stand good by the rescript. With regard to the escheat to the imperial exchequer, fiscus, the officers thereof are ordered so to manage matters that the liberty of the person shall not be infringed, but that it be preferred before pecuniary considerations; in other respects, everything to take the same course as if the inheritance had been regularly entered on.

In subsequent times the decree received some extension, thus creditors or other persons, besides slaves inheriting freedom, are allowed on petition to enter upon the inheritance upon the same conditions as the above, as is now the case in England.

1 I. 3, 11, § 2. 2 § 439, 1249, 1320, h. op. 3 C. 7, 2, 2; C. 7, 4, 1. 4 C. 7, 4, 4, § 21. 5 I. 3, 11, 1. 6 Westenberg in D. Marco, diss. 78; Schaumburg, ad const. imp. aut. manip. 14, obs. 4; Zipernick, diss. de test. dest. irrit. § 277, et seq. 7 § 1414, h. op.
To these provisions, Justinian, as was his wont, added some conditions; to-wit, that the right of demanding the addiction of goods should be annual;—that if many persons applied simultaneously, offering security, the goods should be addicted to them altogether;—that preference should be given to him who promised most;—that he who offered a larger dividend within the year (formerly it was in solido) than another to whom the goods were addicted, should obtain the goods, the other retaining his liberty.¹

§ 1417.

The fifth universal mode of acquiring property was by sectio sive venditione bonorum. Secare signified, in the earlier times, to sell by auction; sectio, the substantive, signifying such auction where the things sold were divided among the bidders (emptores) according as they bid (licebant); and to whom they were knocked down (addicebantur); from the practice of increasing on the price, they came to be called auctiones, from augeo; thus we find the term auctio hæreditaria is a general term for all sales of this species by which the quiritian ownership was transferred, and upon usucapion a right to sue acquired. The first auctions appear to have been held on the field of battle, where a spear was raised in token that the plunder had been taken in war,—hence the term sub hastâ vendere and ἀγχύσιαλωτοι applied to prisoners of war sold as slaves, whom the Romans called hastati. It was the business of the praece, or cryer, to repeat aloud the bids, and puff the thing put up for sale, after the manner of an auctioneer; that of the magister or argentarius to collect, or take security for, and register payments. The suggestion may be, perhaps, ventured, that auctio originally applied more properly to the usual sales of goods; but that sectio more properly to a legal sale, by authority of some court of justice, as an execution, or as in the above case.

Cicero¹ gives us a description of such a sale in the following words, which it may be interesting to insert in this place:—Cæsar Alexandriam se receptos, felix, ut sibi quidem videbatur; mea autem sententia, si quis reipublica sit infelix, felix esse non potest. Hastâ posita pro æde Jovis Statoris bona— bona inquam Cn. Pompeii Magni vocē acerbissimâ subjecta praecosis—expectantibus omnibus quinam estem tam impius, tam demens, tam diis hominibusque hostis, qui ad illud scelus sectionis auderet accedere, inventus est nemo praeter Antonium! Unus inventus est, qui id auderet, quod omnium fugisset, et formidadisset audacia. Tantus igitur te stupor oppressit, vel ut verius dicam, tantus furore, primum, ut quum sector sis isto loco natus, deinde quum Pompeii sector, non te execrandum populo non detestabilem, non omnes tibi deos omnes homines et esse inimicos et futuros scias?

¹ C. 7, 2
² Cic. Phip. 2, 26
§ 1418

Heineccius gives the following account of the execution on a debtor's person:—he says, the praetor having adjudged the debtor to a creditor, he could in nervum ducere, which may be interpreted as binding him, or putting him into prison, or under other restraint; hence, he remarks, debtors were called obārati and nexī, also addictī, indebted, bound, or adjudged; but as ingenuitas, gentle blood, was not, in commercio, an object of trade, and therefore the debtor became not a slave, but was, nevertheless, condemned to perform many servile duties by the judgment of the praetor,—hence they were still ingenui on recovery of their suspended liberty. Servius Tullius is said to have introduced the cessio bonorum to restrain the cruelty of the nobility towards such ingenui as were indebted to them; this boon did not, however, long survive, being abrogated with other of Servius Tullius's laws by Tarquin.

The decemviri decreed that thirty days grace should be given to confessed or judgment debtors, aris confessi rebusve jure judicatis XXX. dies justi sunt; (the thirty days were subsequently increased to two months; and extended to four by Justinian); post deinde continues the decemviral law manus injectio esto, in jus ducito, that is, for the praetor to adjudge him to his creditor; the next step was, ni judicatum facit, aut qui locuples endo eo in jure vindicit, secum educito, vincito aut nervo aut compedibus XV. pondo ne majore, aut si volet minore vincito, that is, if he neither paid nor procured sufficient security, he became a prisoner, and might be put in irons, si volet suo vivito, ni suo vivit, qui em vinctum habebit libras farris endo dies dato si volet plus dato; the debtor could therefore claim a certain alimony from his creditor, if he neither could nor would live at his own expense, ni cum eo pacit LX. dies endo vinculis retineto, inter ibi trinis nudinis continuis in comitium procitato, asique aestimiam judicati predicata, ast si pluribus erunt rei tertii nudinis partes secante. Si plus, minusve secuerunt se fraude esto, and it is this passage which is supposed to refer to the death of the debtor, by a misapprehension of the word seco; first, it is by no means clear that these proceedings were not intended to force payment from an unwilling or fraudulent debtor who would not surrender his property, or perhaps, indeed, to induce his friends to come forward and give security for him. This resembles the proclamation to outlawry in England, in three successive county courts.

§ 1419

Bynkershoek, as well as others, interprets the law of the Twelve Tables, debitorum obāratum creditores secanto trans Tibērim, not to allude to killing the debtor, but to selling him, and

1 Hein. A. R. 3, 30, § 2, seq.
2 Gell. N. A. 20, 1; Tertull. Apoll. iv.
3 Quinct. Inst. 3, 6.
5 C. 5, 54, un.
6 Obs. jur. rom. I. x. 1
7 Cic. pro Roc. Am. 63; Ascon. Prædian. od Cic. Verr. 3, p. 1843 & 1815; Flor. 2, 6; Varro de Re rust. 2, 10.
Author's view of the sale of the goods only.

Modification by the Poetelian Papyrian law.

The new bankrupt law of Julius Caesar.

The cessio bonorum.

We may go yet further than Bynkershoek, and infer from the passage and practice of the times, that simply the goods corpus of the debtor were seized in execution, sold, secanto, by auction, and divided among his creditors, on the other side of the Tiber, the place appointed for such sales, as not being within the city, because the old fiction was that they were sold on the field of battle; latterly, it is seen, a spear was put up before the temple of Jupiter Stator, where the Sabine forces were checked. It by no means appears that a Roman citizen could, in the age of the Twelve Tables, be reduced to slavery and sold, but rather the contrary; he was then fictitiously banished for the purpose.

The rigor of this decemviral law was, however, abated by the Lex Poetelia Papyria, introduced in a.u.c. 427, under the consulship of C. Poetelius Libo Visolus, and L. Papyrius Mugillanus, ne quis, nisi qui noxam meruisset, donec panam lueret, in compedibus aut in nervo tenetur; pecuniae creditae bona debitoris non corpus obnoxium esset et nequis in posterum nectaretur: here the word is necto, not neco, nor is any allusion made to the death of the debtor; from this period, then, the sale of goods alone was permitted. Since, however, the people continually demanded a new law on this subject,

Julius Caesar promulgated the following:—Ut disjecta novarum tabularum expectatione, quae tam crebro movebatur, debitores creditori-bus satis facerent per estimationem possessionum, quanta quales ante bellum comparassent, deducta summa aris alieni, si quis usurae, nomine numeratum aut prascriptum fuisset; this enabled debtors to have their estates valued and delivered to their creditors in satisfaction.

The cessio bonorum was introduced by the same or another lex Julia, and consisted in the cession of goods by any party unable to pay to the creditor in satisfaction, if no fraud had been committed.

1 A. Gellius, N. A. 20, 1, understands the sectio literally, and he is no mean authority; indeed, he is the originator of this view on the matter; but Gellius lived A. D. 350, or about six centuries after the law was obsolete, and it is presumable, therefore, that he knew no more of the practice than we do. It is possible that the vulgar error prevailed in his time, and was related as an instance of the severity of the first ages of Rome, brought by the decemvirs from Greece. Shakespeare possibly alludes to this in representing the alternative condition of Shylock's bond as he does, for he does not make Portia question the legality of the condition, had Shylock been a Christian. Shakespeare, therefore, considered this was good Venetian law; whether it was or not is another question.


3 In Corpus is used to signify the property, in the same sense as bona and facultae, P. 5, 3, 25; P. 26, 7, 23.

4 Liv. 8, 28; Liv. 1; Ov. Fast. 6; Varro, L. L. 6, 5; p. m. 85; Tertull. Apolog. 4.

5 Senec. de Ben. 1, 4; Quinct. Decl. 336; Sigon. de I. C. R. 1, 6, p. 96.


7 C. 7, 71, 1, 4; Cod. Theod. tit. qui bonis ex L. Jul. cedere possunt.
§ 1420.

A bankruptcy or insolvency, then, was conducted as follows:—

When any one became insolvent, his creditors appointed a curator under the authority of the praetor, who sold the massa or estate as it stood, consisting of active and passive debts, to some buyer who agreed to pay the whole or a certain per-centage on the amount, or their respective demands, such person became the successor universalis of the debtor.

At a subsequent period this became obsolete. Justinian is, however, very obscure upon this head, for he says,— Sed cum extraordinariis judiciis posteritas usa est, ideo cum ipsis ordinariis judiciis etiam bonorum venditiones expiraverunt et tanta modo creditoribus dato officio judicis bona possidere, et pro ut eis utile visum est, ea disponere.

Hoppius explains this passage by stating, that formerly certain praetorian decrees were necessary to put the creditor into possession of the debtor's effects, the magister being appointed with power to sell, and the curator, with the consent of the creditors, for the distribution among them, pro rata: thus two judicia extraordinaria or decrees were required; judicium extraordinarium appears to have been, generally speaking, the judgment of the praetor, in point of law, upon facts,—to obtain which, he assigned a judex to try the issue of fact, which was termed ordinarium judicium; thus Vinnius adds, three applications must be made to the praetor: the first, ut liceret bona possidere; secondly, for the appointment of the master; and thirdly, for the sale and arrangement with the purchaser.

But as the law was finally fixed, and now stands, the cessio bonorum, or surrender of goods, is permitted to the debtor voluntarily or by order of the court; but if he do not within due time after confession of the debt in jure surrender, judgment may be taken against him, and execution issued,—such confession may be in jure, or by letter or message; the debtor who by misfortune in business has gotten into debt, but who cedes all his goods, is liberated for the time; he is bound to hand in an inventary, and swear that he had withheld nothing: but his wearing apparel, alimony, and even the usufruct of a legacy is often granted him out of humanity, nor can he be further troubled at that time; but if he come into property subsequently, he can be again distrained, till the creditors are paid, in the following order:—first, his moveables, then his immovable, and lastly, his incorporeal rights are taken possession of; if, however, an insolvent think he can pay if
respite for a time, he obtains what is called the *fæble auxilium et miserum ajutorium* or *rescriptum moratorium* introduced by Julius Caesar, which allowed debtors a period, usually five years\(^1\) time, to pay on giving security.\(^2\) Thus the Roman law does not distinguish between bankruptcy and insolvency; nevertheless, the general provisions of the above law do not materially, in principle, differ from the English law of bankruptcy, and appears historically to have been exposed to far fewer changes by patching, enacting, repealing, and consolidating, than that of England. The Romans being evidently aware, that one of the laws most important to the prosperity of commerce ought to be permanent, and not rendered uncertain by constant meddling and interference.

§ 1421.

The *senatus consultum Claudianum* ordains that, if a free woman illegally cohabited with a slave, whose master had thrice forbidden the connection, after which she had persisted, the judge was empowered to assign such free woman over to the slave's master as a slave,—whereby this latter acquired a property in her, and all that to her belonged.\(^3\) Justinian abolished this *modus adquirendi* which he calls *indignus suis temporibus*; and here Höpfner is inclined to doubt whether, by the above expression, the emperor intended to pay a compliment, or imply a satire on the age in which he lived.

§ 1422.

Certain persons receive from the reigning prince a right of succession not founded on consanguinity,—these are termed *socii liberalitatis principis*, and arose when the emperor gave two persons together a thing jointly; as, for instance, a landed estate, and attached to it the inherent capacity of devolving on the survivor, in case the deceased had not disposed of his share before his death by will, and had left no relations who could inherit it *ab intestato*.\(^4\) *Ut si quis forte ex bis, quibus communiter à nobis aliquid donatum sit, nullo hærede relicto, decesserit, ad consortem potius solatium, quam ad personam aliam, pars descendentis perveniat.*

It is, however, doubtful whether the *socius liberalitatis principis* inherit after all relations whatever, or immediately after the children. The law in the Codex is evidently founded on a law in the *Codex Theodosianus*,\(^5\) in which we read, *qui intestatus aut sine liberis diem defunctus est*, which Anian interprets, *si aliquis ex bis  

\(^{1}\) C. 1, 19, 2 & 4.

\(^{2}\) This resembles the Ley. de Espera lately passed in Caracas; but which, being retrospective, and injuring foreign merchants, was repealed at the instance of foreign states.

\(^{3}\) C. Th. 10, 14, 1 & 2.

\(^{4}\) C. 7, 24, un; I. 3, 13, § 1; Darnaud, lib. 1, c. 20; Burgii Elect. c. 8; Theas. otton. tom. 1, p. 322; Bach. hist. jurispr. Rom. I. 1, 3, § 21.

\(^{5}\) C. 6, 14, 1.
SUCCESSIO EX SPECIALI FUNDAMENTO.

\[355\]

mortuus fuerit—et nec testamentum fecisse, nec filios reliquisse cognoscitur, placet ut portionem ejus socius adquirat.\(^1\)

That this is not strictly a *jus accrescendi* is clear; it, nevertheless, may be placed with more propriety under that head than under any other. The *jus accrescendi*, it is true, ceases so soon as the co-legatee acquire his share;\(^8\) it may, therefore, be termed an anomalous or bastard *jus accrescendi*.\(^3\)

\[\text{§ 1423.}\]

Secondly, husbands and wives succeed *ex speciali fundamento*. In the earlier ages of Rome, wives, for the most part, *venerunt in manum mariti*, and therefore succeeded as *suae heredes*.\(^6\) But this was not the case with a wife not in manu, who had no intestate rights on her deceased husband's property, nor had he on hers, neither would the praetor even grant the survivor *bonorum possessionem ex edicto unde vir et uxor*; hence, as the *conventiones in manum* fell into desuetude, it was exceedingly seldom that the above circumstances arose, under which alone the praetor would grant the *B. P.*\(^5\)

Justinian, therefore, amended this part of the law by new constitutions, to keep pace with the altered usages of society, decreeing that when the one of a married couple is rich and the other poor, of whom the latter survives, he or she shall receive a certain proportion of the property of the deceased, to the prejudice of relations, although in the nearest degree to the deceased. Hence, when the survivor is not poor or the deceased not rich, the old law remains in force, and the survivor inherits only in default of all relations, in virtue of the edict *unde vir et uxor*; but if the case provided for by Justinian do arise, then the survivor obtains a *pars legitima* together with the relations, but there is a considerable difference in the nature of his right; under the edict, the survivor is a real *hares ab intestato*, with all rights and obligations thereunto attaching; but under Justinian's ordinance, he is no real heir, although so-called\(^7\) in the constitution, because he has no *jus accrescendi* and pays no legacies,\(^8\) but receives this share, *título speciali, ex beneficio legis*.\(^9\) He can be deprived of nothing by testament, but can claim his due *condictione ex lege* without the necessity of impugning the will in other respects; hence it is not a *legitima ordinaria*.\(^10\)

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3. P. 7, 2, 1, § 1 & 3, § 2.
5. Nov. 53 & 117.
7. Nov. 53, c. 6, § 1.
8. Stryk. *l. c.* disp. 42, c. 7, § 26, seq.
Questions arising out of Justinian's constitution.
What is rich and what poor.
Amount of apportionment.

§ 1424.

But it has been seen that the deceased must have been rich, the survivor be poor, and, inasmuch as this is not defined by law, jurists are agreed that the deceased was rich, if the property left sufficed to maintain the survivor and the rest of the heirs; but that the survivor is poor, when he has not sufficient to live according to his or her rank in society.

The next question which arises regards the apportionment, the facts of wealth and poverty having been established. Here the survivor receives one-fourth of the whole estate, if there be three or fewer claimants to the inheritance; but be there four or more, he or she obtains a portio virilis, that is, the estate is equally divided among the claimants; thus the surviving husband or wife can under no circumstances obtain more than one-fourth, but may get less.

The share of the survivor must not, however, exceed 100 libras auri, estimated at about £350. of British money.

If the survivor compete partly with his or her own, and partly with step children, the amount of his portion is determined by the number of heirs, but he or she only obtains the usufruct of the proportion which would have vested absolutely in his or her own children, if he had not been their co-heir, but absolute property in the residue. This, however, is to be understood of the survivor's succession in his or her quality of husband or wife only; since, in case of relationship of the deceased, he or she comes in in that capacity.

If the survivor come in with children or grandchildren, he or she does not obtain the dominium of his or her portio which vests in such children, but merely the usufruct or life estate; if, however, he or she concur or compete with other persons—as step-children, parents, or brothers and sisters of the deceased—he or she receives the absolute dominium.

§ 1425.

There is no doubt that the widow, if poor, thus succeeds the husband; but many deny the converse of the proposition—on the authority of the 117 Novella, but it would seem not upon sufficient grounds, as that law treats only of the case of a husband who has repudiated his wife without just cause.

Now, the surviving husband has a certain legal life interest in a civil portion of his deceased wife's property, which such of his children as are no longer under his power inherit from their

1 Struben, Recht. Bed. 2 B. 58 Bed.; Koch, l. c. § 111; Martius, Rechtsgutachten, Hiedelb. Spruch, coll. 1 B. N. 310.
2 Nov. 22, 18.
4 Cujac, ad N. 53; Rittershus, ad N. part 7, c. 17; Voet, ad P. 38, 17, § 243; E. F. Hagemeister, diss. jur. coniuc. sec. Nov. 117, c. 5; haud esse reciprocum, Gryphius, 1801; Glück, l. c. 37.
5 C. 6, 60, 3.
mother; and the same applies to the grandfather, when his grandchildren inherit the estate of their grandmother. In most continental countries where the Roman law forms the rule, this has given place to a more definite regulation, or is superseded by local customs, such as the so-called Gütergemeinschaft, or community of goods between married persons and the like.

§ 1426.

If the deceased have no survivor or heirs, the collegium or corpus whereof he was a member succeeds, if it have that privilege, for all do not possess it.

Churches have it, when an ordained priest dies without heirs.

Poor-houses, being corporate bodies endowed for the relief of decayed persons, when their beneficiary dies.

Academic institutions succeed to the estate of an academical citizen dying without heirs.

The company of the regiment, to the relictum of a soldier of it.

If any one assume the care of an idiot until his death, whose heirs, who would succeed him, ab intestato or by testament, have neglected him, he succeeds to his property, and has, indeed, precedence over all other heirs mentioned. He must, however, have called upon the heirs of such idiot to take care of him, and they must have declined or neglected to do so, notwithstanding the application.

Failing all these, the Fiscus steps in and occupies the estate as derelict; but this must be done within four years, since otherwise the tenant in possession has acquired a prescriptive right in virtue of such possession.


2 Höpner, ad Hein. § 702, P. R.; Scherer's Lehre, v. d. ehelichen Gütergemeinschaft, 2 Thelle, Manh. 1799, in which the whole is treated in extenso, Weber, ad ed.

3 Glück, § 203-4, as to the general practice of the courts.


5 Koch, l. c. § 117, etc.; Glück, l. c. § 147, etc.
The succession to intestate inheritances before and even in the age of Justinian has been set forth, and may be summed up, thus:

The first period is that of the decemviral law,—according to which, the deceased was succeeded by his suus hæres; failing him, by his proximus adgnatus; failing him, by the gentiles.

The second period comprises the innovations on the decemviral law by the bonorum possessiones of the pretors,—according to which, the deceased was succeeded by emancipated sui, by the edict unde libri; the wife not in manu, and the husband, by the edict unde vir et uxor; the more remote adgnati, by the edict unde legitimi; the cognati, by the edict unde cognati; the ascendants, by the edict unde decem persona; and as regarded freedmen severally, by the edicts tanguam ex familia, pro patronis, and unde cognati manumissoris respectively.

In the Code, the Institutes, and the Pandects, this law was acknowledged, with exception of the four last edicts, as has been seen in the preceding title; consequently the succession was open, in fact, to all of equal degree, either agnates or cognates. But Justinian was a friend to finality as to all but himself, and so set about recasting and consolidating the entire law of succession by a new constitution. He threw the decemviral and edictal law into one, and added certain new enactments, embodied in the 118th Novella, intituled ΔΙΑΣΩΣΙΣ, ἀνανεώσα τὰ adgnatica δίκαια, καὶ τιμοῦσα τὰς ἔξ ἀδιαβέτου κλήρους, addressed Αὐτοκράτωρ Ἰουστινιανὸς Αὐγουστος Πέτρω, τῷ ἐνδοκτάρῳ ἐπάρχῳ τῶν ἱερῶν τῆς τῷ πραυγωρίῳ, and dated on the 7th day before the kalends of August (22nd July), in the 17th year of his reign, A.D. 543.
The principles enunciated in this constitution are—
That all blood relations succeed ab intestato.
That there is no difference between agnates and cognates,—the nearer of either excluding the more remote in either.
That there is no difference between sui and emancipati, except in the form; the former being ipso jure heirs, the latter being required to administer.
That certain other persons, unconnected with the deceased by blood, should on special grounds have the right of succession.
It must be here remarked, that affinity never conferred any claim to an intestate succession, consanguinity forming the basis of this as well as of former laws, thus:

The stepfather A does not succeed to his stepson B, nor the brother C to his sister-in-law D.

The following is a diagram illustrative of *successio jure representationis*, or right of one to the share his immediate ancestor would have taken had he been alive.

§ 1428. The law of representation.

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1 Prefatio. Quum multis et diversis leges antiquis temporibus promulgatas inveniamus, per quas differentiam successiones ab intestato inter cognatos ex maribus et feminis non iustae introductione neesse necessarium diximus per presentem legem omnes simul successiones cognationis ab intestato clara et compendiosa distinctione definire, ut eessantibusprioribus legibus de hac causa ladi, in posterum ea solaservantur, quae nunc definimus. Itaque quoniam omnis ab intestato familiae successio tribus ordinibus cognoscitur, scilicet ascendentium, et descendentium, et collateralium, qui in agnatos et cognatos dividuntur, primam esse sacram descendentium successionem.

4. Nullam vero differentiam esse volumus in quacunque successione aut haereditate inter masculos et feminas ad haereditatem vocatos, qui ut ex sequo ad haereditatem vocentur definitivimus, quos communiter ad haereditatem vocari definitivimus sive per masculum, sive per feminarum defuncti conjungantur, sed in omnibus successionibus agnatorum et cognatorum differentiam cessare volumus, sive per feminarum personam sive per emancipationem, vel alium quemcumque modum prioribus legibus considerata fuerit, omnem sine ejusmodi differentia secundum cognationis suae gradum ad cognatorum ab intestato successione venire jubemus.

2 C. 6, 59, 7, ad finlasisjure nulla successio permittitur; C. 6, 38, 5, alludes to F. C.

3 The praetors, notwithstanding the extent of their relaxation of the decemviral law, never admitted the affines.

4 O denotes a male; Q a female; O the person deceased whose relictum or estate is in question; O E persons dead, but whose relicta are not presently in question; O—O denotes married persons. These are the signs generally used, but others are found in some authors.

5 The expression *jus representationis* is not to be found in Justinian's works, but is of a later date.
Here X dies, and D receives the share to which his deceased father A would have been entitled had he been alive. E and F divide the share which would have fallen to B; so G, H, I, that of C.

When there are more than one claimant, the inheritance is divided in capite, by poll; or in stirpes, by branches; or in linearis, by lines.

The succession is said to be in capite, when as many portions are made as parties.

Here A’s relictum is divided into three portions for the three existent heirs, B, C, D.

Succession in stirpes arises—
1. When equal partition is made according to the number of persons in the nearest and next nearest degree of succession.
2. When if one, or some, or all such persons are dead, and their respective portions are again subdivided among their next heirs.
3. When these latter or next heirs are also dead, and their respective portions are again further equally subdivided among their next heirs.
4. And so further, &c.

Thus:

In distributing A’s estate, the inheritance descends through B, the other through C; E and D would, therefore, each receive \( \frac{1}{3} \) of \( \frac{1}{3} \), = \( \frac{1}{3} \); F and G, \( \frac{1}{3} \) of \( \frac{1}{3} \), = \( \frac{1}{6} \) each; L and M, \( \frac{1}{3} \) of \( \frac{1}{3} \), = \( \frac{1}{3} \) each; and lastly, N and O, \( \frac{1}{3} \) of \( \frac{1}{3} \), = \( \frac{1}{6} \) each. The children always equally dividing the paternal share.
Succession in lines arises where the inheritance is so divided amongst ascendants, that the paternal and maternal sides respectively take moieties, thus:

Here A dies, and leaves a grandfather B on the paternal side, but both his grandparents B and C on the maternal side. Here the inheritance is divided,—the grandfather B taking one moiety, and the grandfather C and the grandmother D the other moiety between them, or each \(\frac{1}{4}\) of it.

§ 1429.

Hence, in intestate successions, two questions always arise:—
1. Who succeeds? 2. How much he takes? This depends upon the four classes or orders of relations:

In the first class succeed all descendents of the deceased.
In the second, the next ascendants, brothers and sisters of the full blood, their sons and daughters.
In the third, half-brothers and sisters, and their sons and daughters.
In the fourth, all other relations, according to the proximity in degree.

These rules may be impressed on the memory by the following verses:

Descendens omnis succedit in ordine primo.
Ascendens proprius, germanus filius ejus.
Tunc latere ex uno frater quoque filius ejus.
Denique proximior reliquorum quisquis superstes.

It must here be remarked that the above division differs from that of Justinian, into the ordo descendentium, ordo ascendentium, and ordo collateralium. The object of the above deviation, according to Koch, adopted by Höpfner, and since generally, is to obviate the confusion which arises from certain collaterals having equal claim with ascendants, and to render this puzzling subject more clear.

§ 1430.

The principle with respect to classes is, that the prior class always excludes those following. Thus, so long as persons belonging to the first class exist, none of the second can claim the inheritance or any part thereof; in like manner, the second class must be exhausted before those belonging to the third can claim; but these latter must come in before those of the fourth class can take.

Thus:

\[1\] Hein. § 684.
The Roman Civil Law.

Persons of the same class succeed together.

The duplicitas vinculi.

First class.

All legitimate children of both sexes succeed without restriction.

\[ A \text{ dies, } C \text{ inherits alone, for } B \text{ has no co-claim to the succession, although related to the deceased in equal degree, for } C \text{ belongs to the second, and } B \text{ to the fourth class.} \]

But persons in the same class do not exclude each other, but succeed together; for ascendants, brothers and sisters, and their children are in one class, and succeed alike.

These rules appear to make the matter pretty clear; but it must be observed, they do not apply to the triple divisions.

Now, as it is perfectly possible that persons, where the succession is in lines and in stirpes, may be doubly related to the deceased, so they may have a double claim on the inheritance.

This duplicitas may be vinculi, as of brothers and sisters of the whole and half blood, which is not the point in question, but of that cognationis,—for two sorts of relationship may concur in one and the same person, the natural and the civil; thus, a grandfather on the maternal side may adopt his grandson;—and a man may be related to the deceased on more than one side; thus, if we suppose that the parents of deceased were the children of two brothers or sisters, and he leave the father of one of his parents on the father's, and one who is so on both the father and on the mother's side; but in cases where the number of persons decides the portions, this double relationship is not taken into account.

§ 1431.

To the first class belong the descendents of the deceased, being capable of succession. These may be,—1. Legitimi, legitimati, or illegitimi; or, they may be adoptivi.

All legitimate children, male and female, sui or non sui, succeed,

1 Koch, succ. ab intest. succ. 3.
2 Itaque quem descendentiun relinquit is, qui intestatus moritur, cujuscunque sexus aut gradus, sive ex masculis, sive ex feminis descendat, sive sui juris, sive sub potestate sit, omnibus ascendentiis et a latere cognatis praeponatur. Licet enim defunctus sub alterius potestate fuisse, liberros tamen ejus, cujuscunque sit sexus aut gradus, ipse etiam parentibus, sub quorum potestate defunctus erat, praeferrer jubemus, acilit ex illis rebus, quae secundum alias nostras leges parentibus non adquiruntur. Quantum enim ad illarum rerum usufructum, qui illis aquiri vel servari debit, leges de his latus parentibus servamus, ita ut, si quem, ex his descendentiibus relitibus liberae mori contigerit, filii ejus aut filiæ, aut reliqui descendentes, sive sub potestate defuncti, sive sui juris inveniantur, in parentis sui locum succedant, et tantum ex hereditate defuncti partem capiant, quotquot etiam sint, quantum parentis ipsorum, si superesse caset, accepissent; quam successionem in stirpes antiquitas vocavit. In hoc enim ordine gradum requiri nolunus sed cum filii et filiabus nepotes ex præmorte filio vel filia vocari, sancimus, nulla differentia facienda, sive masculi, sive feminae sint, et sive ex masculis, sive ex feminis descendant, sive sub potestate, sive sui juris sint. Et huc quidem de successionem descendentiun depositusius. Consequens autem nobis videtur de ascendentibus etiam, quomodo ad successionem descendentiun vocentur, constituere.
however remote their degree, on proof of relationship; but none must stand between the heir and the deceased, that is, none must be nearer in the same line,—thus, the children get no share if their father or mother be living and inherit; in like manner, a grandfather excludes the grandchildren.

A dies, and B and C inherit, and D, E, F, G, are excluded.

Thus emancipated children no longer require \textit{B. P. ex edicto unde liberi}, because their right is now founded on the civil law.

Children succeed to their mother and grandmother by this law, without recourse to the \textit{S. C. Orphitianum}.

Difference in degree being of no importance in this class, the descendent of the deceased inherits, although other descendents may exist nearer in degree, thus:

A dies, and B, C, D inherit, although B is related to the deceased in the first, E in the second, and D in the third degree.

When there are issue by different marriages, they succeed to the common parent, be it father or mother; but own issue, to the particular parent, thus:

A marries B, and dies, leaving issue E and F; D marries C and dies, leaving issue I and K; B then marries C, both die, leaving issue G and H.

Now B and C are common, and A and D particular parents, then E and F succeed A alone; E, F, G, H succeed B; G, H, I, K succeed C; and I and K succeed D.

The issue of the first marriage or marriages take first of all whatever the father or mother inherited or otherwise possessed, \textit{titulo lucrativo}, from the deceased husband or wife,—for when B remarried with C, she forfeited the dominion of what she inherited
from her deceased husband A, and this right devolved upon her children E and F; on her death they retain it, plus such life interest or usufruct as the mother enjoyed during her life. Hence G and H, the issue of her marriage with C, get nothing from the late A's property, because the legal estate on the death of A devolved on his widow, conditionally on her not remarrying,—in which event it vested in E and F, although the possession did not pass from the mother till her death; in like manner, whatever C inherits from his wife B is vested in his issue C and H; but I and K receive no part thereof.1

§ 1432.

Children legitimated, per subsequens matrimonium, are in absolutely the same position as those born in wedlock.

Children, per rescriptum non plene legitimati, on the other hand, are to be looked on in matters of succession as illegitimate, since such legitimation operates no rights of inheritance; but

The rights accruing from legitimatio per rescriptum plene are not in the same category.

Legitimated children clearly inherit, default of legitimate issue; even so if a man beget children out of wedlock and having obtained their full legitimation, after that marry and beget children in wedlock, the legitimated and legitimate possess equal rights.

But let it be supposed that a man having illegitimate issue, marry and beget children in wedlock, and after that obtain the full legitimation of his first family, what right of succession do they possess to the paternal property? Upon this point there are three opinions,—firstly, that they have the same rights as those subsequently born in wedlock;2 secondly, that those born in wedlock have a previous claim for their portio legitima, but that quoad the rest, the legitimated and legitimate succeed together and alike, this is the general opinion;3 thirdly, that the legitimated children take nothing, inasmuch as the legitimate had already acquired an indefeasible vested interest in the inheritance.4 This latter opinion contains the best logic, and is, moreover, supported by the constitutions5 of Justinian, which declare expressly that natural children can only be legitimated by rescript, in default of legitimate; and so jealous were the Roman legislators lest the legitimate children should be prejudiced by the illegitimate issue, that natural children could not be instituted in a testament for more than one-twelfth,6

1 The issue of the second marriage first take specially what the deceased husband or wife had received from their own father or mother by blood sponsalitio largitate, C. 5, 9, 3 & 4; Nov. 22, c. 23; Nov. 98, c. 1; Glück, v. d. Intest. Erbf. § 101, et ibi D. 4. Of the property which the deceased obtained mediately by inheritance from one of his children, from out of the estate of a former wife or husband, Nov. 22, c. 76.

2 G. H. Ayres, diss. de rescript. legit. prin. plenissimum effect. legitimis liberis extant. Goett. 1743; Koch, de succ. ab intest. § 29.

3 G. S. Modihi, diss. de legitimo nat. post. leg. in succ. cum legitimatis, Hal. 1755.

4 Puf. l. c.

5 Nov. 74, 1; Nov. 89, 9.

6 § 1239, h. op.
where there existed children born in wedlock; hence, if the legitimation by rescript has been obtained, it does not place the issue so legitimated in a better position.

Höpfner is of opinion that none of these restrictions apply on the continent, where the Roman law guides intestate and testamentary inheritances.

§ 1433.

Referring to the sections of this work in which adoptio stricte or plene, and minus plene and arrogatio is treated of at length, it now remains to be seen what rights persons have in respect of intestate successions according to the jus novissimum. Persons arrogated, or adopted in the full sense, succeed to the inheritance of the adopting father, but to no part of that of the natural father, and this first fact is beyond doubt; the second, however, is not so; for if the adopting grand- or great-grandfather then after emancipates the adopted son, he succeeds his natural father.

Now, inasmuch as the preface of the 118th Novella confers on cognates and on agnates equal successorial rights, and inasmuch as a person, though adopted, still remains a cognate of his natural parent, it follows that a person arrogated, or perfectly adopted, succeeds to the inheritance of both.

An arrogated person succeeds the male ascendants of the arrogating father, when such person has concurred in the arrogation; but not so the wife of the arrogator, her mother, and grandmother.

A child adopted minus plene, or imperfectly, inherits of both the adopted and natural father—but the adopting father can exclude such by will; such adopted child does not succeed to the wife of the adopting father nor to her ascendants, notwithstanding their concurrence in the adoption; and hence it follows, that when a woman adopts, the child succeeds to her only, not to her husband nor to her ascendants.

§ 1434.

Illegitimate children are born, either of a marriage within the prohibited degrees, or ex damnato coitu nati; or of adulterous intercourse, adulterini; of a common whore, vulgo quasiti; or of a maid, spurii; or, lastly, of a concubine, who are naturales. The first inherit from neither parent. The second, third, and

2 § 683-707, § 1239, h. op. Notandum est arrogationem dici de adoptato homine sui juris, adoptionem stricte plenam, de descenditibus sub patriis potestate adoptatis; minus plenam, de aliis sub patriis potestate quibuscumque adoptatis. C. 8, 48, 10.
3 In extenso de hoc, vide Lehr in Hagemann, et Günther's Arch. f. I. Rechtsgelehre, § B. No. 9; Glück, l. c § 110, etc. C. 8, 48, 5.
4 § 660, h. op.
5 C. 5, 5, 6; Poll. de exsiderat. et prae-terit. c. 41; Titius ad Lauterbach, obs. 793.
6 It is erroneous to suppose adulterini to be within the provisions of Nov. 39, c. 15.
Where mother persona illustris.

Quintuple division of official nobility under the oriental emperors. Illustres, who.

Succession of the naturales.

Rule of distribution in the first class.

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fourth inherit from the mother by the S. C. Orphitianum, but take nothing from the father.1 And here, respect must be had as to whether2 the mother be a persona illustris, and has also issue born in wedlock; the adulterini, vulgo quæsiti, and spurii are excluded by them, otherwise they inherit.

Under the oriental emperors, the magistracy was distinguished into five classes,—illustres, spectabiles, clarissimi, perfectissimi, and egregii.

The consules, magistri militum, quæstores sacri palatii, magister officiorum, comites sacrarum largitionum, comites rerum privatarum; praefecti pratorio, praefecti urbi,3 had all the predicate or style, illustres; hence mater illustris is she whose husband or father belonged to the illustrious class. The reason given for the rule of law which excluded the adulterini, vulgo quæsiti, and spurii from the succession of a mater illustris having legitimate children, is found in the Codex,4 quia in mulieribus ingenuis et illustribus, quibus castitatis observatio præcipuam debitum est, nominari spurios satis injuriosum satisque acerbum, et nostris temporibus indignum esse pedicamus.5

Naturales inherit of the father only when he has no legitimate issue, and can take then only 1/6 of his property, which they must, moreover, share with their mother; and it would appear that, if the concubina survive without issue, she takes 1/6.6

§ 1435.

After having seen the persons who succede in the first class, their respective shares of the inheritance becomes the next question. The general rule is, that those of the first degree, viz., sons and daughters, succede in capita; those of the second, grandchildren of the deceased, in stirpes.

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1 Suipater incertus est applies to all but the naturales, C. 5, 5, 5; Ludolff, v. d. Intestat Erbfolge, § 160; Koch, I.

2 C. 6, 56, 5; Koch, de succ. ab intest. § 42, sch., holds that children issue of a stuprum, do not succede the mother, it being a coitus damnatus, and because as such it is punishable by the Law Julia de adulteris. But Nov. 79, cap. ult. speaks clearly of marriages within the prohibited degrees only. Again, although the stuprator was punishable by the L. Julia, the stuprata was not so; hence the stuprum was not a damnatus coitus, so far as she was concerned. The term vulgo quæsiti is certainly used in all passages which speak of the succession of illegitimate children to the mother's property; and e converso C. 6, 56, 5, § 3; P. 38, 17, § 2; but the term does not import the issue of whores (ex meretrice nati), in the strict sense of the word, but frequently comprises all illegitimate chil-

dren, P. 7, 5, 5; P. 25, 3, 5; § 5; P. 38, 2, 18; Höpfner ad Hein. § 690, n. 4.

3 Gothof. ad Cod. Th. T. 3, p. 108.

4 C. 6, 56, 5.

5 Hopfner hereupon remarks: "Curious that if such a mother bear whore-sons, it is a libel to say so; and how does it follow that the whore-sons do not succede her when she has legitimate issue, but do if she have not?" The answer is not difficult. A libel is not less a libel because true, and the law simply says it is a libel to say a gentle or noble woman has bastards, yet they shall succeed, not being to blame, but shall not prejudice legitimate children. The same author thinks this law not applicable to Germany, taking an analogy of rank; neither is this clear to nkt.

6 I. M. Rosen, dissertationes de succ. concub. si sola superstitis sit, Mogunt, 1787, § 1239, h. op.
There being four children of A, the inheritance is divided into four shares; B and C liber primi gradus take whole fourths each; D and E take each \( \frac{1}{4} \) of \( \frac{1}{2} \) each; F, G, H \( \frac{1}{2} \) of \( \frac{1}{2} \), or \( \frac{1}{4} \) each; being all five liberi ulterioris gradus. Now if B and C, who inherit in capita, be struck out, D, E, F, G, H would succeed in stirpes, and take D and E \( \frac{1}{2} \) of \( \frac{1}{2} \), or \( \frac{1}{4} \); and F, G, H \( \frac{1}{2} \) of \( \frac{1}{2} \), or \( \frac{1}{4} \) each.

No sufficient reason exists for not stating, as in the present case, that all persons of the first class succeed in stirpes, in which case B would represent the first, C the second, and D, E, F, G, H the third.\(^1\)

It is also an admitted fact in this class, that succession in stirpes obtains, and that the nearer does exclude the more remote; hence it has been disputed whether the grand- and great-grandchildren succeed virtually of their own proper right, jure proprio, to their grand- or great-grandfather or jure representationis, and whether such can repudiate the paternal inheritance, and succeed in capita.\(^2\)

Many high authorities repudiate the principle of representation in the first class, because they say it only applies in those classes in which the nearer degree excludes the more remote, and the more remote does not claim as representative of a deceased ascendent. Again, according to the law of the Twelve Tables, \emph{all sui}, and by the praetorian law, \emph{all emancipati}, without distinction of degree, inherit; but the 118th Novella confers the rights of inheritance on all descendents, without reference to degree; and Weber\(^3\) observes that there is no trace of any fiction in the class of descendents whereby the more remote is admitted to the succession, \emph{ex jure et beneficio parentis}, as was the case in the collateral line; and hence Justinian\(^4\) declares,—\emph{Hujusmodi vero privilegium in hoc ordine cognoscamus fratem ...}, brothers' sons, nephews, are not to be excluded by brothers, uncles.

\(^1\) Rotgenius, de succ. legit. c. 7, p. 225, sq.
\(^3\) Ad Hopfner, § 691, n. 1.
\(^4\) Nov. 118, 3; Koch, in his \emph{Basis of a New Theory}, Giesls. 1790, p. 11, repudiates this controversy as useless; contra, Glück, v. d. Intest. Erbf. § 100, urges that the representative system is irreconcilable with the right of grandchildren to inherit of their grandparents, when they are not also their parents' heirs (vid. C. 6, 14, 3, where the parents are dead), and with the claim of the grandchildrento the inheritance of their grandparents, which their parents have repudiated, vide et Ch. Gmelin diss. hist. representationis, I. C. R. exhibens Tub. 1787. Of the double portion accruing to the descendents ex duplci stirpe, Webr. l. c. § 684, n. x. x.
In its origin, the succession by representation is clearly founded on a fiction. The succession being really in capita,—suppose one of three brothers to be the intestate, leaving one brother alive, and the children only of the other, the surviving brother would exclude his nephews, because the nearer excludes the more remote; the fiction then consists of supposing the father of these nephews of the testator to have died after him, so as to have obtained an interest transmissible, to his children, who then divide his share; for if they really succeeded in capita, they would take each an equal share with their uncle, which they do not, but merely their father's share.

§ 1436.

The statute laws of England differs from the civil law in this class, in two respects:—

First. In that it admits the widow of the deceased, if alive, amongst the children and other descendents.

Secondly. In that grandchildren, who it has been seen succeede by the civil law in stirpes, succeed by the English in capita,—thus, if a man die leaving grandchildren by three different sons deceased before him—three by one, six by another, and twelve by a third—each class by the civil law would take one-third, but by the English law they would take in capita, to each of the twenty-one grandchildren, an equal share; for the statute is only supposed to rule representation where it is necessary to prevent exclusion. The fathers are in the above case passed over, and the grandchildren looked upon as direct issue of their grandfather.

§ 1437.

The second class is called to the succession in default of the first, and applies to ascendants; 1 the general rule being that the nearer degree excludes the more remote, and no representation is

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1 2. Igitur si defunctus descendentes quidem haereses non reliquit, pater vero vel mater allive parentes illi superstites sint, omnibus ex latere cognatis eos preferri, san- cumus, exceptis solis fratribus defuncto ex utroque parente conjunctis, sicut in sequentibus declarabimus. Si vero multi ascendentiunm supervivunt, eos preferri jubemus, qui, gradu proprinquoiores inveniuntur, masculos et feminas, sive ex mater sive ex patre sint. Si vero ejusdem gradus sint, equaliter inter eos haereditas divideitur, ita ut dimidiam quidem partem omnes ex patre ascendentem, quotcunque sint, accuriant etiam quorum vero dimidiam ascendentem ex mater, quotcunque inveniri contigerit. Si vero cum ascendentibus inveniantur fratres vel sorores defuncto per utrumque parentem conjuncti, cum ascenden- tibus gradu propinquieribus vocabantur, licet etiam pater aut mater sint, haereditate acilicet inter eos pro numero personarum dividenda, ut et ascendentiunm et fratrum quilibet equalam partem habeat. Neque in hac specie pater in filiorum aut filiarum parte ullam usumfructum sibi omnino vindicare queat, quoniam pro illo usufructu partem ipsi haere- ditatis et dominii jure hac lege dedimus. Nec ulla differentia inter illos personas observetur, sive feminae sive masculi sint, qui ad haereditatem vocantur, et sive per masculum, sive per feminam conjunguntur, et sive sui juris, sive sub potestate fuerit, cui succedunt. Reliquum est ut tertium quoque ordinem definiamus, quo ex latere ad-pellatur, et in adgnatos et cognatos dividitur, ut hac quoque parte definita lex unique perfecta inveniatur.
admissible. This class comprises the nearer ascendants, full born brothers and sisters, fratus germani, serores germani, sons and daughters of full born brothers and sisters.

A and B are uterine brothers, C and D half-brothers by the father, but neither are German, as E and F.

§ 1438.

Although, according to the above, all full born brothers and sisters are capable of succession, it does not follow that their sons and daughters or ascendants are so; the rule on this point is, that children who fully succeed to their parents in the first class, are capable of succeeding to their uncle and aunt in this class also.

That children who do not fully succeed in the first class, are utterly excluded in this class.

A being a filius naturalis in prima classe patri non plene succedit, hence he cannot succeed to his uncle B in the second class.

But although A be a filius naturalis, he succeeds to his mother,—ergo, he can succeed to his uncle B.

With respect to ascendants, the general rule is, "that the right of succession is reciprocal between ascendants and descendents."

Issue legitimated, per subsequens matrimonium, succeed their parents, hence the parents succeed them.

The issue of an incestuous marriage do not succeed their parents, hence the parents do not succeed them.

Adulterous, spurious, natural, and whore sons succeed the mother, hence the mother succeeds them as aforesaid.

1 The more remote being excluded by them.
2 Grandchildren do not coinhereit in this class for jus representationis ultra fratrum liberet non obtinet.
3 Sons and daughters of the same father and mother are of the full blood; by full born, not only this is intended to be conveyed, but also that, being of such full blood, they possess a right of succession.

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Natural children succeed the father, then, only when there exist no legitimate children or wife, hence the father succeeds to them only when they have left no legitimate wife.

§ 1439.

Having shown who succeeds, it remains to be seen how the inheritance is distributed in the second class. The general rule is,—

Ascendents succeed in lines, in lineas; collaterals, being brothers or sisters, in capita.

The children of collaterals, being brothers or sisters, in stirpes.

To which there are two exceptions:—

1. Ascendents, who compete with brothers or sisters or their children, succeed in capita; ascendentes conjuncti succedant in capita.

2. When neither ascendents nor full born brothers nor sisters are extant, but only the children of such, they succeed in capita; fratrum proles succedant in capita.

The deceased leaves parents and grandparents,—the former inherit as next in degree, and so exclude the latter.

\[ \text{G dies, and E and F inherit, but A, B, C, D have no participation in the succession.} \]

The same is the case, if but one of the parents be alive,—the grandparents are equally excluded. But when grandparents alone are extant, they inherit together in lineas.

Here we have a maternal grandmother and a paternal grandfather and grandmother. The grandmother A here takes one moiety of the estate of D, the grandfather B and grandmother C divide the other. Nor is the sum D inherited from his respective parents taken into account, in respect of which the 118th Novella makes no provision; and though D got 4,000 aurei by his father, 2,000 only by his mother, yet A will receive \( \frac{4,000}{2} \), and B and C \( \frac{2,000}{2} \) each.

If the deceased leave full bred brothers and sisters only, they succeed in capita.

1 Sed vide Koch, de succ. ab intest. § 46; Walch, contr. p. 225; Weber ad Höfner, § 684, n. xx.
A's *relictum* is equally divided between A, B, C, D.

When *children* of brothers and sisters survive, but neither brothers and sisters nor ascendants, the succession is *in capita*.

A dying, leaves none but his brothers’ children, B, C, D, who therefore make equal division of his estate.

When brothers and sisters compete with the children of brothers and sisters, the succession is *per stirpes*.

A’s estate is divided into four: B and C each take \( \frac{1}{2} \); D and E \( \frac{1}{2} \) of \( \frac{1}{4} = \frac{1}{8} \); F, G, H, \( \frac{1}{3} \) of \( \frac{1}{4} = \frac{1}{12} \).

When ascendants and full bred brothers and sisters survive, both inherit *in capita*.

A, B, C, and D, each take \( \frac{1}{4} \).

If ascendants and the children of the deceased brothers and sisters compete,—the former inherit *in capita*, the latter *per stirpes*.

Here the division is triplex: A takes \( \frac{1}{3} \), B \( \frac{1}{3} \), and C, D, E each \( \frac{1}{6} \) of \( \frac{1}{2} = \frac{1}{3} \) each.

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1 Voet. ad Pand. tit. de succ. ab intest. (post tit. 14, lib. 38), § 13, thinks grand-parents are excluded by full bred brothers and sisters; sed vide Puf. T. 4, obs. 139; Hübner, pralect. ad Inst. tit. de succ. ab intest. n. 10.

2 Voet. l. c. § 12, thinks the children of deceased brothers and sisters do not inherit with ascendants, if brothers and sisters do not survive; but this is circumstantially refuted by Coccelli, jur. con. lib. 38, t. 15, q. 6; Hannesen, tr. de compact. grad. in diss. prorusoria.
If ascendants, brothers, and brothers' children survive,— the first and second inherit in capita, the last per stirpes.¹

The estate of E is divided by 7, whereof 6 parts fall to A, B, C, D, F, G, or ¼ to each, and the remaining ¼ is divided between H and I, or ½ for each.

§ 1440.

By the law of England, the father takes the whole personal estate of his intestate son, and does not share with the mother, as by the civil law.² A next of kin in the ascending line is preferred before all collaterals, the grandmother to the aunt; but the statute prefers nearer collaterals to more remote direct ascendants, whereas by the civil law collaterals have no claim at all, until not only descendents, but also ascendants (except full bred brothers and sisters, who inherit together with such ascendants) have been exhausted.

The brother is preferred to the grandmother or grandfather by the English law.³

By the civil law, it has been seen they inherit in capita, or together, though some prefer the grandfather, because, though equidistant, he is in the direct line.

§ 1441.

The third class comprises half brothers and sisters, their sons

¹ This is doubtful by Roman law. Accur-sius thinks per stirpes; Aso, in capita; vide Vinn. ad I. 3, 5, p. m. 555, et ejusd. auct. Select. Quest. II. 30, et Hunnius in resolut. lib. 3, tr. 1, 9, 36. When a brother and a brother's children survive, of whom the first have repudiated the inheritance, or have died before aditio or administration, the brother's children inherit per stirpes; Glück, opusc. fascic. 4, p. 153, seq.; et Id. v. d. Intest. Erbf. § 122, etc.; Koch, l. c. § 45 & 78. E. Schraeder on the intestate succession of ascendants, when such compete with full bred brothers and sisters, or their children (german), in d. Abhandl. aus dem Civilrechte, Han. 1818, n. 5, § 6, etc.

² Blackborough v. Davis, per Holt, C. J. father and mother are nearer than brother and sister, so grandfather and grandmother are nearer than uncle and aunt; E. 23 W.; 1 Salk. 28, 251; Prec. Cha. 527; 12 Mod. 623; 1 P. Will. 51; Ld. Raymond, 684; Woodroffe v. Wickworth, T. 1719; Prec. Cha. 527.

³ Under Hen. I. either could have taken the whole real estate; soon after that it was altered in favor of collaterals, and the principle established "that inheritances do not ascend." The law is now restored as far as the father taking precedence of collaterals is concerned.

⁺ Blackborough v. Davis, per Holt, C. J. father and mother are nearer than brother and sister, so grandfather and grandmother are nearer than uncle and aunt; E. 23 W.; 1 Salk. 28, 251; Prec. Cha. 527; 12 Mod. 623; 1 P. Will. 51; Ld. Raymond, 684; Woodroffe v. Wickworth, T. 1719; Prec. Cha. 527.

⁺⁺ Poole v. Willershaw, T. 1708: Norbury v. Vicars (Fortescue, M. R.), M. 1743; Evelyn v. Evelyn, H. 1754; Hardwicke, Ch. quod vide ibique cit. This important leading case is well worthy the attention of civil lawyers (Burn, Wills Distribution, p. 417).
and daughters; in default of ascendants, full bred brothers and
sisters, and their children.1

Half brothers* are such as have but one common parent to whom they succeede plene.
These may be children of the same father, but of three descriptions of different mothers.

If A and B, the children of C and D, were
the issue of a stuprum, fornicatio, or concubinatus,
they are half sisters, succeeding the mother only, or
the father imperfectly.

The half brethren are partly consanguinei, having
a common father, to whom they succeede plene, quia ex eodem sanguine procreates sunt, as A and B; or,

Uterini, who have a common mother, so called
quia ex eodem utroco venerunt, as C and D.

All half brethren are legitimi ad successionem, but not so their children.

1 3. Igitur si defunctus neque descendentes neque ascendentes relinquat, primo ad haereditatem vocamus fratres, et sorores ex eodem patre, et eadem mater natos, quo etiam cum parentibus haereditatem vocamus. His vero non extantibus in secundo ordine illos fratres ad haereditatem vocamus, qui ex uno, qui ex uno parente defuncto jun-guntur, sive per patrem solum sive per matrem. Si vero defunctus fratres relinquat et alterius prædefuncti fratri aut sorori liberos, hi cum thia paternis et maternis, masculis et femininis, ad haereditatem vocantur, et quotcumque tandem sint, tantum ex haereditate parentem capient, quamcum parentes eorum habiturus erat, si viveret. Unde consequens est, ut, si forte præ mortuus frater cujus liberis supserunt, per utrumque parentem defunctus personæ conjunctus fuerit, superstites vero frater per patrem forte solum aut mater illi conjunguntur, liberi ejus patris suis praeventur, etiam vel tertio gradu sint, sive a patre sive a matre sint illi, et sive masculi sive feminini, si aut pater ipsorum praeventus fuerit, sive vixissent. Contra ea si quidem superstites frater per utrumque parentem defunctum cognatione attingat præmortuus vero per unum parentem conjungatur, hujus liberos ab haereditate excludimus quoadmodum et ipso, si viveret, excluderetur. Hoc autem privilegium in hoc cognationis ordine sola concedimus fratum masculorum vel femininarum filiis vel filiabus, ut in parentum suorum jura succedant, nulli vero aliique personæ ex hoc ordine venienti hoc jus concedimus. Sed et ipsae fratrum liberes tum illud beneficium præbemus, quando cum thia suis masculis et femininis sive paterni sive materni sint, vocantur. Si vero cum fratribus defuncti descendentes etiam, ut jam ante diximus, ad haereditatem vocantur, nullo modo ad successionem ab intestato fratriis aut sororibus liberos vocari permissum est, nec si ex utroque parente pater ipsorum vel mater defuncto conjunctus fuerit. Quandoquidem igitur fratris et sororis, liberi ejusmodi privilegium dedimus, ut in parentum locum succedentes soli tertio gradu constituiri cum illis, qui præmo et secundo gradu sunt, ad haereditatem vocentur, illud manifestum est, quod defuncti patriis et masculis et femininis sive ex patre ex mater sint, praeposantur, licet illi quoque tertium similitur cognationis gradum occupant.

§ 1. Si vero defunctus neque fratres neque fratrum liberos, ut diximus, reliquerit, omnes deinceps ex latere cognatos ordine ad haereditatem vocamus, secundum unius cujusque gradus prorogativam, ut propinquiores gradu ipsi reliquis praeposantur. Si vero multi ejusdem gradu inventantur, pro numero personarum inter eos haereditatem dividatur, quod leges nostrae in capita adpellant.

3 It is an error to suppose that half brethren inherit together with ascendants. P. L. Birkner, diss. larva absurda sent. de succ. unilat. cum ascend. detracta, Alt. 1774.
The general rule is, that he who only succeeds to his parents plene in the first class, succeeds to his uncle in the second.

C being a filius naturalis cannot succeed his father plene, therefore he takes nothing from B.

In other words, these are consanguineous brethren, but do not succeed as such, but as half brethren.

§ 1442.
The rule for distribution in this class is,—
Half brethren in capita.
Their children per stirpes.

A's relictum is divided into third for B, C, D.

But if E die, the division becomes duplex only; F takes $\frac{1}{2}$ and G and H $\frac{1}{2}$ of $\frac{3}{4}, = \frac{1}{4}$.

The exception to this rule is expressed fratrum proles succedit in capita; that is to say, that when there are no survivors, but the children of half brethren, these inherit in capita.

Here five shares are made.

In this class also respect is not had to the origin of the property, when uterini compete with consanguinei,—these latter have no advantage on that account, inasmuch as the deceased derived his property from the father; nor the uterini, inasmuch as they derived it from the mother.

Although B had all or the greater part of his property from his father, A and C, nevertheless, divide the estate in equal moieties.¹

¹ Contra, Stryk. de succ. ab intest. dim. c. 1, § 22, seq.; Leyser, Sp. 423, med. 1; Walch, controv. p. 393, Ed. III.
On the continent, where the Roman law of succession is used, respect is generally had to the origin of the property,—the consanguinei first take the paternal, the uterini the maternal property out of the total, and divide the residue equally; this distinction is, indeed, to be found in the Code, but not in the Novellae.

In England, this holds with respect to land only,—those which came by the father shall descend to the heirs on the part of the father; and the lands which came by the mother shall descend to the heirs on the part of the mother. But with respect to personal estate, the statute requires an equal distribution amongst all such ascendants as are in equal degree.

With respect to the succession to personalty, the law of England gives the half blood equal rights of succession with the whole blood contrary to the rule of the civil law; and is, moreover, extended to posthumous children of the half blood.

As in the civil law, where brothers do not concur with nephews, the succession is in capita; nor is any distinction made between the whole and the half blood.

§ 1444.

The fourth class comprises collateral relatives,—agnate or cognate, male or female, according to proximity of degree, in default of any of the above.

The general rule is, that the nearer excludes the more remote.

With respect to the period to be regarded in determining the proximity of degree, Justinian says,—proximus autem, si quidem nullo testamento facto, quisquam decesserit, per hoc tempus requiritur, quo mortuus est, cujus hæreditate quaeritur. Quod si, facto testamento, quisquam decesserit per hoc tempus requiritur quo certum esse ceperit, nullum ex testamento hæredem exiturum. Quod quidem aliquanto longo tempore declaratur. In hoc spatio temporis sape accidit, ut proximiore mortuo proximus esse incipiat, qui mortu mortem non est proximus.

1 C. 6, 58, 13, § 2.
2 Nov. 118; contra, Koch, l. c. § 82; Hunnius, resolut. p. 603; Fachin, contr. lib. 6, c. 5; Müller ad Leyser, opus. 670. Pro Stryk. and Leyser maintain the origin of the property is not in question, if children of half brethren alone claim; that that only is to be understood under paternal or maternal property which the deceased inherited immediately in the paternal or maternal line, and not that which he may have received from the relations of the father or mother, Glück, l. c. § 129.
4 Janson v. Bury, 1729.
5 Dr. Wall had two sisters, Susanna of the half blood, and John, Mary, Dorothy, and Elizabeth of the whole blood, and both sisters died in his lifetime. The court decreed a moiety to the wife, and the other moiety to be divided into four parts,—one for the issue of Susanna, and the three for the issue of Elizabeth, Burn, 159.

Collaterals, according to proximity of degree, succeed in the fourth class. Influence of the period.

7 Koch, l. c. § 11 a; Glück, l. c. § 19.
Hence, since *proximior remotiorem excludit*, it follows:

A succedes to the estate of B to the exclusion of C, because A is related to B in the third degree, C in the fifth.

This, then, is the first class in which the degrees are reckoned, except in the case of ascendants; but where there are many of like degree, they succede *in capita*.

Thus, A's estate undergoes a quadruplex division in favour of B, C, D, E.

The *duplicitas vinculi* is not regarded; and it is immaterial whether a relation descend from half or whole bred brethren.

A succedes to D as well as C, notwithstanding C's grandfather being a full bred, and D's a half brother of the deceased.

Neither is any respect had here to the origin of the property, whether proceeding from the father or mother.

**§ 1445.**

To inherit in this class, the claimant must be—

1. Capable of inheritance; that is to say, in a capacity to inherit *plene* from father or mother, through whom the claim accrues.

2. None must intervene between the claimant and the deceased through whom the claim passes, who was not in a position, if alive, to have inherited *plene*.

Thus, with regard to this latter rule, if B was issue of an incestuous marriage, C cannot succede to A, because B could not have succeeded to his parents.

Now, if B be the natural son of his father, *filius naturalis*, C cannot succede to A, B not possessing the full title to his father's property. But it is not required that there should, in the whole
line of relationship, be none born out of wedlock. If the illegitimate link in the line could have inherited *plene* of the mother only, through whom he is related to the deceased, the right of inheritance is not prejudiced by such illegitimate procreation.

Although C, father of D, is a *naturalis* of his mother B, D will, notwithstanding, succeed to A.

For inasmuch as children born of concubinage succeed to the mother *plene*, C could have succeeded his mother, *ergo* D can inherit from A.

However remote the relationship with the deceased of any descendant may be, yet he inherits; nor is there any restriction to the tenth degree, as some urge on the passage *hoc loco et illud necessario admodum sumus*, *adgnationis quidem jure admitti aliquem ad hereditatem etsi decimo gradu sit*,¹ that this is merely used *exempli gratia* appears from the expression applied to the *adgnati* *etiam si longissimo gradu sint*, decimus being simply used to signify very remote.

§ 1446.

In a former title³ it has been shown what actions can be brought in cases of testamentary succession, for the purpose of impeaching or supporting a testament, which will be found to be the *querela inofficii testamenti*, *querela nullitatis ex jure antiquo* or ex jure novo, and the *bonorum possessio contra or secundum tabulas*. It now remains to be seen what remedies the intestate heir has against other parties who are in adverse possession of the inheritance. This remedy is termed *hereditatis petitio*, and lies against the possessor *pro hærede* or *pro possessore*, praying that the petitioner be declared the true heir, and that the actual possessor be required to deliver up the *corpus hereditatis cum omni causa*, or together with all that appertaineth thereunto.

The *hereditatis* is an *actio universalis mixta*: *universalis*, because it concerns an *universitas juris* or an entirety of things, viz., the whole inheritance; and *mixta*, because, as regards the inheritance, it concerns a *res*, and therefore is *reals* in its nature; and *personalis*, because the action arises out of an obligation, and

¹ *Tit.* xii. § 1293.
² I. 3; ², § 3; Koch, l. c. § 99, ibique citat.; Glück, l. c. § 133, ad fin.
³ I. 3, § 5; Koch, 1. c. § 99, ibique.
demands an account and damages as founded upon this double basis; it is, therefore, both realis and personalis, and consequently mixta, or composite, and partaking of the nature of both jura in rem and jura in personam.

§ 1447.

This action does not lie until the death of the deceased can be attested and certified by witnesses,—or by a document of the authority, be such the parson of the parish or of others; but in the case of one who has disappeared, and of whom no traces can be discovered, satisfactory proof of death must be given.1

This action lies against him who is in possession of the inheritance, or of a part thereof, or of something appertaining thereunto, qui pro possessore or pro hærede possidet;2 but it will not lie against him who possesses titulo singulari as a legatee.

Whoso possesses the inheritance and does not maintain, that he is the heir, notwithstanding his inability to allege any other title, or alleges one which is evidently null, is said pro possessore possidere. Whoso, on the contrary, maintains, that he is the true heir, is said pro hærede possidere. Lastly, whoso maintains, that he has bought the object in question, pro empto, has received it as a gift, pro donato, or by way of exchange, pro permutato, is said titulo singulari possidere. Thus it is clear, that that action lies pro possessore or pro hærede,—for the former has no title at all, and the latter maintains he is the heir; as soon, therefore, as the true heir proves his right; both are defeated by some title or a better title respectively.3

The case of the possessortitulosingulariis, however, different, for he does not question the heir’s right, but simply confesses in avoidance, alleging, that although the petitioner is heir, yet, nevertheless, the object was not the property of the deceased, or was already alienated by him in his lifetime, hence nothing is gained in this case by the hæreditatapisettio or proof of the heirship, which is in fact admitted; the proper action in such case is the rei vindicatio,4 in order to demonstrate a property in the object in question; but, nevertheless, the hæreditatispetitio will lie against him who has fraudulently, dolose, ceased to possess,—for such person is still looked upon as possessor.

§ 1448.

The prayer of the hæreditatispetitio is for deliverance of the inheritance, cum omni causa. If the possessor of the inheritance

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1 The German practice allows seventy years to be reckoned from the birthday of a person having so disappeared, and then adjudges him pro mortuo, because he ought to be dead by the new testament.
2 Branchu, obs. c. 6; E. F. Hommel, in epist. de mirabili Ulpiani impostitura existimantis adversus eum qui pro possessore possidet, non rei vind. sed hæreditatis petiti-
3 Struv. exerc. 10, th. 47.
4 Vinn. Quest. sel. 1, 23; Oelze, progr. de act. real. adversus quemcumque possessorum non competente, § 11.
have possessed in good faith and honesty, bona fide, he is only required to deliver up what he actually possesses, and that whereby he is a gainer; that is to say, if, during the occupation, emblements to the amount of 1,000 aurei have accrued to such possessor, by reason whereof he has expended so much less of his own property, he may be said to be a gainer by 1,000 aurei, and must pay over just so much to the true heir. But such bona fide possessor is not answerable for loss, extravagance, or destruction; the male fidei possessor, on the other hand, is not only answerable for all these contingencies, but, moreover, for fructus percipiendi or mature growing emblements, which he is bound to restore.

§ 1449.

The haereditatis petitio is duplex in respect of its form, and is termed qualificata¹ when involving a testament, hence the querela nullitatis and inofficii testamenti are haereditatis petitiones qualificata: the haereditatis petitio simplex, on the other hand, embraces every other prosecution of the right of inheritance arising either out of wills, the laws, and the like.

In respect of the object, the haereditatis petitio may be partitaria, on the prayer of one to be acknowledged as co-heir, and that the possessor do deliver his share to him.²

In respect of its legal basis, it may be civilis when prayed by the civil heirs, or possessoria when prayed by the praetorian heir. He, therefore, who has already prayed the B. P. under the edict and obtained a decree, can institute this suit against the possessor of the inheritance, but it is not to be confounded with a simple possessory action, being merely a mode of enforcing the praetorian decree.

The haereditatis petitio fidei commissaria belongs to the particular species of actions on inheritances, and is instituted by fidei commissary heirs under the following presumption:—Let it be supposed that the hæres fiduciarius, not being in possession of the inheritance, is not in a position to deliver it to the hæres fidei commissarius. In such case, the trustee administers to the estate merely in word, and restores it by mere word to the cestuique trust, who is then in a position to institute the haereditatis petitio fidei commissaria against such third person as may be in possession of it.³

§ 1450.

Every heir is bound to his co-heirs duly to administer the inheritance which may be in his possession, and to divide it with his co-heirs at their request. As the different modes of division all

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¹ This is a modern term, convenient for the sake of more clear distinction.
² It lies not only against him whom the petitioner lets pass as a co-heir, but also against one to whom the petitioner acknowledges no heritable right.—P. 51, 4, 1, § 1; Voet. ibid. § 1.
³ § 1345, h. 0p.
partake more or less of like properties, whether effected judicially or extrajudicially, but the whole question of partition is more or less involved\(^1\) in the present examination.

The partition may be effected by the deceased **immediately**, by testament, codicil, or *inter liberos*;\(^2\) or **mediately**, by confiding the distribution to a third party.\(^3\) Or the heirs themselves may partition the inheritance in person or by an arbitrator.\(^4\) Lastly, the heir may effect the partition judicially by instituting a suit *familiae herciscundae* against a co-heir, in which case, the judge will assign the due proportions;\(^5\) but an extrajudicial partition confirmed by the judge, does not amount to a judicial division.\(^6\)

\[\text{§ 1451.}\]

The first step to be taken, by whoso will take a part in the division, is to prove his heirship;\(^7\) nor can anything be divided over which the deceased had not full right of disposition, and which has not passed as an inheritance. The first step, however, is to sever everything which does not strictly belong to the estate; excluding whatever has become forfeited to the fiscus by way of penalty,\(^9\) and whatever a private individual is precluded from possessing as such.\(^10\) Generally, therefore, and upon the same principle, the debts of the deceased cannot be assigned legally so as to obligate any heir or creditor, either by the judge or the heirs, or even by the deceased himself,\(^11\) distributing them contrary to their apportionment, according to such imaginary heritable shares,\(^12\) as follow in the due course of law; the general admissibility of the *cessio* or right of assignment, however, allows a separate assignment of claims (*chooses in action*); and when necessity requires it, even in the case of judicial partition.\(^13\)

The deceased may refer a creditor, for his advantage, to a particular heir to the estate, in so far as he is authorized to burden such heir with legacies; but, of course, he must do so according to the form appertaining to legacies, and not by contract;\(^14\) but the creditor is, on his part, not bound to confine himself to the person designated. The partition may be made by allowing the capital to remain as a common fund, the produce thereof to be divided; or by making the object over to a third party, for a price to be agreed upon and distributed; or as a set off against a claim the creditor may have on

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\(^1\) Voet. de fam. hercis. com. T. 2, tit. 10; Grass, de arbit. fam. hercis. Gebauer de herite cito ob inaequal. in melius reform (op. T. 1).

\(^2\) § 1229, h. op.

\(^3\) Voet. Com. T. 2, 10, § 5.

\(^4\) C. 2, 3, ult.

\(^5\) P. 10, 2.

\(^6\) Struben, 5, B. 127, Bed.

\(^7\) P. 10, 2, 1, § 1.

\(^8\) C. 1, 36, 17.

\(^9\) P. 49, 14, 4; vide et post de Pignor. versus fin.

\(^10\) P. 16, 2, 4; § 1.

\(^11\) An exception is found in P. 16, 2, 16; P. 10, 2, 11, § 1; Voet. l. c. 3, 29, § 23, 24.

\(^12\) P. 30, 44, 45, § 2; P. 31 (3), 69, § 2; C. 3, 31, 25.

\(^13\) I. 2, 20, § 21; P. 30, 44, § 6; P. 30, 75; § 2; C. 6, 37, 18; Crell. de divia. nom. in judici. fam. hercis. Vit. 1743.

\(^14\) P. 30 (1), 69, § 2.
other objects. The first and second case raise the questions of the claims of a co-heir, who has suffered eviction of the thing in question. Now, if the deceased have himself made the apportionment, the co-heir must in general consent to eviction; but where the apportionment is after the manner of a pre-legacy, the heir can insist on eviction conditionally only, that is, so far only, as he could in the case of any legatee who may suffer eviction of property proved to belong to another; but he can insist on eviction unconditionally, if his portio legitima be infringed thereby.¹

If, on the contrary, the apportionment have been made after the deceased’s death, it is to be placed upon the same footing as bargain and sale, and the heir retains his claims for eviction;² in cases where the distribution has been made by the deceased, action can only be brought for infringement of the portio legitima.³ The judicial apportionment is only impeachable on the ground of an unequal distribution for fraud, but never on the ground of its being unjust after it has come into legal operation. In like manner, extrajudicial partitions, even those of an arbitrator,⁴ can be impeached as well on the ground of fraud as that of extraordinary lesion; but such as do not come within this definition cannot be taken into consideration.⁵ Other grounds of impeachment of judicial sentence and contracts are, of course, not excluded here.⁶

§ 1452.

Another action, termed the actio familia herciscunda, is also incidental to inheritances, and presumes—that the inheritance belongs to many co-heirs;—that one of such has already been in possession of it and administered it;—that such person or the other co-heirs desire its distribution; and whoso brings suit with this object, maintains an actio familia herciscunda.

The origin of this action is extremely ancient, the first mention of it being made in the Twelve Tables,⁷ which provide nomina inter haredes pro portionibus hæreditatius ercta cita sunt, cæterarum familia rerum ercto non cito, si volent hæredes erctum citum faciant. Prætor ad erctum ciendum arbitros tris dato, that is, let all choses in action (obligations due and rights of action) be distributed among the co-heirs rateably according to their hereditary portions. Let there be no division made of the remaining available assets of the estate; but if the heirs so require, let distribution take place. Let the prætor appoint three arbitrators to divide the integer. Which is to be thus explained,⁸ that all choses

¹ P. 10, 2, 33; P. 32 (3), 77, § 8; sed vide Glück, Pand. 10, B. S. 107-111.
² P. 10, 2, 20, § 3 & 66, ult.; C. 3, 36, 14; C. 3, 38, 1.
³ C. 3, 36, 10.
⁴ Thib. Pand. § 500, ibique cit. si ultra dimidium laedatur.
⁵ C. 3, 38, 3; P. 10, 2, 36; P. 42, 1, 27; C. 4, 44, 1 & 8 varying are—Voorda, elect. c. 26; Gebauer, l. c. Püttermann, prob. c. 7; Glück, Pand. 10, B. S. 734; Cocceii, I. c. 2, 10, 6 & 7; Meurs de Inequale (Oelrichs Th. nov. vol. 3).
⁶ P. 44, 79, § 4, 11 & 12; Id. 8, 9 & 16, § ulti.
⁷ I. Gothofr. fr. XII. Tab. v.
in action should be divided, *ipso jure*, among the co-heirs in proportion to their shares in the inheritance assigned them respectively by law, and that no contract should be entered into among such co-heirs, for a division which may not be rateable as such shares; the operation of which is to except legatees from the burden or benefit of such actions,—for being singular successors, they are not in the position of heirs. The other available assets of the estate formed a species of common fund, or *societas*, for the heirs; but it being a maxim that none should remain a member of any partnership against his consent, it was permissible for any one to quit it, to which end the action for division of the inheritance was instituted; and the prætors, thereupon, assigned three arbitrators, who should settle the share to which each was entitled.

Various explanations have been attempted of the term *familiam hercisere*,—that of Festus, however, appears preferable. *Familia*, in one of its significations, denoted the estate left by the deceased; *ercere*, erectus, in the now obsoletelanguage of that period, signified entire, and is, perhaps, connected with the Greek word *epros*, a fence or bulwark, consequently, that which is hedged about and so separated from that which surrounds, it being the conception of an integer; this root, remarks Festus, is still, perhaps, traceable in the word *coerceor* (*coerceo*), *coercitum*, *coercatum*, *ercatum*.* Cure signified to divide, hence *familia ercta non cita* will signify an integral and an undivided inheritance, out of which, in later ages, the word *erciscere* or *herciscere* was corrupted and compounded, and used by Cicero and Apuleius.

§ 1453.

This action, therefore, as well in its origin as in its subsequent use, was only available by a co-heir, consequently, if the defendant does not admit this quality in the plaintiff, he cannot sue him in this form; hence the plaintiff must first establish his co-heirship *hæreeditatis petitione partiaria*, and the possessur singularis, *pro empto* for instance, is not liable to this action, as possessing *titulo singulari*.

The object being partition, this action does not apply to active and passive debts, for these are already distributed, *ipso jure*, among the co-heirs; thus, if the intestate have left 1,000 *aurei* outstanding debts and two heirs, each has to pay 500; in like manner, if there be 1,000 *aurei* due to his estate, each heir will have to receive 500 without any agreement being required. This action does not lie for things prohibited.

1 P. 17, 2, 1, § 1; Id. 14.
2 Ad voc. ercetum.
3 § 371, h. op.
4 De orat. 1, 56; it is evidently, therefore, not a corruption of Trebonianus.
5 Meh. 6, sub. extrem.
§ 1454.

The *actio familiae herciscundae* lies utiliter by *haereses fideicommissarii*, arrogated minors, and for the *quarta Divi Pii*, and by the *familiae emptor*, but only against heirs, and is guided by the following rules:

In the first place, this action is, in the first place, only competent to such as have free and full disposition over their property. The party sued must defend, nor does the tutor require the decree of a magistrate for that purpose; and a curator is appointed for defendants being absentees.

In the second place, the action being universal, cannot be instituted repeatedly, except by a co-heir omitted in the partitions. *Actio communi dividundo* is, therefore, the only one which will lie in such case; but the *actio familiae herciscundae* is not barred by the partition having been effected extrajudicially.

In the third place, although the object of the action is distribution, yet, nevertheless, the personal duties and claims of the administrator of the estate may incidentally become a question; in which case, it will be ruled by the principles applicable to the *actio communi dividundo*.

In the fourth place, all accessory things follow the principal object, and all undistributed portions of the estate must be delivered to the heir in chief, judicially apportioned, or entrusted by lot or consent to some one heir or other person. The judge must assign the residue requiring to be distributed (if no understanding by reciprocal exchange of different objects can be effected) to him, of the co-heirs, who bids most; or to such of them as, in case of equal offers, has the greatest interest in the matter. But if the heirs will not bid against each other, the judge must direct a public sale of the object; or, if the co-heirs object to this course, effect a compromise by division of the rights on the objects. If the judge have divided many objects into portions where this could not be effected, or several co-heirs have bid equal sums, a decision must be arrived at by lot; but this measure is to be resorted to only in cases where the judge cannot found a decision on any reasonable basis; and he must endeavor to render the partition as little prejudicial as possible to third parties.

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1 P. 10, 2, 2, § 1; Id. 18 & 40.  
2 P. 27, 9, 7, pr. C. 5, 71, 17; Voet. 2, 10, § 15.  
3 C. 3, 36, 17.  
4 Id. et P. 10, 2, 20, § 4 & 44, § 2.  
5 C. 3, 36, 11 & 21; P. 10, 5, 32.  
6 P. 10, 2, 19 & 22, § 4 & 44, § 3 & 56.  
7 Vid. Thib. Pand. § 716.  
8 P. 10, 2, 4, § 3; Id. 55 C. 1, 7, 68, 2.  
9 I. 4, 17, § 4; P. 10, 2, 2, pr. § 1, 2, 3; Id. 25, § 10.  
10 P. 10, 2, 22, § 1 & 32, § 1; C. 3, 37, 1.  
11 P. 10, 2, 22, § 1 & 55; C. 3, 36, 1 & 33 Puf. T. 4, obs. 110; Struben, 2 B. 28 Bed.  
12 P. 7, 1, 16, § 2 & 6, § 1.  
13 C. 6, 43, 3; P. 10, 2, 55 et vide P. 3, 149; § C. 1, 5, 47, in fin.; Vinn. quest. sel. c. 25, 1.  
14 P. 10, 2, 25, § 6; Voet. l. c. § 23.  
15 In many places in Germany particular statutes confer upon the parents or wife the right of apportionment, and to the husband, or to the cadet, what is termed the Kührecht.—Thib. l. c. § 881; Hellfeld, jurispr. § 733.
Where distribution is suspended by the deceased. Clubbing of suits.

In the fifth place, if the deceased prohibited distribution for a short period, the *actio familiae herciscundae* must be suspended so long:

Sixthly, it is to be observed, that several inheritances may be included in one action.

 Occasionally a *collatio*, termed in English a hotch potch, must be made in order to effect a division; that is to say, every heir must account for what he has received from the deceased, or acquired through having been qualified by him so to inherit.

If children inherit of their parents, and have received something from them during their lifetime, *inter vivos*, without it, however, having been intended that they should receive such benefit over and above their inheritance, they are under the obligation of bringing this into account to re-establish the equality, this being termed *conferre*, whence *collatio*.

The *B. P.*, granted praetorianly to emancipated children, was the source of this collation or hotch potch, because, inasmuch as they now inherited together with the *sui* who had been acquiring for the father; while the *emancipati* had, in the mean time, acquired for their own account, by which the *sui* were placed at a disadvantage,—to remedy this, the praetor decreed that, if *sui* and *emancipati* inherited together, the latter should bring into hotch potch (*conferre*) that which they had acquired since the emancipation; but that *emancipati* and *sui* should not confer with each other respectively, that is, if all were *sui* or all *emancipati*, nor even when both existed, so long as the competition of the *emancipati* did not prejudice the *sui*.

But inasmuch as by the new law a *suis* no longer acquired everything for his father, collation became a dead letter in the above case; nevertheless, although varied in two respects by imperial constitutions, it still obtains quoad every descendant who succeeds as intestate or direct testamentary heir, and who is still bound to confer whatever he had received from the deceased. When it is a question of a descendant competing with such, the rule is altered in its extension as to the testamentary succession of children, to whom it formerly applied in cases of intestacy only, for instance, as regards the *dos* and *donatio propter nuptias*; and in so far as the improved capacity of acquisition granted to the *sui* prejudiced the *emancipati*.  

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1 P. 17, 2, i & 70; P. 10, 3, 142. 2 P. 10, 2, 25; § 3-5; P. 17, 2, 52, § 14. As to the disputed extent of this right, vid. Mühlenbruch, Pand. T. 3, p. 362, n. 16. 3 P. 17, 6, 1, § 3, 4, 5; Vinn. l. c. c. 34. 4 Unterholzner, hist. doct. Jur. R. de collationibus, Alt. 1809.  

a C. 6, 20, 17; v. Tigerström, dotalr. 1 B. S. 388-398.  

b Nov. 18, 6; Thib. P. R. § 882, ad fin. et 884; Franke, a a O; contra, Rom. hist. Erbrecht. § 414-444; Mühlenbruch, Pand. T. 3, p. 352-357.
Collation is based upon the presumed desire of the parents, under which term is included all ascendants, that their children or descendents should be equally dealt with, whether ex testamento or ab intestato, or that they would have been so, failing a testament. The more remote must collate with the nearer; the grandson, not being his father's heir, must bring into hotch-potch everything which his father had received from his father, and must himself have collated. Hence, the grandson, as heir of his grandfather, must collate everything which may have been given by the grandfather to his deceased mother; and, after the death of the mother, the marriage portion which has accrued to her widower by the statutory succession.

Descendents are, however, not liable to collate with ascendants, collaterals, or third persons, nor are they obliged to collate with each other.

A descendent, not being heir, is exempt from collation; and, in like manner, if and in so far as he is not, without any fault of his own, a gainer by what he has received at the period of the deceased's death.

If the creditors of an insolvent descendent who administered to a creditor, the estate come into his place, they are bound to collate just as much as they are at liberty to demand collation from other descendents; but in cases where others, in virtue of their own right, come into the place of one who is no longer a participator, the obligation which such party was under to collate, does not devolve upon them.

Since, then, no collation takes place when parents succeed their children or collaterals each other, but only when some or all of the children have received something or other from their parents donatione inter vivos, it results that, if A die, and B during his lifetime had received 1,000 aurei to start in trade, C 2,000, and the daughter D 4,000 as a marriage portion, these various sums are to be deducted from their several shares, — board, lodging, clothing, and the like, are not brought into account, or any not alimony;
thing else which comes under the head of maintenance: thus the expense of education in professions, books, or in a trade, are considered as coming under that head, so long as they do not exceed what is necessary; and perhaps, also, the ransom of a captive son. Secondly, whatever the children may have received mortis causa, and prelegacies, are excepted; because the basis whereupon collation is founded, viz., the presumed equality of the shares, no longer exists, it being evident by the fact that the parents did not intend to observe an equality.

§ 1457.

Emancipated children collate with the sui, the peculium profectionum approved to be retained by them on emancipation, and all the proceeds of things belonging to the adventitium ordinaria.

But no children collate things in respect whereof the sui have now equal hereditary rights with the emancipati; hence not such peculia as are at the free disposal of filii familiae, and the dominion of the peculium adventitium regulare.

Peculia castrensia and quasi castrensia are likewise excepted, in so far as they be not derived from the deceased, but have been acquired by the children independently; nor even the adventitia under similar circumstances,—no, not even when they have been given to the children by the parents in virtue of a privilegium: for instance, if the father have given his son 500 aurei to fit him out for the army,—nor whatever children have received from parents in the evident intention that they should have it beforehand; for then the principle of the collation does not operate, but applies to simple presents—they must, however, be donationes simplices, not donationes ob causam; under which latter head come the cases of money advanced to start in trade, or as dos, or donatio propter nuptias, as before observed, and which must therefore be brought into hotch-potch, except the contrary be stated.

Now if a parent give one child a dos, or donatio propter nuptias, and make another a gift in order to equalize them, Justinian says—Jubemus ad similitudinem ejus, qui ante nuptias donationem, vel

1 P. 10, 1, 50; vide Thib. P. R. § 884, n. u. ibique cist.
3 Hellfeld, § 1611; contra, Müller ad Leyser, obs. 651; sed vide obs. 301, ejusd. cive.
4 C. 8, 51, 17; sed quere? Franke, a a 9, p. 1771; Päzer, p. 471.
5 C. 6, 20, 17 & 21; Basilica, L. 43 Tit. 36; Harmen. Prompt. L. 5, T. 25; Franke, l. c.
6 P. 17, 2, 52, § 8; P. 36, 1, 54; P. 37, 6, 1, § 15; C. 6, 20, 12.
7 P. 23, 3, 1; P. 5, 3, 20, pr. § 1; C. 6, 20, 20, § 1; Franke, l. c. p. 402-412.
8 C. 6, 20, 13 & 20, § 1; Müller ad Leyser, obs. 638; Franke, l. c. p. 239 241, dispute upon this matter.
9 C. 6, 20, 10, § 15; sed vide Id. § 33; Beck, de collat. bon. c. 4, § 99, ibique cist.; Wernher, pr. L. 6, obs. 317; G. Mascov. diss. de coll. bon. § 50, in opusc. p. 206; Walch, contr. p. 978, ed. 3, ibique cist.; C. F. Paelicke, diss. de don. simplici in hæred. pat. non conf. Helmost. 1762; Puf. T. 7, obs. 1711; de dote vid. F. Kämmerer, y B. Rost. et Schwerin, 1817, Nro. 7. Some jurists, however, are of opinion that all presents whatever are liable to collation.
The fact of the child being *sub potestate*, or *sui juris*, makes no difference: neither does any collation take place when the parents dispense with it, expressly or tacitly, so long as it does not infringe the *portio legitima*,\(^1\) for nothing must be done whereby that legal share of the other children may be prejudiced, except indeed in the case of an exheridition valid in law, or what the deceased may by will have given one child more than another.\(^2\)

The collation may be thus represented:

<table>
<thead>
<tr>
<th>The estate amounts to</th>
<th>5,000 aurei.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The son A has already received</td>
<td>1,000 &quot;</td>
</tr>
<tr>
<td>The son B</td>
<td>2,000 &quot;</td>
</tr>
<tr>
<td>The daughter D</td>
<td>4,000 &quot;</td>
</tr>
</tbody>
</table>

Total 12,000 "

Which gives for each child a portion

- A takes 4,000 — 1,000 = 3,000 "
- B takes 4,000 — 2,000 = 2,000 "
- D takes 4,000 — 4,000 . . .

Collation is effected at the option of the party,\(^6\) either by delivery of the thing itself, or estimation of its value at the time of the deceased’s death, deducting necessary and advantageous improvements in existence at the period of the collation.\(^7\) The **patria potestas** is **not important.** The **portio legitima** **not to be infringed.**

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\(^1\) Sed quære quod tacitum Archiv. f. civ. Praxis, 2 B. I Hft. nr. 6.

\(^2\) P. 10, 2, 39, § 1; C. 6, 20, 16; Glossa ad C. 6, 20, 20.

\(^3\) P. 37, 6, 1, § 16; C. 3, 28, 30, § 2; C. 6, 20, 20, pr.

\(^4\) Thib. P. R. § 884, ibique ult.; Leyser, spec. 411, m. 5, 6; Müller ad eundem, obs. 645.

\(^5\) Carpzov, P. 3, Const. 11, Def. 21.

\(^6\) P. 37, 6, 1, § 12; C. 6, 20, 5; contra, Müller, obs. 641; Pfizer, § 193-201; sed vide Heidlb. Jahrb. 1808, 1 st. 118, 119.

\(^7\) C. 6, 20, 1, § 11 & 12; P. 37, 6, 11 & 20; P. 37, 7, 1, § 5; C. 5, 13, 1, § 11; contra Pfizer, § 202-241, 244-253-257.
When an ascendent, direct collation not within the province of the general law.

conferent may, however, demand to retain whatever he may have received on relinquishing all claim to the inheritance. Profits and interest are to be calculated from the moment when the obligation to collate accrues; and should an heir refuse to collate, he may be deprived of his actions on the inheritance, and is exposed to legal measures. Should he, nevertheless, from circumstances not be in a position to collate at the time, he must give security that he will do so later.

§ 1460.

The question, however, arises as to in how far the deceased may direct collation to be had of things not within the general law of collation, as for instance, when that which was given proceeded from mere liberality, as the aliment which a child could draw from the produce of his property; in this case, collation may be directed, if done simultaneously with the gift. If, however, the father lie under the obligation of making this outlay, he is not at liberty to impose any conditions.

1 P. 37, 6, § 12, hence also in case he abstain, C. G. Buner opusc. T. 1, nr. 35.
2 Müller, obs. 640; Langenn et Kiri Eroert. 2 B. nr. 20; contra, Walch, jus contr. p. 403; Weisius (Pr. Zoller), ex quo tempore usura conferendor. sint petendae, Lips. 1767.
3 P. 37, 7, 5, § 1.
4 P. 37, 7, 11; P. 37, 6, § 10; C. 6, 20, 8 & 14.
5 P. 37, 6, 1, § 9, 10, 13.
6 C. 6, 20, 20, in. f.
7 Mascov. Diss. § 26; C. 2, 19, 11; contra, Lauterbach, coll. 37, 6, § 16.
TITLE XVII.

There is a diversity of opinion among commentators as to the position which the *jus pignoris* should occupy in a treatise on the civil law. The Institutes, which were framed as an elementary work for students, and as a manual for inferior judges, bestows a passing notice of it under the title, *Quibus modis re contrahitur obligatio*; thus treating it in its bearing as a contract. In the Pandects we find an entire book given to it, intituled generally, *De pignoribus et hypothecis et qualiter ea contrahuntur et de pactis eorum*, at the conclusion of the whole question of contracts; but it is notorious that no logical arrangement is adopted in the Pandects. The argument for considering it in the light of a contract is, that a contract exists between the parties that a certain thing shall be granted, or a grant understood of a right on the object pledged, as a security for an outstanding debt, and it is said to be *re*, because all those contracts are such which are perfected by the delivery of a thing; hence the *mutuum commodatum* and *depositum* are in like category. But it is not termed a real contract, because it gives a *jus in re*, for no contract gives other than *actio personalis*. Real actions accrue out of a *jus in re*, and no such right attaches on a pledge, which remains the property of the owner in the hands of another, who has a lien upon it for a contract of debt. Thus, a *mutuum* is a gratuitous loan, to be returned in *like*; a *commodatum*, the gratuitous loan of the use of an object; a *depositum* obligates the depositary gratuitously to keep safely the thing deposited; and in all these there is not necessarily a mutuality of advantage.

A *pignus*, however, is the deposit of a thing in consideration of something due; and if a contract at all, is ancillary to the loan. Almost all modern commentators agree, and Thibaut, no mean autho-

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1 I. 3, 14, 4.  
2 P. 20, E. et.  
3 Hopfner in Hein. § 763-4.  
4 P. R. § 781.
The jus pignoris, declares it is no contract, but a species of servitute on the property of another. He thus terms it from its similitude to services in which the dominion remains vested in the dominus soli; and the jus itineris, for instance, is a right upon the soil conceded by the owner, and based upon some contract; thus, under the so-called real contracts, Thibaut enumerates only the mutuum, commodatum and depositum. It certainly, then, appears that a pledge is more like a service than a contract so termed real, which it only represents in the delivery of the object. No rei vindicatio lies for a pledge by the pawnnee, for the property has never passed to him; and this was the difficulty under the old law, which gave rise to the various modes taken to remedy the insecurity to which pledges were exposed, and alluded to below. Upon these grounds the law of hypothecation has been placed in the same category with jura domini servitutis and hæreditatis in the present work, instead of under that of real contracts, thus reduced to three.

The jus pignoris, then, contain no title which treats of the law of pledges and hypotheks, although such a title is inserted both in the Pandects and in the Code. The reason of this important subject having been so slightly touched upon in the Institutes, and included under the head of contracts, may perhaps be referred to the desire of rendering this elementary work as concise as possible; but, nevertheless, considered in its capacity of a contract, it is so peculiar in its nature, that it appears at least as deserving, even as such, of a separate title as Emptyteusis. In the present work, however, it is treated as constituting the fourth of the jura realia, which have already been remarked to be jura domini, servitutis, hæreditatis, and pignoris.

Marezoll and Thibaut define the jus pignoris, in nearly the same words, to be "a real right, attaching on a thing belonging to another, granted to a creditor as security for his claim." Its nature consists in the right of the creditor to sell such property of another, and to indemnify himself out of the proceeds.

The prætorian jurisdiction developed insensibly, in the process of time, a law peculiar to the pignus; for before the edict thus defined the law of pledge, the creditor was under the necessity of resorting to various fictions in order to make his security real and available on the property of the debtor; this was usually accomplished by delivering the object to the creditor as his sole and entire property, or by conveyance of what, in English law, is

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1 P. R. § 545.  
2 Fk does not adopt the view of Thibaut because he had the honor of sitting under that great lawyer, or because he was one of his examiners, but because he thinks his arrangement in point of logic superior even to that of Trebonian.  
3 I. 3, 15; § 4.  
4 P. 20, 1.  
5 C. 8, 14.  
6 Lehrbuch der Inst. des R. R. Leipzic, 1841. This is an excellent elementary work, perhaps the best for a student to commence with; it is, however, not translated.  
7 Syst. des P. R.
DE JURE PIGNORIS.

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termed the legal estate, or by cessio sub lege remanicipationis or sub fiducia, which may be translated the equity of redemption; these fictitious modes of constituting a pledge are mentioned by Gaius, — Qui rem alicui fiduciae causa mancipio dederit, vel in jure cesserit, si eandem ipse possederit, potest usucapere anno completo et soli sit. Qua species usucapionis dicitur usuceptio, quia id, quod aliquando babuimus, recipimus per usucaponem. The usucapion of a year and a day is, in English law, one of the incidents of pledges which, in default of the payment of the interest, must be redeemed within that time, or they may be distrained or sold to satisfy the debt. Gaius continues,—Sed quum fiducia contrahitur, aut cum creditore pignoris jure, quo tutius nostra res apud eum essent, siquidem cum amico contracta est fiducia, sane omnimodo competit usu receptio; si vero cum creditore, soluta quidem pecunia omnimodo competit, nondum vero soluta, ita demum competit, si neque conduxitur eam rem a creditor debitor, neque precario rogaverit, ut eam rem possidere liceret; quo casu lucrativa usucapio competit.

Herefrom resulted the inference of a regular pledge, the delivery of the thing to the creditor, with possession and the power of sale in case necessity should require that measure for realising the obligation. Nevertheless, so long as this right of detention on the part of the creditor was not protected by an in rem actio, even as against third parties, he possessed no real, perfect, and lasting security. To remedy this defect, the praetors granted the pawnee, at least for one particular case, an actio termed serviana, which acknowledged an action of real right in the possessor of the pledge to enable him to vindicate it as against every detentor.

Item serviana et quasi serviana (quae etiam hypothecaria vocatur) ex ipsius praeors jurisdiction substantiam capiunt. Serviana autem experitur quis de rebus coloni, que pignoris jure pro mercedibus fundi ei tenentur. At a later period, this right of action was extended by the quasi servian action, whereby the law of pledge acquired a fully real character, and the possibility of making the claim on a pawn operative in law, without putting the creditor into absolute corporeal possession of the object itself accrued, and this was term a hypotheca or mortgage. Quasi serviana autem est, qua creditores pignora hypothecasve persequantur.

§ 1462.

The word pignus is derived from pugnus, the fist, and is exactly translated by the German Faustpfland, or fist pledge; whereas the word pledge is derived from the low German plichten (verpflichten), which is the same as the high German pflichten (verpflichten), to obligate an expression of far larger signification. The word pignus is used in a triple sense; sometimes it serves to indicate the contract in which the debtor delivers to the creditor

1 Gaius, Com. 2, § 59-61.  
2 I. 4, 6, § 7.  
3 Ibid.  

Affected by usucapion; by the fiduciary contract.  
The want of a real action.  
The actio serviana, which is reals given.  
The quasi servian action given as by an extension. Where no possession was given, pledges were termed hypotheka.  

Derivation of the word pignus, which has a triple signification:—
an object, to the end that he may acquire a real right therein, keep it as a security, and return it when the debt shall have been paid.

Secondly, it is used to signify the real right itself, which accrues to the creditor as a security for his claim.

Thirdly, pignus is the object itself upon which the creditor acquires such real right.

Hypotheca has, in like manner, a triple signification as a pactum, a jus, and a res.

§ 1463.

Proprie pignus dicimus, quod ad creditorem transit, says Ulpian; and in this passing to the creditor, it differs from a hypothek,— thus the same jurist continues, hypothecam cum non transit, nec possessio ad creditorum; this, then, is a mortgage. A pledge can be made available by the creditor without judicial intervention, for the remedy is in his own hands; whereas a hypothek can only be realized by means of an action, and this is the true distinction. Hence it is erroneous to suppose, as some jurists do, that a pignus applies simply to moveables, an hypotheca to immoveables; a moveable can be hypothecated, and an immoveable can be pledged according as possession is or is not given to the creditor; for pignus contrahitur non solum traditione, sed etiam nuda conventione, etsi non traditum est; here it is clear that Ulpian uses pignus in its generate sense, including both hypotheks and pledges, because Gaius says,—Pignus a pugno; quia res, quae pignori dantur, manu traduntur, unde etiam videri potest verum esse, quod quidam putant, pignus proprie rei mobilis constitui, and pignoris appellatione cæm proprie rem contineri dicitur, que simul etiam traditur creditori maxime si mobilis sit; because the possession of immoveables is not so readily transferred as that of moveables: thus Justinian continues, ut eam, quæ sine traditione nuda conventione tenetur proprie hypothecæ appellatione contineri dicitur.

§ 1464.

Hypotheca is a contract whereby one party grants to another a real right on his property, as security for a debt contracted; thus, Paulus says, contrahitur hypotheca per pactum conventum, cum quis paciscitur, ut res ejus propter aliquam obligationem sint hypothecæ nomine obligata. In like manner Isidorus tells us, though not with the same precision, hypotheca est, cum res aliqua commodatur sine depositione pignoris, pacto vel cautione sola inter-
§ 1465. Distinction between pignus and hypotheca.

Veniente. — The principal difference, then, between pignus and hypotheca consists in the actual possession remaining with the debtor; a particular object, υποθετα, is subjected or obligated to another as security for the debt; hence it follows that that especial thing is more particularly liable than anything else belonging to the debtor, and differs from a hypotheca in name only — one having, so far as the remedy by action is concerned, no advantage over the other. Inter pignus et hypothecam, quantum ad actionem hypothecariam attinet nihil interest. Nam de quâ re inter creditorem et debitorem conveniât, ut si pro debito obligata, utraque hac appellacione continetur. Inter pignus et hypothecam tantum nominis sonus differt; that is, so far as the remedy by action is concerned.

In hypothecâs, the dominion or legal estate passes to the creditor, but the usufruct or use remains with the debtor.

A hypotheca may be granted in respect of part or the whole of any obligation whatever. Res hypothecâs dari posse scintendum est, pro quacunque obligatione, sive mutua pecunia datur, sive dos, sive emptio vel venditio contrabatur, vel etiam locatio conductio, vel mandatum, . . . sed et non solvenda omnis pecunia causa verum etiam de parte ejus, et vel pro civili obligatione, vel honoraria, vel tantum naturali: it may be pure, conditional, present, or future, — et sive pura est obligatio vel in diem vel sub conditione, et sive in presenti contractu sive etiam præcedat; sed et futurae obligationes nomine dari possunt.

A hypotheca can, moreover, be constituted on account of a man's own proper obligation or on the part of another. Dare autem quis hypothecam potest, sive pro sua obligatione, sive pro alienâ.

The pignus or hypotheca, which afterwards comes into the possession of the creditor (for then, in fact, it becomes a hand pledge) also has the important peculiarity of transferring to the creditor the burden or advantage, as it may be, of possession, and the duty of due diligence.

§ 1466. Distinction between pignus and hypotheca.

Table of the various sorts of pignora.

1 P. 4, 6, § 7. 2 P. 20, 1, 5; § 13; vide et P. 20, 4, 12, pr. et § fin.; P. 4, 11, pr.; C. 8, 18, 8; Schulting, thes. controv. dec. 75, th. 3; Boehmer, diss. de div. pign. et hypoth. jure, c. 1, § 13, in Exercit. ad Pand. T. 3, p. 831; Leyser, sp. 223, med. 1.
3 P. 20, 1, 5; Marcianus. 4 P. 20, 1, 5; § 2. 5 I. H. Boehmer, de diverso pign. et hypoth. jure, Hal. 1718 (Exerc. T. 3); Gesterding, § 129-132.

VOL. II.
The jus pignoris is an accessory right.

When general.

The right of pledge being accessory in its nature is, in a great measure, dependent on the validity, defect, or conditions of the principal contract; and hence, a pledge given for a debt not due can be reclaimed.1

The jus pignoris is generale when the debtor obligates his entire property; thus the formula, “all my moveables and immovable,”2 includes past, present, and future corporeal and incorporeal property in possession or in action,3 such things however as have been acquired in the place of those alienated with the creditors’ consent4 are excepted; another presumption also is, that the debtor has excepted all tools of trade and furniture necessary to his subsistence;5 nevertheless, the creditor may distress these even if there be not otherwise wherewithal to satisfy his demand.6

The jus pignoris is otherwise speciale;7 and applies only to individual objects, and by no means to such things as the debtor may acquire in lieu thereof, except where the thing surrogated follows the conception of the ideal object, as in a universitas servorum, a flock or herd, or an open store, because exchange and variation is inseparable from such;8 but the same rule must not be applied to all universitates rerum.9

Both the general and special pledges have the same operation, even when they come into collision with each other;10 although the latter may have the preference, provided it do not prejudice the former.11

It may occasionally happen that a creditor, in addition to his general claim, has also a special one on some one particular thing contained in the integer; the consequence of which is, that he is

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1 P. 20, 1, 5; pr. as to limited pledges, P. 20, 1, 14, § 1; P. 36, 1, 59; pr. C. 8, 31, 2; P. 14, 6, 9; § 3; P. 20, 2, 2; P. 46, 3, 101, § 1; C. 4, 92, 4 & 123; vid. Weber, in d. Nat. Verb. § 107; Seuffert, Erört. einz. Lehren, 2 Abh. S. 28-9; contra, Franke, Civ. Abb. Gött. 1826, nr. 2; Hepp, in der A. L. Z. 1832, p. 482-4; Rosshirz, Zeit. 2 Hft. S. 150-4; P. 20, 1, 25, & 33; Thib. Civ. Abb. p. 323-336; Seuffert, p. 85-7; Rosshirz, l. c. § 135-7; contra, Weber, l. c. § 104; Glück, l. c. § 864.

2 Erxleben, § 144; Lauterbach, coll. L. 20, 1, § 23; cont. Glück, Pand. 18, B. S. 219-222.

3 P. 20, 1, 7, 24, § 2; C. 8, 17, 9.

4 C. 8, 26, ult.; contra, Vermehren in Arch. f. Civ. Prax. 13 B. 1 Hft. S. 29-33; sed vide Hepp. l. c. 1832, S. 512.

5 P. 20, 1, 7, 8; Vost. 20, 2, § 4; Cocceii, cod. qu. 11; Huber, prael. 20, 2, § 1; Meissner vollst. Darst. et Lehre v. Stillsch. Pf R. Leipzig. 1803, § 30; as to testamentary, vide Musset de jus. legato spec. 1, Heid. 1810.

6 Huber, l. c. 20, 1, § 24; Westphal. § 37.

7 C. 8, 17, 91; cont. Merc. pres. Schrader, de ver. in dolce, div. hypoth. in gen. et in spec. Thüb. 1818; sed vide Capil. de gen. spec. aliqua hypoth. dis. Gött. 1820; Baumbach defends the Florentine reading, L. 2, qui potiores, Jen. 1820; Rosshirz, Zeit. st. nr. 1.

8 P. 20, 1, 2; & 34; pr.; P. 20, 2, 9.

9 Thib. P. R. § 175, 784, n. 6; Bachov. 1, 5, n. 3; Vost. 20, 1, § 14; Leyser, spec. 223; m. 6; 224; m. 6; Glück, P. 18, B. S. 229-34; Zimmern in Linde Zeit. 1 B. 2 Hft. S. 49-51; Gesterding, 392-95; Bolley, verm. jur. Aufi. 1 B. nr. 19; Hoffmann, über den Einfluss allgemeiner Pfandrechte Darm. 1817, S. 68-122.

10 P. 20, 9, 2 & 7, § 1; C. 8, 18, 6; Wordenhofer, de concursu, hyp. gen. eum spec. (Oelrichs, Th. nov. vol. 1, T. 2.)

11 P. 49, 14, 47; C. 8, 14, 2; Helsh. de vir. hyp. gen. Heidelb. 1762.
compellable, if he have not contracted for the liberty to vary,1 to
distrain the special pledge first, whether the pledger himself, another
creditor secured by pledge, or some third party2 be in possession.

§ 1467. All pledges presuppose a debt or obligation on account whereof
it is given; security for which may, in addition to its being general
and special, may also be voluntary or necessary.

The pignus voluntarium3 is a constituted contract, depositum
bominis, whether by the debtor himself, or by another on his behalf,
or by last will; but the necessarium is the natural result of law, or
effected juris dispositione: the voluntary is subdivided into conven-
tionale and testamentarium, and both may be express or tacit.

The pignus conventionale expressum is founded on a contractus
pignoratitius in pledges, or pactum hypothecae in cases of hypothe-
cation, and is constituted by the debtor declaring in express words
that he grants a real charge upon a thing as a security for a debt
incurred.4 The pignus tacitum5 arises in the presumption of a
transaction, or from the implication resulting out of a special con-
tract, such as signing the document, making over the pledge, or
ceding the possession of an object to a creditor on account of his
claim.

Pignus testamentarium6 is constituted by the testator expressly
granting a right to the pledge under his hand; and it is, more-
over, tacitum when the nature of the testamentary disposition
renders such pledge presumable by implication, as by bequeathing
the annual revenue of an estate to a person, whereby he will ac-
quire a tacit testamentary pignoratitium claim upon the estate itself.

The pignus necessarium is subdivided into legale,7 or that which
the law necessarily implies, so that there is no necessity for bar-
gaining for it expressly; neither will a bargain, to the contrary,
be of avail, on which account it is said to be understood, and is
therefore also called a tacit pledge;8 and into praetorium, otherwise
termed judiciale, or that claim which the judge assigns upon the
goods of another for his own security.

1 Hofacker, T. 2, § 1191. P. 20, 1, 15, § 1; P. 20, 4, 2; C. 8, 14,
2; but hereupon is much controversy, Müller ad Leyser, obs. 424-55; Weber, Beitr. z.
Stillschw. Conv. P. R. n. 2 (vide et his at-
tempts, 1 B. S. 177, seq.); Glück, l. c.
18, B. S. 235-51; Arch. f. C. P. 9 B. 3
Hft. nr. 19; Capilk, l. c. p. 73-76; Linde,
Zeitsch. 1 B. I. Hft. 37-49; 2 Hft. S.
127-356; Schwpepe, Röm. Priv. R. a. B.
S. 312-33; Gesterding, S. 329-337.
3 P. 20, 1, 17, § 2; P. 20, 1, 3.
This latter, inasmuch as it grants a real
right without delivery, is praetorian, and an
exception.

4 Thib. P. R. § 108, 101, 786; Gester-
ding, S. 122-55; Meissner, l. c. § 2-14;
Hert de Pign. conv. tac. (op. v. 2, T. 3.)
5 C. 4, 65, 5; Weber, i. c. n. 1 (vern. 1,
B. S. 79, seq.); Donell de Pig. c. 4, Bach.
L. 1, l. c. 12, n. 4; Glück, 18, B. S.
305-6.
6 Musel, l. c. spec. 1, 2, Heidl. 1810-
11; Meissner, l. c. § 178-85; Glück, l. c.
18, B. S. 189-191, 19, B. S. 169, 76;
Hepp, l. c. Lipa. 1825, § 16.
7 This expression was invented by com-
mentators to avoid a confusion, the proper
Roman term being tacitum.
8 Prescription is by some held to confer
this right, but how can this be? A debt
must be supposed; this would be prescribed
in ten amongst presentees, and in twenty
amongst absentees, but it is pignoratitium
right in thirty years, vide Thib. P. R. §
786 & 1018, which is ten years after the
extinguishment of the debt; which is ab-
surd, i.e.
With reference to the general charge on property:—

Firstly, the fiscus, and he to whomsoever its rights have been farmed or ceded, possess a general charge or claim on account of taxes in arrear; the pignoratitian right accrues from the moment in which such taxes are imposed.1

Secondly, this right extends to the property of those who have contracted with such farmer of revenue or with his predecessor in office, although only from the date of the cession being made to such person.2

Thirdly, the legal3 and perhaps the putative wife* or their successor possess it on account of her dos, any augmentation thereto, and the donatio propter nuptias; but in respect of paraphernalia, only in as far as they consist in ready money.5 The claim is, however, only available to Christians of the orthodox confession; hence a Jewess6 does not possess it. Neither does it accrue to a bride, sponsa,7 but only to a married woman, or to one who is putatively so; and here, too, a distinction is to be drawn as to the period at which the right accrues. If the dos have been settled before marriage, the right commences with the solemnization; but in cases of augmentation and paraphernalia, with the illatio: in the case of donatio propter nuptias, with the time at which it is settled.8

Fourthly, the husband has it on the property of such as promised the dos.9

Fifthly, it accrues to children on the property of their father, when he administers property which descends to them from their maternal ascendants,10 and on that of their own proper father, as far as regards property forfeited by his contracting a second marriage;11 likewise on account of a dos, or donatio propter nuptias, which may have come to him by dotal contracts.12 Children, 13

1 P. 49, 14, 28; Id. 47; Id. 45, § 9; P. 49, 15, 5; § 3; C. 7, 73, 2, 8, 7, 73; C. 8, 19, 2; C. 4, 46, 1; C. 10, 2, 1; Meissner in a measure of a different opinion, § 109.
2 C. 8, 15, 1, 2; P. 49, 14, 6; Schröter in Linde Zschrft. 1 B. 2 Hft. p. 336-341; contra, Happeıl right of the creditor in respect of hand pledge (German), Giess. 1802, p. 179-193; Hepp. l. c. § 5; Wening, C. R. 1 vol. p. 314.
3 C. 5, 12, 50; C. 5, 13, 1, § 1; Nov. 97, 2.
4 Glück, l. c. seq. B. S. 107-111, 130-142.
5 C. 5, 14, 11; C. 5, 3, 19; C. 5, 12, 29; Nov. 109, 1; Emminghaus, de pig. leg. quod uxori propter bon. para. in bon. mariti competet, Jen. 1788; Meissner, § 163-8.
6 Nov. 109, 1; Puf. T. 1, ob. 208; v. Tigerström, dotal. 2 vol. 394-400; Struben, 3 B. 68 Bed.; contra, Koch; Med. 1 B. n. 7; Dabelow, Concur. p. 245-9; Gesterding, Nachf. 19 vol. p. 111-120.
7 Hofacker, 2, § 118; vid. et Dabelow, § 243-5; Hepp. l. c. § 35-40; Glück, l. c. 19, B. S. 93-106; cont. v. Tigerström, l. c. 356-369, 377-403.
8 Hepp. l. c. § 7.
9 C. 5, 15, 1, § 1; Meissner, § 140-8.
10 Hellfeld, de divers. pig. jur. lib. in par. bon. comp. (in opusc.); Müller ad Leyser, obs. 458; Meissner, § 123-159, such is the generally received opinion; sed vide contra, Lühr, im Arch. f. C. F. P. 9 B. 1 Hft. nr. 4, 10 B. 3 Hft. nr. 15; Pfeiffer, prakt. Auf. 1 B. nr. 5.
11 Nov. 98; Maresoli in Linde Zschrft. 3 B. 1 Hft. S. 84-91.
12 C. 3, 9, 6, § 2, 3; Id. 8, § 4.
moreover, have a similar claim on the property of their *stepfather*, if the mother contract a second marriage without previously presenting the guardianship accounts,¹ because the property comes under his administration.

Sixthly, pupils, minors, madmen, and their heirs, have a pignoratian claim on the property of their tutors and protutors, not being the magistrate, on account of claims arising out of their administration, which date from the moment of the transfer or voluntary assumption of the guardianship.²

Seventhly, the Church has a tacit hypothek on the property of its emphyteuta, where he has dilapidated the property held by that tenure, dating from the period of waste committed.

Eighthly, the tacit hypothek on the property of a widow entering a second time into wedlock, contrary to a testamentary prohibition, accrues in favor of those who, under such circumstances, have a claim to the subject-matter in her place.³

§ 1469.

Thibaut, following the usual classification, adds a paragraph in his system of the law of the Pandects, intituled Miscellaneous;⁴ but remarks that this hypothek is in its origin more strictly special. He places under that head the claims of legatees on the property which the heir, who is burthened with the payment of legacies, has received from the testator or on that of many, *pro rata*,⁵ should there be more than one; it, therefore, makes no difference whether such person be or be not universal heir. This hypothek vests immediately after the *cessio diei*,⁶ and is effective even against third parties.⁷

Fidei commissary heirs enjoy it in as large a sense as legatees;⁸ the same applies in the *fidei commissum ejus quod supererit*¹⁰ when this confers a vested interest.¹¹

1. C. 8, 15, 6.
2. C. 5, 13, 1; § 1; C. 5, 30, 5; C. 5, 35; 2; C. 5, 37, 20; C. 5, 70, ult. 5; C. 8, 15, 6; Nov. 22, 40; Nov. 118, 5; Müller ad Leyser, obs. 460; Glück, l. c. 19, B. S. 154-9; Brokes, de lac. pup. hyp. per mutuum non expir. Jen. 1750; Meissner, l. c. § 112, 122; Hepp. l. c. § 6; contra as regards protutors, Bingo an pupilis in bon. eor. qui pro tut. gesserunt hyp. tac. comp. Heidelb. 1816; as to German practice vid. Hofacker, T. 2, § 1183; Dabelow, l. c. § 217-8, 234-5, 527, n. 5; Müller, l. c. obs. 464; Hellfeld, J. F. § 1089; Biener, opusc. T. 2, nr. 733; Glück, l. c. 19, B. S. 106-8.
3. Nov. 7, 3, § 2; Hepp. l. c. § 8; Id. in Arch. f. C. P. 10 B. 2 Hft. S. 272-4; vid. Buri ed Runde, 2, B. S. 248, in Thib. P. R. § 789, n. b; as to extension to all emphyteutical contracts, contra Meissner, § 198.
4. Thibaut's view is founded on Nov. 22.
5. Glück, l. c. S. 164; Vermehren, Arch. f. C. P. 13 B. 1 Hft. S. 37-42; vide dispute between Marezoll in Lohr. Mag. 4. B. 2, 3 Hft. S. 221-3 et in Linde Zachst. 6. B. 2 Hft. nr. 8; et Kämmerer, id. nr. 7.
7. C. 6, 43, 1; Meissner, § 182, 3; contra, Glück, l. c. 19, B. S. 176-196; sed vide Arch. f. C. P. 5 B. 2 Hft. S. 213-23; Gesterding, Nachf. 3 B. S. 197-208.
8. Thib. l. c. 941; Meissner, § 185; Musset, de jur. pig. leg. spec. 2, Heidelb. 1811; Hepp. diss. cit. § 13.
9. Nov. 108, 2; Meissner, § 181; contra, Faber, error. pragm. Dec. 48, Er. 9.
10. C. 6, 43, 1; Lohr. Magaz. 4. B. a St. S. 85-100; Archiv. l. c. p. 208, 212; contra, Gmelin, v. d. Rangord. J. St. 4, c. § 2; Meissner, § 178-181.
11. Thib. l. c. § 790 & 927.
The jus pignoris speciale.

As applicable to money laid out in building, or for the purchase of a militia; but for that of an immovable, or of ships, by agreement only; but in the case of a praedium, it accrues on the produce;

Thibaut concludes by observing, that, when these have been mentioned, there are no other legal or tacit hypotheks.\(^1\)

Firstly, such as lend,\(^6\) with knowledge of the architect,\(^3\) money for the re-erection of a building which has been destroyed,\(^4\) acquire a special legal lien on such superstructure, and upon the ground whereupon it has been constructed,\(^6\) from the day that the advance has been used for such purpose.\(^6\) Such as have bargained for, or otherwise\(^7\) possess, a pignoratitial right on a house or other object on account of what they have contributed to its restoration in money, labor, or material.\(^8\)

Secondly, whoso actively contributes something or advances money for the purchase of a militia,\(^9\) acquires a legal pignoratitial right on the employ;\(^10\) but he who advances part of the price of an immovable purchase, or gives credit for that of a landed estate,\(^11\) or the construction of a house, acquires a mere privileged pignoratitial claim on agreement having been made that he should have one;\(^10\) and the same rule applies to ships.\(^13\)

Thirdly, the law gives the landlord of a farm, praedium rusticum or urbanum,\(^14\) a charge in default of special agreement,— in the first case, a mortgage on the produce, dating from the moment of harvesting;\(^15\) and in the latter case, on the furniture, &c. of the tenant destined for his constant use,\(^16\) dating from the moment of

\(^1\) Harprecht, trutinax x. pig. sac. vel in dubius spuriorum vel summe dubiorum, Tüb. 1705; Lauterbach, coll. L. 20, T. 2, § 126; vide et Meissner, § 189-202.

\(^2\) P. 20, 2, 1; Puf. 2, obs. 170; G. L. Boehmer, de merc. et de opific. in conc. cred. (elect. T. 1, n. 12) § 11, 12; Walch, de pac. in refect. ed. cred. (opusc. V. 3) § 6; Meissner, l. c. § 77; Thib. P. R. § 788, ibid. cit.; Glück, l. c. 19, B. S. 1-46; Schwepp, Mag. 1 B. 1 St. nr. vi.

\(^3\) Frister, de priv. cred. person. Goett. 1804. c. 2, § 8; Meissner, l. c. § 79-80; contra, Walch, 2, § 7.

\(^4\) Schulting, Th. contr. Dec. 76, n. 7; Meissner, § 78.

\(^5\) Nov. 97, 3; Walch, 2, § 4; Frister, l. c.; Hepp, ad § 786, n. m, cit. § 10, im Archiv. J. C. P. 10 B. 2 Hft. S. 274-6.

\(^6\) P. 20, 2, 5 & 6; vide Thib. l. c. § 785, ibique citat. de priv. exig. Cuj. ad L. 7, qui pot. in pig.; Carpzov, P. 1, c. 28, Def. 105; Lauterbach, de priv. cred. per simpl. § 27, 28; Erzleben, de jur. p. § 83 & 235; Dabelow, on Conc. 2 ed. p. 225-9; Meissner, § 84; Schwepp, Mag. 1, St. nr. 6; Newhathel et Zimmern Untern. vol. 1, p. 283-93; Tulleken, de pig. et hyp. tac. Lugd. Bot. p. 28-42.

\(^7\) P. 20, 4, 5, 6; Beust, de jur. praelati non cred. f. 1, c. 29.

\(^8\) Under this head belong legally saleable and inheritable court offices (charges de la court), the right of practising in the late palace court, or a commission in the army or gentlemen pensioners, corresponds in the present day to the Roman or Byzantine militia.

\(^9\) C. 8, 14, ult.; Nov. 53, 5; Nov. 97, 4; Koch, de per. ad emend. cred. ges. 1780, § 14; contra inter alios multitus, Dabelow, l. c. p. 249-51; Hofacker, T. 2, § 133.


\(^11\) P. 14, 4, 5, § 17; P. 50, 16, 66; C. 8, 14, 17; C. 8, 18, 7; Nov. 97, 3; Koch, l. c. § 13; Gmelin, l. c. § 4, 5, 6; Frister, l. c. 2, § 10.

\(^12\) Nov. 97, 3; Gmelin, l. c.

\(^13\) Bachov. L. 1, l. c. 12, n. 12; Glück, P. 18 vol. p. 403-448.

\(^14\) The former term is applied to farms for the cultivation of produce; the latter, to a dwelling-house; P. 20, 2, 3 & 4; Weber, vern. 1, v. ii. n. 1, § 1; Meissner, l. c. § 71-3.

\(^15\) P. 20, 2, 7, pr.; P. 19, 2, 24, § 1 & 53; C. 4, 65; 51; Weber, § 2, sq.; Meissner, § 71-3.

\(^16\) P. 20, 1, 32, in fin.; P. 20, 2, 7, § 1, this does not extend to obligations; Negri- ziantius, P. 2, m. 4, n. 152, and in the case of open stores, only on the entirety; P. 20, 1, 34, pr. 20, 4, 21, § 1; Puf. T. 2, obs. 29; Meissner, § 63.
its illation,¹ in respect of claims arising out of the contract.² Now, if the lessee underlet, the produce clearly remains mortgaged to the first hirer; but to the first lessee or landlord, the furniture and things brought in illata by the under-tenant, to the amount of such sub-rent only.³ Further, an under-tenant possesses a similar claim against an under-tenant,⁴ but not an under-lesser against an under-lesser;⁵ but this right of mortgage cannot be extended to other persons.⁶

Fourthly, pupils and minors possess a legal or tacit mortgage⁷ on all things really bought with their money, and in cases where the tutor or curator was himself the purchaser, even the actio dominii.⁸

Fifthly, ground landlords to whom ground rent is due;⁹ and

Sixthly, the fiscus in respect of property acquired by those who have had dealings with that department after contract made. Thibaut denies the right of the two last; sed quære?¹⁰

§ 1470.

The missio in bona,¹¹ by the prætor, confers a jus pignoris prætorium. This occurs under various circumstances, the principal of which are as follow:

It granted contumaciam coercenda causa, that is to say, when the adverse party in a suit contumaciously fails to appear, or is absent.¹² This has some similarity to the distringa to compel appearance issued in England, when the defendant cannot be found.

In cases where the defendant declined to give the plaintiff cautio de damno infecto ex primo decreto.

When a plaintiff is disabled from some cause from bringing his action within the proper time, and by the delay is exposed to the risk of losing his claims; thus, for instance, when a legacy is left sub conditione or in diem, termed immissio legatorum servandorum causa,¹³ and there is a probability of the heir who refuses, or is unable to give security, dissipating it before the period of payment

and in cases of under lease; of the property of pupils and minors; of ground landlords; of contractors with the fiscus.

The jus pignoria prætorium.

Contumaciae coercenda causa.

Pro cautione de damno infecto.

Legatorum servandorum causa.

¹ P. 20, 2, 2, 3, 4, 5, 7, 7, 9, 9; P. 11, 7, 14, § 1; P. 13, 7, 23, § 5; C. 8, 15, 7; C. 4, 65, 5; Voitnage, de tac. pig. loc. Arg. 1757; Hepp. l. c. § 11.
² P. 20, 2, 2; Struben, 3 B. 12 Bed.; Meissner, § 62.
³ P. 19, 2, 24, § 1; P. 13, 7, 17, § 5; Voot. 20, 2, § 7; Puf. T. 2, obs. 28; contra, Perez, in c. 8, 15, n. 3; Erxleben, § 90.
⁴ Vid. supra, n. 3.
⁵ P. 19, 2, 24, § 1; id. 53; P. 20, 2, 7, pr.; Meissner, l. c.
⁶ Meissner, c. 74, 6; contra, Gisler, de hyp. tac. dom. ex causa cunempt. Erl. 1778.
⁷ P. 20, 2, 7; P. 27, 9, 3; P. 26, 9, 2; C. 7, 8, 6; Meissner, § 85-91; Glück, l. c. 19 B. S. 47-58.
⁸ Thib. P. R. § 707.
⁹ Westphal. § 101; Müller ad Leyser, obs. 448; Gottschalk, disc. for. nr. 16; Glück, l. c. 19 B. 58-61.
¹⁰ Thib. l. c. § 788, 803.
¹¹ P. 13, 7, 26, non est mirum si ex quacunque causa magistratus in possessionem aliquam miserit pignus constitui, C. 8, 23, 1; Kistner, de ritu pig. cap. ap. vel. Rom. diss. 1, 2, Lipe. 1741-2; Alep. de pig. præt. Hiedel. 1739; Schroeder, op. de nat. et eff. pig. præt. et jud. Marb. 1751; Happel, die Rechte d. Glaub. in Ausch. der Faus. pf. Geis. 1803, S. 31-53, 63-74; Höpff. in Hein. § 824; Thib. l. c. § 734, 787.
¹² Thib. l. 1, 24, § 3.
¹³ C. 6, 54, 31, 5, 6.
can arrive; or if the debtor is a prisoner of war in a foreign country, and therefore out of the jurisdiction of the court.

In the case of a widow who obtains B. P. ventris nomine.¹

When a judgment in a personal action has been obtained against a defendant, who either cannot or will not conform to the sentence; under such circumstances, he is deprived of so much of his goods as will represent the claim, these remain in the plaintiff's possession, and may be sold by him after the expiry of two months by public auction, and the surplus, if any, be paid back to him; this is termed the jus pignoris pratorium judicati exequendi causa, or pignus judiciale, to distinguish it from the pignus pratorium stricte dictum.²

When many immissiones pratoriae concur, no priority is allowed³ to one over the other.

§ 1471.

A right of pledge may be privileged, in that it has a priority over other public and elder claims of like nature,—in which case, it is termed pignus privilegiatum, qualificatum, or cum jure praetationis conjunctum. If no such right of priority exist, it is termed simplex.

The pignus simplex having, by its very nature, no inherent priority, it follows that it must acquire such by some external circumstance, such as public authority or seniority; but the privileged pignus possesses this priority intrinsically over those which are older in date, or possess the sanction of public authority.

If the produce of the pledge be sufficient, ordinary creditors, termed private, come in according to the order of their seniority (the pignus pratorium having, as has been already observed, no priority by reason of its seniority);¹ nor is this priority confined to legal hypothecations only, it equally applies to certain conventional ones.

Firstly, the fiscus has a priority of claim on the property of the subject, on account of taxes in arrear.⁵

Secondly, the creditor of a sum lent for the purchase of an hereditary government office legally saleable, and termed a militia, provided he bargain for his priority at the time of the loan.⁶

Thirdly, the military chest has a priority of claim on the property of the primipilus or primipilaris cohortis, the paymaster-general or chief of the commissariat department, on account of priority of the fiscus:

On the militia:

on the property of the primipilus;

¹ Höpf. in Hein. § 656; P. 37, 9, 7; pr. "The term pignus judiciale does not occur in juridical Roman authors; it is termed pignus quod in causa judicati capitur."²

² Hopfner in Hein. 716, 718, L. C.; Schroeder, de natura et effect. pign. praet. atque judiciales, Marb. 1751, § 165, seq.; Erxleben, tr. cit. p. 74, seq.; attachment will not constitute a pignus pratorium,—


⁴ C. 8, 18, 3; P. 42, 5, 12.

⁵ C. 4, 46, 4; Walch, controv. p. 797, ed. 3.

⁶ Eisenhardt, de jur. ejus qui ad militiam emend. creditid in concursu creditorum opusc. num. 10, Hopfner in Hein. § 719.
the provisions not being properly distributed; on which account, the fiscus has been obliged to become responsible, further upon the property of the contractors gained by the contract.¹

Fourthly, the hypothecarius, for money advanced for the rebuilding or repair of a building.

Fifthly, the hypothecarius who, with an express stipulation for priority, has lent money for the purchase of an immoveable or of a ship.²

Sixthly, the hypothecarius of a thing sold, with the express reservation of a prior claim upon it, until payment of the price of it.

Seventhly, pupils, in respect of things bought with their money.³

Eighthly, the wife, in respect of the dos; and her children, only when the stepmother or second wife of their own father⁴ demands back her dos.⁵

Ninthly, according to Thibaut's opinion, all the persons mentioned in a former part of this work.⁶

These privileged creditors precede the simple ones; and when they come into collision with each other, their priority is to be settled by seniority of date, when neither have any especial privilege of priority.

Upon this question, there is much difference of opinion. Thibaut⁷ gives the sequence as follows:—He places the fiscus first; next, those who lent money, as above, for the purchase of a militia; who, if he has, however, not reserved his priority, cedes to the wife on account of her dos;⁸ otherwise, she comes into the third place, together with those who have lent money for the purchase of a ship, or repair of a building, thing, &c.⁹

As to other privileged hypothecators,—if none can assert some particular privilege, the priority is ruled by the principles of the common law on such matters.

§ 1472.

The jus pignoris may be either publicum or quasi publicum, according as it is constituted in court, or before three unimpeachable male witnesses at least. A public charge must be effected in court by the pawnor or hypothecator himself in person, or by some one specially empowered by him in that behalf, together with the

¹ Thibaut, l. c. § 803, says that the wife of the primipilus, not being a paymaster or commissary, is preceded by the fiscus as a co-debtor of such primipilus. As to the contractors, he denies the privilege, but says that the fiscus has a claim in virtue of a sort of prior date. Quære distinction?

² § 1480, h. op.
³ P. 205, 4, 7, pr.; § 1480, h. op.
⁴ Thib. l. c. § 803; contra, Meissner, § 172.
⁵ Nov. 91, 1; C. 8, 18, 12, § 1; vid. Thib. l. c. n. d. ibique cìtt.
⁶ § 1480, h. op.
⁷ l. c. § 834, remarks that the theories vary, citing Bachov. 4, 145; Erxleben, § 230; Hofacker, T. 2, § 1213; Hölzner, com. § 715; Dabelow, p. 301-5, 620-1; Meissner, § 174-5; Bucholz, qui poterit in pig. Regemont. 1829; v. Tigerström, Dotalr. 2 B. p. 369-393.
⁸ Thib. § 801.
⁹ Nov. 91, 4.
¹⁰ C. 8, 18, 13; Nov. 97, 3, 4.
¹¹ This is not so in Germany, where the judex rei sitae only has this power, Erxleben, tract. cit. p. 46; sed vide in extenso, Boley's doctrine of public sub-pledges, according to Roman, German, and Württemberg law (German); Tüb. 1802.
express declaration of the grant of the charge; but, inasmuch as none can thus create or improve a charge on the property of another without the express consent of the pawnor or hypothecator, a confirmation of a charge said to exist, obtained from the court by the creditor ex parte, will be of none effect as a jus pignoris publicum;¹ nay, further, a private charge does not become a public one even by the subsequent admission of the debtor himself.² But if the debtor, or debtor and creditor appear, and having agreed to receive the confirmation, such hypothek is converted into a public one.³

In order to convert a pignas publicum, constituted before witnesses, into one absolutely publicum, it is requisite that these be males, that their character be unimpeachable, that they be three in number, and that they subscribe the usual instrument.⁴

A well-known constitution of Leo⁵ of 469, gives public charges of this nature a priority over private ones; it runs as follows:—Scripturas qua sæpe adsolent a quibusdam secrete fieri interventibus amicis necne, transigendi, vel pasciscendi, seu fænerandi, vel societatis coëndæ gratia, seu de aliis quibusdam causis, vel contractibus conficiuntur (qua ioniææ graece adpellantur) sive tota series earum manu contrabentium, vel notarii, vel alterius cujuslibet scripta fuerit, ipsorum tamen habeant subscrip-

siones sive testibus adhibitis sive non: licet conditionales sint (quos vulgo tabularios adpellant.) sive non, quasi publice conscriptas, si personalis actio exerceatur, suum robur habere (decernimus). Sis autem jus pignoris vel hypothecæ ex hujusmodi instrumentis vindicaret quis sibi contenderit, cum qui instrumenta publice conficiat, praænt (decernimus) etiamsi posterior is continentur; nisi forte probata atque integra opinionis trium, vel amplius virorum subscripiones eisdem idiochiris instrumentis continentur, tunc enim quasi publice confecta accipiantur.

The history of this constitution is, that before the reign of Leo all hypotheks had execution according to their respective dates, whether conventional, testamentary, legal, or praetorian, the privileged alone excepted. The fact of priority was a question of evidence to be proved by witnesses or documents; but a simple private instrument was of none effect as against a third party, because a fraudulent hypothecator had it in his power to make conclusively some other hypothek deed dated before the first, which is not so easily effected in the case of a document made before a public authority or before three witnesses, both having in some

¹ Puf. 2, obs. 160.
² Puf. 3, obs. 197; Schweder, dim. infra cit. § 12, p. 334.
³ Puf. 4, obs. 176; sed vide Schweder, dim. de auct. publ. ad pig. const. necessaria, § 5, in collect. dim. vol. 2; Gimelin von der Ordnung der Gläubiger, c. 4, § 123; I. F. Wahl, dim. de val. et effect. reser-

vationis dominii vel hypothecæ in secur. resid. pret. Goett. 1753, sect. 1, § 14, who maintain unconditionally the reverse.
⁴ Mevius, pt. 7, dec. 235; Schweder, L c. § 23, p. 356; Müller ad Leyser, obs. 797, as to notarial instruments, vide Schweder, l. c. p. 355.
⁵ C. 8, 18, 11.
measure the advantage of publicity, in addition to a perfect proof of the date at which the instrument was made.

Höpfner attaches great importance to the fact of publicity, because the simple formality ought not to give priority when another has really lent money upon such security; nevertheless, this appears upon all fours with wills, if the mortgagee do not conform to the law made for his protection, he is punished by loss of his priority.

§ 1473.

The pactum antichreticum is peculiar in this, that it by its nature assigns the produce as the word implies, by way of interest to the pledgee, termed in English law a Welsh mortgage.

The pactum antichreses is taken to imply, in all cases of doubt, a pignoratian contract; which, therefore, by its very essence, transfers all burdens from the usufructuary to the creditor, and in so far partakes of its incidents.

This contract must not, however, be made a means of obtaining usurious interest, whether its proceeds consist in civil or in such natural products as are calculated on an average of years.

It is, nevertheless, a rule that the creditor is not chargeable with the value of such fruits as he may neglect to gather.

An antichresis tacita accrues to a creditor who has lent his debtor a capital sum without interest, and permits him, by implication, to retain so much produce as will represent the legal interest, although no antichretic contract have expressly intervened; he must, moreover, return the object to the debtor on the extinguishment of his claim, and, if he should sell the pledge, hand over the surplus which may remain over and above the amount of such claim.

§ 1474.

The jus pignoris must be regarded in four points of view,— firstly, as concerns the relation of the debtor to the creditor; secondly, of the creditor to the debtor; thirdly, as regards the four points of view in which the jus pignoris may be regarded.

1 Ad Hein. § 716, n. 5; citing I. H. Boehmer, diss. de prærogat. hypoth. publ. c. 1, § 12; in Exercit. ad Pand. T. 3; Westphal. vom Pfandrecht, § 167; Sator, diss. de pig. prærog. § 13; Hofacker, diss. de prærogativa pig. publ. Tübing. 1780; Heilfeld, de prærog. hypoth. publ. tac. seque ac expresse competente in opus. J. C. Soeldner, de hypoth. tac. judici alibus, § 18; Coceii, de antich. (Exerc. V. 3; n. 29); Lauterbach, de jur. antich. Tübing. 1644; P. 13, 7, 11; Westphal. § 66; Puf. 2, obs. 169; Thib. l. c. § 799, n. 9, ibique cit.

2 C. 4, 13, 14 & 17; Puf. 2, obs. 76 & 3, obs. 57; S. L. Boehmer, Rechts, i. B. n. 71; Diverse Emminghaus ad Coce. 13, § 5; Erzeuigen, § 112; Happel, die Rechte, d. Gl. in Aus d. Faustpf. S. 229-283; Schneiden. de usur. antich. etc. Wiseb. 1784, § 57-75; Seuffert Erört. eins. lehr. 2, Abtb. S. 104-6; Coote on Mortg. ch. 2, p. 8.

3 P. 13, 7, 33; P. 20, 2, 11, § 13; Cuj. obs. 3, 35; Glück, l. c. 14, B. S. 104-118.

4 Leyser, Sp. 157, m. 7-9.

5 Engelbrecht, de cred. antich. ad fruct. percip. non oblig. Lips. 1724.

6 Thib. l. c. § 9, 799; P. 20, 2, 8; Noodt, de fem. et usur. 2, 9, contra, Vinnius, Q. S. 2, 7; Happel, l. c. p. 230-41; Glück, com. 14 B. p. 50-7.

7 C. 4, 32, 14 & 17.
rights of several hypothecarii respectively among themselves; and fourthly, as to those of hypothecarii, as against third persons. The first may be treated in conjunction with the second, since the rights and obligations of the creditor naturally include those of the debtor; and for like reason, the fourth also.

The creditor’s charge extends over the entire object impounded until it be wholly discharged, for which purpose he may proceed to sale. In the case of the pledge, properly so-called, the civil and natural possession, together with all the rights incidental thereto, is at once transferred to the creditor; hence, should he suffer eviction and be ousted of his possession through some inherent defect in the contract, by which a pledge has been granted him, he can enforce the grant of a corresponding and fresh charge, together with indemnity for damage accruing to him by the fault of the debtor or otherwise; neither is he even affected by the casus fortuitus or mere accident, inasmuch as the object remains the property of the debtor,—for which reason he has also a lien for necessary expenses laid out upon the object, and even, as has been seen, for beneficial improvements, if moderate. Moreover, he can subpignorate or under-pledge his right but not the object himself; and can exercise his right of retention for a claim for which account the object has not been pledged to him; an anomaly apparently irreconcilable with sound legal logic, the reconcilement of which has, nevertheless, been attempted by some authors.

§ 1475.

We now come to the rights of the pledgee,—when the pledge is sold, and there are various claims upon the fund produced by the sale, the leading distinctions on this head are the following:

In the first place, those creditors who possess privileged debts enjoy a right of priority of payment in virtue of a tacit prior pledge; and here it must be remarked, that, as pledging constitutes a claim only without passing the property in the object away from the original owner, the express pawnee or holder of the pledge has, in fact, no lien at all in virtue of his possession: thus the fiscus possesses a tacit prior claim on the property of all subjects on account of taxes due; when, then, the pawnee who holds plate in pawn proceeds to distrain, he discovers that the pawnor is indebted to the fiscus, which, in virtue of its prior and

1 P. 21, 2, 65; C. 2, 19, 3.
2 Thib. P. R. § 208.
3 P. 13, 7, 29, pr.; Id. 31, 32.
4 P. 13, 7, 9, pr.; Id. 31, 32, & 36, pr.
5 C. 8, 14, 5, 6, & 9; P. 13, 7, 43, § 1.
6 P. 13, 7, 8, pr. & 25; C. 8, 14, 6; Leyerer, spec. 156; Rivinus, de deb. delicato in cont. fs. indicio, Velreb. 1743.
7 C. 8, 24, 3, 2; Gmelin, l. c. § 63; Westphal. § 142-4; as to P. 13, 7, 40, § 2, comp. P. 20, 1, 73, § 2, and Hepp. in Arch. f. c.; P. 13, B. 3 Hfl. n. 28, and Id. in d. A. L. Z. 1832, S. 493, 494, &c. Arch. f. c.; P. 15 B. 1 Hfl. n. 4.
8 P. 13, 7, 8, § 5; C. 4, 33, 22; C. 8, 27, § 1.
9 Hepp. l. c. 1832, S. 204; C. 4, 35, 4; de quo vide Gesterding, S. 59-62.
10 Story, Bail, § 312; Domat. B. 3, t. 1, § 5, per tot. Pothier de Nant. n. 26; Pand. lib. 20, t. 4, per tot.
privileged claim, steps in and pays itself first out of the proceeds; and if there be any other creditors who are on all fours with the fiscus, they will take together with it; but otherwise in their order of rotation, yet always before the holder, pari passu, according to their rank and degree.

Secondly, those pignoratitian creditors who have, as such, a specific title to the thing, take according to the priority of their respective titles in point of time, except, indeed, some peculiar circumstances intervene to vary the rule of qui prior est tempore, potior est jure; thus, when equally privileged or simple gagees collide, it is a common rule of law, that he who has the best proof of his title shall precede those whose claim is less perfect; hence pignora publica and quasi publica will have the preference over those who can adduce no such legal proof.

A private pledge may be converted into a public one; the consent or ratihabito of the pledger is, however, in all cases presumed.

The public credit does not, however, go the length of placing a privileged gage before the private one of one not so privileged; nor of placing an especially privileged one before one not so especially privileged; nor a simple before a privileged one. But the rule is valid not in the competition of simple pledges only, but also in that of those equally privileged as respects each other; notwithstanding which, this does not extend, so far as regards other creditors, to a testamentary pledge constituted before a public authority, or before three witness at least.

Thirdly, if the pledge be for the joint benefit of several creditors, or in solidum, each of them is entitled to share equally with the other, pro rata debitorum, so long as the one be not in exclusive possession of the object; and that is considered the elder, which is granted as a security for a claim coming due before another.

Fourthly, if the object has been pledged severally to two creditors without any communication with each other, one of whom has obtained the possession, he is entitled to the preference according to possession; following the maxim,—In pari causd possessor potior haberi debet; and in æquali jure melior est condition possidentis.

Fifthly, it is a common law rule, that the object is distributable in proportion to the greater amount of the claim, under the proviso applicable to all sorts of gages, that if a private novation have taken place, whereby a new obligation is substituted in

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1 Poth. Pand. 20, 4, § 1.
2 Thib. P. P. § 805, ibique cit.; et vide C. 8, 18, 11, & 12; Nov. 97, 3, 46 et § 1472, h. op.
3 Puf. 1 obs. 207; Id. 2 obs. 160.
4 Thib. l. c. § 805, n. n.
5 Bolley, § 121.
6 P. 20, 11, 7; P. 43, 321, 5, § 1.
7 Thib. 20, 4, 13.
8 P. 50, 177, 128.
9 P. 20, 4, 11, pr. 12, § 2, 16; C. 8, 18, 8; v. Bülow, Abh. Bruns. 1817, p. 133-54; Hepp. ex quo temp. hypoth. bona debitoris officiat. Lips. 1825.
the place of the original one upon the old security, the creation of such pledge or right shall be held to date from the first, and not from the new grant of the claim, according to the extent which it originally possessed.¹ Praetorian pledges, it has been seen,² are excepted, and go contemporaneously with each other, irrespective of the date of immissio in bona granted.

Sixthly, legatees in that capacity have a prior claim on a testamentary or legal gage in respect of all such as were so created before the death of the testator or deceased. But as they regard each other and later creditors, they take their place according to the common rules.³

Such are the general leading rules to be observed in the distribution of a fund produced on the sale of a pledge, and may be summed up most readily according to the order to be found noted in the margin:—

Firstly, privileged creditors.

Secondly, equally specific co-privileged claimants in order of time.

Thirdly, creditors severally according to possession.

Fifthly, claimants according to amount.

Sixthly, testamentary claimants.

Thus the creditor who possesses a superior right or privilege will be entitled to maintain it, and to receive compensation in full out of the fund, before the creditor who holds under a mere contract of pledge from the debtor; and in the next place, if the thing is pledged or sold to one and the same creditors for several debts, and the pledge when sold be insufficient to satisfy them all, the proceeds of the sale are applicable, proportionately, to extinguish all the debts, pro tanto.*

Thibaut⁵ terms these priority creditors, or creditors of creditors, separatists; his excellent and exact remarks are deeply logical, and conceived in very concise and difficult language, but are of the above substance.

A right of gage is older which has been granted at a prior period to another; thus, if such right be conditionally or unconditionally granted for a certain debt, the creation of the claim dates from the day the condition came into existence, save the condition be such as was generally capable of being withdrawn.⁶

¹ P. 20, 4, 3, pr. 12, § 5.
² § 1470, h. op.; P. 36, 4, 5, § 3; P. 30, 2, 15, § 15; P. 42, 5, 12; Voet. 20, 4, § 28; Happel v. Recht der Glaubiger in Aris. der Faust Pfänder, p. 44, seq.
³ C. 6, 50, ult. § 5; Meissner, § 186-88; Bolley, § 121.
⁴ ¹ Domat. B. 3, 1, § 5, per tot.; Id. 3, 1, § 1, art. 13, 14; Id. § 3; Hein. P. P. 4, 20, 4, § 31-36; Ayliffe, P. B. 4, t. 18, p. 539; Poth. P. 2 & 4, per tot.
⁶ Thib. l. c. § 126, § 806; P. 20, 4, 9, § 1, 2; Id. 11, § 2; Gesterding, p. 82-88, 248-61; Glück, P. 18, B. S. 214-19, 19, B. S. 233-246; Arch. f. C. P. 4, B. i Hif. nr. vii. 3 Hif. nr. xxviii.; Bolley, l. c. § 110-13; contra, Hepp. l. c. § 21; et Id. in d. A. L. Z. 1832, S. 494-5, 512-24.
§ 1476.

Having seen the rights of pignoratitian creditors as against each other, it now remains to review their rights over against common personal creditors, in cases of bankruptcy or of insolvency. These are, by the later Roman law, ranged in five classes, of which the preceding one always excludes that next succeeding.

In the first class are—
1. Funeral expenses.
3. The fiscus for arrears.

In the second and third classes—
Privileged and simple hypothecars (hypothecarii).

In the fourth—
1. The state.
2. The prince.
3. Holders of bottomry bonds.
4. Loans for restoration of buildings.
5. The wife and bride.
6. Claims against guardians.
7. Payers of other creditors in this class.
8. Gratuitous loans of money.

The fifth class—
1. Residuaries.
2. Exchequer penalties.

§ 1477.

The first class, then, contains eight descriptions of claims.

Firstly, funeral expenses: this term includes all costs for decently and respectfully burying the common debtor, or person whom he himself is under the obligation of burying. But the expense must, in both cases, be made before the formal fiat of bankruptcy; and in the latter, before the death of the common debtor.

Secondly, persons whose whole existence, in board and wages, depends upon their service in the employ of the common debtor; and in whatever they have to claim for their service by contract made before the formal fiat.
Thirdly, the fiscus comes in for taxes in arrear\(^1\) and real dues which have become payable after the concursus precede all other creditors.\(^2\)

In this class, then, funeral expenses take the first place;\(^3\) but the rest follow the rule applicable to purely personal creditors, and share alike, pro rata, without reference to the seniority of their claims.\(^4\)

§ 1478.

The second class comprises those privileged or legal creditors on pledge and those who have stipulated for it, but who are not authorized to take their place in the concursus as creditor's creditors.

Firstly, the fiscus on the property of the subject.\(^5\)

Secondly, the wife for her dower.

Thirdly, the pupil and minor on the thing bought with his money.

Fourthly, those who have lent money to restore a ruined building.\(^6\)

Fifthly, those who lent money to purchase a militia.

Sixthly, the farmer of a prædii rustici, and the hirer of a prædii urbani.

§ 1479.

The third class includes equally privileged or simple pawns.

Firstly, public pawns.

Secondly, private pawns according to order of seniority.

§ 1480.

The fourth class comprises personal simply privileged creditors.

Firstly, the state and municipalities.\(^7\)

Secondly, the sovereign prince or princess of the country; and the fiscus, as to all claims not placed in the first three or in the fifth class.\(^8\)

Thirdly, every one who, not claiming as a hypothecarius,\(^9\) has lent any sum for the purchase, building, or fitting out a ship, or has

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\(^1\) Dabelow, l. c. p. 606; but pecunia hereditaria does not belong here as is asserted by Walch, de privil. pec. hered. (opusc. T. 3); Ag. I. Weber, de pec. hered. Goett. 1816; Puf. 1, obs. 103, § 1; Biener, opusc. T. 2, Nr. 55-6; Dabelow, p. 609-14; ed. vid. Thib. l. c. § 808.

\(^2\) Not real dues which have fallen in before the concursus; Hofacker, 3, § 4617; contra proper, P. 13, 7, 17; et P. 2, 44, 15, is Dabelow, p. 608; ed. vid. Cuj. ad L. 7, qui pot. in pig. who refers both laws; Thibaut, l. c. thinks rightly, to privileged legal hypothecations, and to cases where an advance has been made for the preservation of a thing, § 788, nr. 2; vide Thib. § 788, § 801; et vid. § 1468, h. op.

\(^3\) Hofacker, op. cit. 3, § 4617; contra proper, P. 13, 7, 17; et P. 2, 44, 15, is Dabelow, p. 608; ed. vid. Cuj. ad L. 7, qui pot. in pig. who refers both laws; Thibaut, l. c. thinks rightly, to privileged legal hypothecations, and to cases where an advance has been made for the preservation of a thing, § 788, nr. 2; vide Thib. § 788, § 801; et vid. § 1468, h. op.

\(^4\) C. 11, 7, 14, § 1; Id. 26 & 25; C. 6, 30, 9; V. 11, 7, § 9; contra, Leyser, Sp. 484, m. 1, 2; Frister, de priv. cred. personal. Goett. 1804, c. 1, § 2, 3.

\(^5\) P. 42, 5, 2; Gmelin, c. 2, § 16; contra, Dabelow, p. 614-15.

\(^6\) For a further development of these, vide § 1468, h. op.

\(^7\) C. 11, 7, 14, § 1; Id. 26 & 25; C. 6, 30, 9; V. 11, 7, § 9; contra, Leyser, Sp. 484, m. 1, 2; Frister, de priv. cred. personal. Goett. 1804, c. 1, § 2, 3.

\(^8\) P. 42, 5, 2; Gmelin, c. 2, § 16; contra, Dabelow, p. 614-15.

\(^9\) For a further development of these, vide § 1468, h. op.
sold one on credit. Nevertheless, whose have lent money for the purchase of any other object, though it be immovable, does not possess this privilege.

Fourthly, those who have made advances in ready cash for the restoration, but not for the upholding or repair of a house or other thing. Strictly, the loan must be made with the knowledge of the architect, although the actual application of the loan do not belong to him, it being an entirely personal privilege.

Fifthly, the wife and bride, but not their heirs, on account of dotal claims. This is useless to the wife, though not to the bride, on account of the new right of general hypothek which the former possesses.

Seventhly, all having claims against guardians, except against curatela reales; heirs, too, have it not. The whole is, however, now of little importance, as legal and general hypotheks have been granted against tutors and curators.

Eighthly, all whose money has been used for paying a creditor in this class; but where they have stipulated for this transfer, they pass into possession of all the rights of the person so bought out; otherwise, they belong to this class.

Ninthly, every one who has deposited or lent money gratuitously, without bargaining for interest, if he do not appear as vindicating his right to its return.

The sequence is, then, thus:—the first excludes all the others; the third follows the second; the rest come in pro rata, except the eighth and the last, which occupies the last place.

1 P. 45, 5, 26, & 34; Lauterbach, de priv. person. simul. § 27; Gmelin, l. c. 3 § 45, 5; Frister, l. c. § 10.
2 Lauterbach, l. c. § 29; Thib. l. c. § 788, n. 9; Koch, de pec. ad emend. cred. § 15.
3 Boehmer, l. c. § 11, 12; Meissner, l. c. § 77; contra, Puf. 2. obw. 170.
4 P. 12, 1; § 24; Frister, l. c. § 11, 12; Meissner, l. c. § 79-80; contra propter, P. 17, 2, 52, § 10; P. 39, 2, 46, § 1; Walch, de pec. priv. in resect. cred. (opus. v. 3) c. 2, § 7.
5 Contra propter, Nov. 97, 3; Walch, l. c. § 43; Frister, l. c.
6 P. 42, 5, 17, § 18; P. 23, § 74-75; Frister, l. c. § 15; contra, Feuerlien, de priv. dot. sponsae compet. Helmant. 1772; Walch, contr. l. c. § 41.
7 Thib. l. c. § 780, nr. III.
8 P. 27, § 19, 20, 21, 25; Dabelow, p. 217-18; Frister, l. c. § 16.
9 P. 42, § 22, § 1; Thib. l. c. § 391.
10 Vol. II.
erroneous to suppose that persons worthy of compassion, and
almspeople, also that advocates, have any claim here for their fees. 2

§ 1481.

The fifth class comprises every imaginable claim strictly pro rata, under the following restrictions:—

Firstly, all persons who, as legataries and fideicommissaries, have no claim beyond on that which may remain after deduction of all debts, are to be first paid after all the creditors have been satisfied. 3

Secondly, the fiscus for penalties, and all others whose claims for such have not been fixed, 4 take the last place; 5 nor does it matter whether an action have or have not been commenced for such penalty during the life of the common debtor.

Perhaps all claims for simple gifts may be put into the same category. 6

Lastly, should any balance remain after the satisfaction of all creditors, it can be claimed by such as have not applied; 7 and, consequently, also from the new creditors.

§ 1482.

It often occurs that the claims of many pledgees are in collision with each other,— in which case it is a general rule, that he who has the preferable right takes precedence of him who has a less perfect one; but inasmuch as every bona fide possessor can claim indemnity for money laid out and expended, so the possessor of the pawn can also claim this benefit. 8 The secondary pawnnee or hypothecar can, however, avoid this collision by getting into the place of the primary creditor, which is termed jus offerendi. 9 This may be effected with the consent of the creditor or of the debtor,— of the former, by his consent to make over his prior claim; 10 and of the latter, by the secondary hypothecar advancing the hypothecator the money to buy out the prior claimant under the condition of being put into his place, and which condition is ultimately in fact fulfilled. 11 The creditor so acquiring can, under certain circumstances, enforce his preference as against other hypothecarii; 12 nor does he who pays the fiscus form an exception from these rules. 13

The actio quo minus in the exchequer is referable to this origin, and, though it degenerated into a fiction, it was founded on an

1 Hellfeld, jurispr. for. § 1819; Walch, contr. p. 814.
2 Glück, Pand. § 372, n. 63.
3 Gmelin, 6, § 3 & 4; Thib. l. c. § 806.
4 Hommel Rhaps. obs. 548.
5 C. 10, 7, 7.
6 P. 49, 14, 17, 17 & 48, § 1; Meisner, l. c. 1 B. § 97 nr. III. contra; Hellfeld, de hypoth. finc. § 9; Quistorp, Beitr. n. 33; Gmelin, 2, § 10.
7 Thib. Vernuche, 2 B. S. 298; Puf. 3, obs. 86, § 4; Erxleben, § 267.
8 P. 20, 4, 2, & 12, pr.; Weber, Vernuche, 1 B. II. Abb. n. 3, § 21.
9 Beckmann, de succ. cred. in ulterius et suum ipsius locum, Goett. 1781; Dablow, v. d. concurs. 1 Aufl. 2 B. § 290, seq.
10 Beckmann, l. c. 6-9.
11 C. 8, 19, 1.
12 § 1468, h. op.; Thib. 1. c. § 781 & 800.
13 C. 7, 73, 3, & 7; Westphal, § 178.
accountant or debtor in chief to the crown praying an extent in aid of the king's debtors against a third party, on account of whose default to him he was unable to pay his debt to the crown.

The consent of both parties is necessary if a non-preference hypothecar wish to succeed into the place of another hypothecar and of those in the same category with him; he must, to effect this object, pay over to such preference hypothecar the amount of his claim on the pawn, and reimburse to every third bona fide possessor, such outlay as he may have a legal claim to demand; on the other hand, the preference hypothecar, according to the opinion of many, may retire into the place of a less privileged hypothecar, by other persons exercising a jus offerendi, upon which they, of strict right, have no claim. In neither case are the rights of a creditor whose position is between the two infringed.

A third party who is in possession, though not as pawnee, has the power, when pawnee sues him, of demanding the cession of a jus pignoris, on paying the pawnee's debt.

§ 1483.

As to general rules, the basis of the pignoratian right must be legal: and in conventional hypotheks, all the formalities be observed which the law requires; which, of course, does not apply in the case of legal hypotheks.

Secondly, the subject-matter must be capable of hypothecation: and nothing is so capable which cannot be alienated, as the arms of a soldier, the instruments of a husbandman, and the like, else all descriptions of corporeal and incorporeal things are subject to hypothecation; consequently, no object is exposed to hypothecation which has been declared inalienable in such a manner that the alienation is null and void, nor anything which does not appertain to him whose property is subjected to the charge.

For these reasons, Thibaut observes, that the general rules enunciated, respecting the disposal of the goods of another, have their application also here.

Nevertheless, should the property of another have been hypothecated, and the hypothecator subsequently acquire the ownership of it, the charge will become valid, provided there be bona fides on the property of another.
the part of the creditor; but should he be *mala fide*, then he has a *jus retentionis* or lien only, but no pignoratian claim. There is, however, a discrepancy in the law in cases where the owner is the successor of the hypothecator. It follows, from the above general principles, that a real servitude (easement) which has been created cannot be separately hypothecated, because it is the right on the property of another; but, on the other hand, a *servitus rustica* is capable of hypothecation.

§ 1484.

Not only has the creditor his *jus pignoris* on behalf of the principal debt, but also for the amount of damage due for the delay, the costs of suit, and necessary and advantageous expenses laid out upon the object, together with any interest agreed to be paid which may have become due; and the same rule applies to a penalty agreed upon between the parties. The right extends to the principal object and its appurtenances, and to all accessory things which may subsequently accrue to it, according to the doctrine of the accession of things inseparably incorporated with the principal.

Growing emblements and gathered fruits, it has been seen, are within the law; but if produced before the accruing of the charge, are only distrainable, provided the creditor cannot be satisfied out of the principal object.

§ 1485.

A very important question, is that of the degree of diligence imposed upon the pawnee for the safe custody and preservation of the pawn.

"As the bailment is for the mutual benefit and interest of both parties, the law requires that the pawnee should use ordinary diligence in the care of the pawn; and, consequently, he is liable for ordinary neglect in keeping the pawn." This principle is dis...
tinctly laid down upon this subject:—_Sed ubi utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in societate et dolus et culpa prestandus._

1. _Ea igitur, qua diligentia patrisfamilias in suis rebus prastare solet, a creditore exigitur._ 

_Quia pignus utriusque gratia datur, etc. placuit sufficere, si ad eam rem custodiendam exactam diligentiam adhibent._

Thibaut[^3] thinks that the creditor, under a prætorian decree, is liable for gross negligence only; here Ulpian, in his Commentary on the Edict, speaks of dilapidations of all sorts accruing to farms; and it appears from that passage, that this species of creditor is in a better position than others.

It being then clear that the pawnee is responsible for every degree of _culpa_ or negligence, and, consequently, that he is bound to the greatest degree of diligence, it remains to ascertain in how far he is required to answer for the _casus fortuitus_, or accident.

On general principles, responsibility for certain accidents is excluded in every bailment whatever. And here, again, Story[^4] lucidly lays down the true principle:—“_Losses from inevitable accident and irresistible force are excluded in every contract, although a liability may be created with respect to them, by some special contract or positive policy of law._ By inevitable accident, commonly called the act of God, is meant any accident produced by any physical cause which is irresistible, such as a loss by lightning or storms, by the perils of the seas, by an inundation or earthquake, or by sudden death or illness.

“By irresistible force is meant such an interposition of _human_ agency as is, from its nature and power, absolutely uncontrollable. Of this nature are losses occasioned by the inroads of an hostile army; or, as the phrase commonly is, by the king’s enemies, that is, by public enemies. In the same manner, losses occasioned by pirates are deemed irresistible and by hostile force[^5] for pirates are deemed enemies of the whole human race, _hostes humani generis_; and by the common consent of nations they are, when taken, everywhere punished with death. By the law of nations they are esteemed outlaws, and their crimes, against whomsoever committed, are punishable in the courts of any nation within whose jurisdiction they are brought.”

Robbery by force, _rapina_, is also irresistible, and is, in the civil law, defined to be the violent taking from the person of another, of money or goods, for the sake of gain.[^6]

[^3]: P. 13, 6, 5; P. 13, 7, 13 & 14.

[^4]: I. 3, 15, § 4; Ayliffe, Pand. B. 4, t. 1, p. 58; Jones, l. c. 29, 30, 31; Pothier de Nantissement, n. 32, 33, 34; Id. des obligationes, n. 142, 1; Domat. B. 3, t. 1, § 4, art. 1, Ersk.; Inst. B. 3, t. 4, § 33; 1 Bell, com. 453, Ed. 5; id. § 399, Ed. 4.

[^5]: 1. c. § 790; P. 42, 5, 9, § 5; Lauterbach, coll. 20, 1, 19; v. Lühr, Theorie der culpa, S. 189-190.

[^6]: P. 13, 6, 5; P. 13, 7, 13 & 14.
Ulpianus thus enumerates them, — *Animalium vero casus, mortes, quæque sine culpa accident, fuga servorum, qui custodiri non solent, rapinae tumultus, incendiae, aquarum magnitudines, impetus praedonum a nullo præstantur.* Vinnius details them more at length,—*Casus fortuiti variis sunt, veluti a vi ventorum, turbinum, pluvia rum, grandinum, fulminum, aestus, frigorio, et similium calamitatum quæ cælitus immittuntur.* Nosti divinam dixerunt; *The Theod. 3. blav.* Item naufragia aquarum inundationes, incendia, mortes animalium, ruinarum fundorum, chasmata, incursus hostium, praedonum etc., fugae servorum qui custodiri non solent. His ade, damna omnium illata quæ quo minus inferrentur, nullâ cura posse possunt. Ad casus autem fortuitos non sint referendi illis casus qui cum culpa conjunctae esse solent: cujusmodi sunt furta. Quamobrem, qui rem furto amissam vel incendio verbi causâ servorum neglegentia orto consumptum dicit, eius diligentiam suam probare debet. Quod vero incendium in alienis adibus obortum occurrat ædes vicinas, aut quod fulmine excitatur, aut a grannatrixiiis vel incendiaris immittitur inter casus fortuitos numerari debet. And here the distinction between *impetus praedonum* and *furtum* is important; the pawnor or bailor bears losses by the first, the pawnee or bailee, then, by the second: thus, *impetus praedonum a nullo præstantur;* but *quod si furibus subreptum sit, proprius ejus detrimentum est* 3 quia custodiam præstare deberit, qui astimatum accipit.*

Such, then, are the duties of the pawnee founded upon the doctrine of the *culpa* and the *casus fortuitus.*

Another obligation to which he is exposed is, that of preserving the produce of the pawn for the debtor, and of adding it to the capital. Much depends upon the nature of the pledge; if it be of a cow or of a horse, the pledgee may milk the former, though he must account for the profits, and may keep the horse in exercise, for those acts are incidental to, and constitute due diligence; but generally, nothing is to be used which is not deteriorated by lying idle; for Gordianus says,—*Si quidem, qui rem depositam, invito domino, sciens prudente in usus suos converterit, etiam furti delicto succedit.*

§ 1486.

The most important right connected with all pledges and hypothecks, is the right of distraint or sale for satisfaction of the debt for security of which they are given,—hence an engagement not to sell a pawn, being in itself contrary to the fundamental principle, is
null and void. But, on the other hand, the lex commissoria, or contract whereby the pledge becomes the property of the creditor without sale, in default of payment of the debt, is null and void,—though the canon law admits a case when confirmed by oath; but even then it is of no avail, if subsequent to the transaction. The contract will not, however, be open to the objection of being commissory, if it be agreed, at the time at which the charge originated, that the creditor might retain the object in default of payment, by way of purchase, for a price then or thereafter to be agreed upon, or that it should lapse to the sureties of the insolvent debtor.

In the first place, the creditor is not at liberty to sell until his claim be fully due and payable, and he is then bound to give the debtor notice, denunciatio, of his intention to distrain; after which, the debtor has two years to pay and redeem. The contract not to sell has, however, in so far effect, that it throws upon the pledgee the onus of three notices and applications for payment; nor does it appear what time must elapse between these several notices,—some, and Thibaut among the number, think, reasoning from the analogy of the first case, that two years must elapse after the last notice; but how long between each notice? some think, by the same analogy, two years, making six in all before execution can be had. This, however, appears unlikely, on account of the arrear of interest which would accrue in six or seven years, which might amount to near the value of the thing pledged; to which it may be answered, that the creditor must at first leave sufficient margin and prepare for this contingency. After the expiry, then, of the legal terms, the sale may take place on a certain fixed day, and will be valid if the subject-matter be capable of sale; but if not so, and if the prescribed formalities have not been observed, the sale, though effected, will be null and void, except, indeed, it be effected under authority of the court, which is held to dispense with those formalities; but even then a sale will not be valid, if a creditor whose claim is second to that of another sell of his own motion before his preference creditor have been
Sale, how effected.

The creditor being regarded as the mandatar of the debtor, is under the obligation of being present, and of taking care that the sale be conducted in the forms prescribed by law, and of attending to the interest of the pawnor in all respects.

The same is the law of the sale of unredeemed pledges in England which must be sold by public auction, and the surplus of the sum the sale produces, over and above the debt, be paid over to the pawnor.

A fraudulent sale gives the debtor a personal action against the creditor; and if recourse against him be impossible, the debtor can have restitution against the buyer.

The creditor can, however, sell non-judicial pledges extra-judicially of his own authority; but even then the sale must be effected publicly, and the debtor must be summoned to be present.

Judicial pledges auctionable in two months.

Judicial pledges, on the other hand, are auctionable under judicial authority in the accustomed form two months after default, with the additional advantage to the creditor of a right of pre-emption, which it has been seen is not the case when the creditor puts up a pledge for sale extrajudicially, without the consent of the debtor. But in both cases, if no bidder offer a reasonable price, the creditor may obtain an assignment of the pledge for a price to be settled by the sovereign of the country; nor does the sum so assigned operate as a total extinguishment of the debt, but only of as much of it as the price represents. The debtor, however, on his part retains the right of redemption during two years.

The creditor cannot be compelled to sell, except the debtor give security for the payment of the debt in full; the creditor, again, in cases of doubt, has, if he put up the free hand pledge for sale, the right of election, where there are more pledges than one in his possession, as to that which he will sell, so long as he sell no more than is strictly necessary to satisfy his claim, and that he begin by selling those things which the debtor is best in a condition to spare.

Neither by the Roman nor by the English law can the seller become a purchaser.

1 P. 20, 5, 1; C. 8, 18, 8; C. 8, 46, 1; Löhär im Arch. f. C. P. 14 B. 2 Hft. S. 171; contra, Bopp. in Linde Zeitsch. 3 B. 2 Hft. nr. 12; et im Arch. f. C. P. 15 B. 3 Hft. nr. 17.
2 P. 21, 2, 50; C. 8, 28, 4.
3 C. 8, 28, 4, 7, 9, & 10; C. 8, 30, 3; Westphal. § 220.
4 C. 8, 28, 9; C. 8, 34, 1.
5 C. 8, 28, 4; C. 7, 53-33; Voet. 20, 5, n. 5; contra, Glück, l. c. 19, B. 392; sed vide Thibaut, l. c. § 797.
6 P. 42, 1, 31; C. 8, 34, 2.
7 C. 8, 23, 2, 3.
8 C. 8, 28, 10.
9 P. 13, 7, 34.
10 C. 8, 23, 2, 3; P. 13, 7, 24; Erxleben, § 188. There is a difference of opinion on this point as to the present continental practice.
11 P. 42, 1, 15; § 3; C. 8, 34, 3; § 4.
12 C. 8, 34, 2, & 3; § 3; Westphal. § 193-4-9 & 201.
13 P. 13, 7, 6; Löhär Mag. 4 B. 1 Hft. S. 139-40.
14 P. 20, 5, 8, 11, ult.; C. 8, 28, 6, 7, 8; P. 13, 7, 6.
15 Thib. l. c. § 785, 792-797; Voet. 20, 5, § 3; Erxleben, § 183; § 1488; Kemp. v. Westbrook, 1 Ves. R. 275.
§ 1487.

The *jus pignoris* may be extinguished in nine different ways:—

1. Consolidation and confusion.
2. By extinction of the principal obligation.
3. By expiry of the contract.
4. By destruction of the pawn.
5. By extinction of the pawnor's right.
6. By contumacy.
7. By misuse.
8. By renunciation.
9. By sale.

Many of these principal divisions have their subdivisions, which it will be the object of the following paragraphs to examine and demonstrate.

§ 1488.

First, then, the *jus pignoris* being merely accessory to another right, is extinguished by consolidation, that is, by the property in the pledge vesting in the pawnee, or the right of the pawnee devolving on the pawnor, or by confusion, or its inseparable mixture with the property of the pledger.

Secondly, if the debt, as security for which the pledge was constituted, be utterly extinguished by payment, or some other means, the accessory *jus pignoris* is extinguished with it, upon the common rule of principal and accessory. A so-called *novatio privativa* has a similar effect. *Novatio* is described to be *prioris debiti in aliam obligationem, vel civillem vel naturalem transfusio atque translatio, hoc est, cum ex precedente causa, ita nova constituitur, ut prior perimatur*; by consenting to such novation without providing for a reconstitution of the right, the pawnee is held to have waived it, and the effect where he has not done so has been already alluded to.

Thirdly, if the pawnee allow the time to pass for which the pledge was constituted, he must suffer for his own default, and lose his right.

Fourthly, if the subject-matter of the pawn be utterly destroyed, the right is extinguished. This may be effected by specification, which is here of two kinds, extinctive and conversive,—here the rule is, that if the object cannot be restored to its original state, the specification is extinctive, and no right attaches; thus, if a wood...
be hypothecated, and the hypothecator build a house of the wood, no hypothecary right attaches upon it; but if it can be so restored, the right continues to attach: thus, if the hypothecator make a silver wafer out of a silver pot, which is conversive specification, such pot remains hypothecated. In the case of a general hypothek, however, if the debtor himself operate the specification, the right attaches, because it extends to all his property, independently of the specification, or any change in the form of the individual thing.

Fifthly, if the pawnor lose his right, the pawnee loses his claim, which is merely accessory to the right of the debtor. Now, if the object were not the property of the pawnor, but he possessed merely a right upon it, the right expires with his right; but if the object was his property, the right remains valid. Now, it may return to him by his own volition or it may not; if the property be recalled, the right remains good, but if it be recalled—that is to say, be extinguished by a condition resolutiva made at the time of its acquisition—the right is lost.

Sixthly, if the creditors on hypothek be edictally cited, and fail to appear, whereby they are precluded, they have lost their right (see former sentence ad fin.).

Seventhly, if the creditor have ill-treated a slave impignorated to him, he forfeits his claim as a pawnee.

Eighthly, the hypothecarius, as a pawnee, also loses his claim, if he renounce his right by word or deed.

Ninthly, the sale of the pawn will operate its release upon the presumption of tacit renunciation. Now, if the creditor who has the preferable right sell his pawn, do so, there is no doubt that claims in virtue of the secondary or inferior right are extinguished; but the converse does not apply,—for the secondary pawnee cannot sell without consent of the preference creditor.

But if the creditor gave his assent to the alienation by unmistakeable words or deeds, the right is lost; such deed may, perhaps, be the fact of his consenting to a further impignoration. In the former of these cases, the sale must be regular, and actually
take place; neither must the negotiation be broken off before its perfection, nor reversed after it, on a ground arising out of the transaction itself.

Now, let it be supposed that the pawn has been sold by the debtor without the consent, express or tacit, of the creditor, it may be with or without his knowledge. If the pawn consisted in a head of cattle in a herd, or in an article in a store, or an universitas servorum, the pawn is forfeit.

In like manner, it is extinguished positively when the creditor fraudulently ignores the sale, or when the fiscus, or prince or princess of the country, sell the things they have impignorated,— in which case, the creditor has, nevertheless, his claim of indemnity from the seller, except, indeed, he shall have failed to oppose the sale when he had the right of doing so.

Thibaut mentions a particular exception under the beneficium inventarii, whereby the right of the heir is protected against the claims of all hypothecars, where he has sold an impignorated thing belonging to the estate; in which case, the creditors must seek redress against legatees and less favored creditors who have been satisfied.

But the creditor's right on pawns sold without his knowledge or consent is never impaired or extinguished. If, however, the sale took place with his knowledge, but without his especial consent, his right is only lost if the debtor sold illegally, and not if he sold in a case where sale was permissible.

If, then, it be known that a debtor may sell generally, but not especially hypothecated moveable and immoveable things (except the case mentioned in the fifth paragraph back) without the consent of the creditor, it follows clearly, from the above, that the right is lost.

§ 1489.

Originally, as has been seen, the jus pignoris, as being a mere pactum, gave no remedy by action against the debtor, so long as it remained in his possession,— and none whatever against a third possessor; to remedy which inconvenience, Servius, who by some is said to have been a praetor, by others the great lawyer Servius Sulpicius, granted a real action to the landlord of a pradium

With or without privity of the creditor.

By fraud. Exception and remedy.

The beneficium inventarii protects the heir.

Right on pawns sold without creditor's privity not extinguished.

General right of debtor to sell extinguishes the right.

Remedies by action.

Origin of the actio Serviana.

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1 P. 20, 6, 8, § 6.
2 C. 8, 26, ult.; P. 20, 6, 10.
3 § 1466, h. op.
4 Franke, comm. L. 20, T. 6, n. 44.
5 C. 7, 37, 3, 3; C. 8, 26, 8; Lippert, passim in Zul. zu Rhein. Beitr. 3 B. 1 Hft.
6 l. c. § 876, § 818.
7 C. 6, 30, ult. § 4; Nov. 1, 2.
9 C. 8, 28, 12, & 17; C. 8, 26, 1, & 10; C. 8, 14, 15; C. 7, 8, 3; P. 47, 2, 19; § 6 & 66, pr.; Westphal. § 40–1; contra, Schwabe on the non-authorization of the debtor to sell without the consent of the creditor (German), Erfurt, 1806; and as to moveables, Gesterding, Pfandr. p. 155–7.
11 Leger, diss. hist. J. C. de pig. taciti contractus, Append. p. 2; Hein. A. R. 4, 6, § 29; Cic. pro Murena, 20; Brisson. de Form. 5, p. 382.
rusticum, to claim an object deposited with him as security for the rent, whence it acquired the denomination of actio serviana. This action presumes that a predium rusticum has been let to hire—

that the farmer owes rent—that an action is brought against the occupier for the produce gathered fructus percepti, or, against him for the moveables with which it is stocked, invectorum et illatorum, if such should have been otherwise expressly pledged for the rent, and it prays that these objects be delivered to the plaintiff by the possessor.¹

The fundamental idea is, that the object itself is obligated for the debt, and must in case of need pay; hence it follows, that the creditor can demand the conversion of the object into money.²

§ 1490.

When a jus pignoris voluntarium is sought, that is, when an application for the judicial award of such a right is prayed, it is done simply by imploratio,³ and receives its name from the nature of the transaction; but when it is on a right already in existence, it is partly petitory, partly possessory.

The petitory or precatory lies between debtor and creditor,—

when by the former, it is termed actio pignoratitiae directa; but when by the latter, contraria; whereby both parties have to prove their respective rights.⁴ It, strictly speaking, presumes a contractus pignoratitius; but many laws admit an actio pignoratitiae utilis and in factum ⁵ (which is an equitable relief) as regards personal obligations as to other pignoratitian rights.

This action can be, in its capacity of a personal one, directa, on termination of the pignoratitian right,—but, from its very nature, does not lie against a third party, who must be reached by an actio dominii; but it may be remarked, that the actio pignoratitiae directa will lie against a third party, if the creditor impignorated the object to him at the request of the debtor, or if he have ceded his claim to this latter. This is, however, as little a juridical exception from the above principle, as the admission of an actio in factum, in cases where the third party had personally bound himself in some way to the representative of the pawnor, for the return of the object to him.⁶

§ 1491.

The creditor has many legal remedies, as against third parties, such as the actio finium regundorum;⁷ confessoria, and negatoria

¹ Hopfner, in Hein. § 722.
² Walter, 1. c. 589; Gaius, 2, 64; Paul. R. S. 2, 13, § 5; F. 13, 7, 4.
³ Erxleben, § 267.
⁵ P. 13, 7, 11, § 5; P. 39, 4, 34; P. 42, 5, 9; Meissner, l. c. objects to the term, § 46.
⁶ P. 13, 7, 13, pr. & 27; C. 8, 24, 2; C. 8, 30, 2, 3, 4; X. 3, 21, 6; Westphal. § 144, 220-1, 258; Müller ad Leyser, obs. 342; Küchly, med. 7, p. n. 77, 168; Treuenius de Pignoratitia act. adr. test. non comp. Heidelb. 1751.
⁷ P. 10, 1, 4, § 9; P. 8, 1, 16.
In cases of theft, the common actions arising out of that defect are available, as well as an action for the institution of the cautio de damno infecto; but the detail of these actions do not belong to this place.

The Servian action was extended to all hypotheks under the title of Actio quasi serviana, otherwise hypothecaria, which arises out of a real right; the Romans term it variously,—actio serviana when it is brought by the landlord, and quasi serviana or hypothecaria when it applies to others; sometimes it is implied under the term pignoratitia.

§ 1492.

The hypothecarian action presumes the existence of the right; and can, on account of the indivisibility of the right of pledge, be only evaded by the payment of the claim in full; it lies against every possessor for the recovery of the subject of the right belonging to the plaintiff.

The actio hypothecaria arises out of a pactum, whereby the debtor assigns to the creditor a claim on a certain thing; but this gave no remedy against third parties, until extended as against them, by the Servian edict, as respected all hypotheks.

In like manner the interdictum salvianum arose, giving a possessorial remedy proper to hypotheks, which is one of the remedia adipiscendae possessionis which the creditor has against third persons; but the quasi salvianum lies by other hypothecatary creditors, for obtaining possession of the hypothek, against the pledger only.

The advantage of the actio hypothecaria is to be sought in the summary nature of its process; perhaps the interdictum ex L. 3, C. de pignoribus may be added.

In the case of a pactum de ingrediendo having been concluded between the debtor and creditor in hypothek, whereby the former permits the latter to enter into possession of the object in case of default of payment, an ex parte taking of possession is allowed by the hypothecarius, but recourse must be had to the assistance of the court, if the hypothecator, disregarding the compact, should

1 The communi dividendo will not lie, Thib. § 715. The mortgage creditor of a co-owner cannot call upon the other co-owner to divide, because this is not in his power, although he may be required to do so by such co-owner.

2 P. 13, 3, 2; P. 47, 2, 87; Voet. 13, 1, § 3.

3 P. 39, 2, 11.

4 I. 4, 6, § 7; Schmidt, l. c. § 487 & 491.

5 P. 13, 7, 41; P. 10, 4, 3; § 3; P. 13, 7, 9; 15.

6 C. 8, 13, 71, § 7; P. 20, 1, 19; C. 8, 32, 1, 2; C. 8, 28, 16.

7 P. 20, 1, 13, § 4; Id. 16, § 5; Lauterbach, coll. 20, 1, § 76.

8 Walter, l. c. § 588, thinks that this was adopted into the Roman law from the law of the Peregrini, Cic. ad fam. 13, 56.

9 I. 4, 6, § 7; Theophil. 4, 6, § 7.

10 Gaius, 4, 147, § 3; I. 4, 15, § 1; P. 43, 33; & C. 8, 9, 1.

11 I. 4, 14, § 3; C. 8, 9, 1; Höpfner, § 1214; Meinsens, § 44; Carract, obs. quæd. ad interdict. Salo. Hal. 1774; Pütterm, de Int. Sal. Lips. 1773; Thib. Abb. im Arch. f. C. P. II. B. 3 Hft. nr. 15; Hepp. in d. A. L. Z. 1831, p. 632-36; varying, Zimmerm Linde. Zeitsch. 1 Hft. p. 54, 56; Huschke, Stud. h. nr. IV.

12 Schmidt, l. c. § 172.

13 Puf. 2, obs. 62; Struben, 2, B. 32, Bed. 3, & B. 57, Bed.
oppose the hypothecarius doing so. In such case, the proper remedy would be in the above-mentioned edict, were the plaintiff not expressly referred to the interdictum salvianum.1

Secondly, as another remedum recuperandæ possessionis, the plaintiff has his interdictum unde vi, and his actio spolii;2 and,

Thirdly, as a remedum retinendæ possessionis, his interdictum uti possidetis and utrubi;3 he may also seek redress in the interdictum quod vi aut clam and de precario;4 as also in the novi operis nun-ciatio.5

§ 1493.

The actio hypothecaria cannot, properly speaking, be brought as a real action in the alternative, either against the debtor or against a third party, for delivery of the object or payment of the debt, unless a personal action be combined with it.6

In order to succeed, the plaintiff must prove the foundation of his right. When this action is brought against another hypothecarian creditor or against a third party, it must be ascertained whether the defendant acquired the object from the hypothecator of the plaintiff, or from some other person. In the first case, the plaintiff has to prove that the object had been already hypothecated to him when the defendant acquired a right upon it from the hypothecator; but in the second case, he must prove that the object did actually so belong to the hypothecator at the moment at which it was hypothecated to him, so that such person could succeed against the present possessor according to the principles of an actio dominii, or at least of the actio publiciana.7

Secondly, the plaintiff must not be vexed by any special pleas or exceptions,—thus the debtor or another hypothecary cannot except; that the plaintiff must confine himself to the special pawn, when such has been granted to him in addition to his general hypothek.8

The third possessor,9 with one exception,10 can, moreover, require the plaintiff to sue, first of all, the chief debtor and his sureties; of course, if a hypothek given by one of the sureties be prosecuted, the possessor of the pawn given by the chief debtor must be first sued to judgment, which is termed the exceptio excussionis, except, indeed, the case be such that, from some

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1 Günner, Handb. 8 Proc. 4 B. n. 55, § 38, n. b.
2 P. 43, 16, 1, § 9.
3 P. 13, 7, 35, § 1.
4 P. 43, 26, 6, § ult.; P. 43, 24, 11, § 14.
5 P. 39, 1, 9.
6 Nov. 4, 2; Koch, de benef. excuss. tertio hypoth. spec. possessori compet. Gess. 1772; Schlüter, de benef. excuss. poss. hyp. gen. et spec. comp. Goett. 1776; Puf. 3 obs. 67; Müller ad Leyser, obs. 450; contra, Voet. 20, 44, § 3.
7 Thib. 1. c. § 815, § 713; P. 13, 7, 41; P. 20, 1, 15, § 1; Id. 18.
8 Nov. 112, 1.
9 Nov. 4, 2; Koch, de benef. excuss. tertio hypoth. spec. possessori compet. Gess. 1772; Schlüter, de benef. excuss. poss. hyp. gen. et spec. comp. Goett. 1776; Puf. 3 obs. 67; Müller ad Leyser, obs. 450; contra, Voet. 20, 44, § 3.
10 Nov. 113, 1.
particular cause, this plea of excussion is inadmissible on general principles.\(^1\)

1. The fiscus, too, must submit to this plea of excussion; because, before the regulations of the Novellæ came into force, there was no particular law specially applicable to that department.

§ 1494.

The English law of pawns and pledges is substantively the same as that of Rome; but there are, nevertheless, certain striking distinctions between the two systems.

Blackstone\(^2\) lays it down that an express contract arises between the pawnor and pawnee with respect to the goods, to which the condition to restore them upon payment of the debt in due time is annexed.\(^3\) The special property thus accruing to the pawnee is to be distinguished from the general property residing in the pawnor.\(^4\) A factor, however, has but a special lien\(^5\) by the Roman law; on the contrary, the pawnee has a simple right of retention or detainer, but no special property, and therefore is rather in the position of a factor in England,\(\textit{pignus manente proprietate debitoris solam possessionem transferit ad creditorem.}^7\)

By the English law a pawn is liable for the particular debt only for which it has been deposited as security; but by the Roman law it is prospectively, and retrospectively, and presently liable for all engagements of the pawnor to the pawnee.\(^8\)

By the Roman law a creditor might, after constituting of a pledge by delivery, restore the object to the possession of the pledger, either on hire or under any other contract, without prejudice to his right. \(\text{Si pignus mihi traditum locasse mi domino, per locationem retineo possessionem; quia ante quam conducere debitor non fuerit ejus possessio; cum et animus mihi retinendi sit, et conducendi, non sit animus possessionem adipiscendi;}^9\) but this principle has not been imported generally into the law of continental Europe, on account of its giving rise to too much ambiguity; where it has been admitted in particular cases, it is to be regarded as an exception, and is jealously restricted.\(^10\)

The Roman law permitted a pawnee to repledge goods to the extent of his interest therein, \(\textit{jure pignoris teneri non posse, nisi in the right to under, or re- pledge, beyond interest;}

\(^1\) Lauterbach, l. c. § 75.
\(^2\) Meinm, l. c. § 111; P. 50, 15, 5, § 3.
\(^3\) Com. vol. 2, B. 2, ch. 30.
\(^4\) The law relating to pawnbrokers is regulated by statutes,—30 Geo. II. 24, as to interest; 39 & 40 Geo. III. 99, as to illegal pledging; 2 & 3 Vic. 71, § 26, by persons under sixteen; a & 2 & 3 Vic. 47, § 50; vide et 5 & 6 Will. IV. 62, § 12.
\(^6\) Story, Bail, § 327; Jarvis v. Rogers, 15 Mass. R. 408; see also Homes v. Crane, 2 Pick. R. 610.
\(^7\) P. 13, 7, 35, § 1.
\(^8\) Story, Bail, § 304.
\(^9\) P. 13, 7, 37.
\(^10\) Story, l. c. § 299, ibique cit.
qua obligantis in bonis fuerint; et per alium rem alienam invitum 
domino pignori obligari non posse certissimum est, but not beyond 
it,—for nemo plus juris ad alium transferre potest quam ipse 
haberet; and, by the law of England, a factor, with an appa-
rently good title, may repledge goods upon which he has made 
advances to the full value of such advances.

The common law allows no expenses laid out upon the pawn 
without a contract to that effect, neither has the court discretion; 
but the Roman law allowed such expenses as should be awarded 
by the court.

These are the principal differences between the rules of the 
common and the civil law; both admit tacit pledges, as that of a 
landlord for rent, the authorities for taxes, the warehouseman and 
carrier for goods bailed to them; though these are termed liens, and 
though differing in name, are similar in effect to the pignus tacitum 
of the Romans. The claim of the holders of bottomry bonds, of 
maternal men, and of sailors on the ship for wages, are in a 
peculiar category; the interest cannot be termed a pignoratitum 
for want of possession, nor a lien for, the same reason, nor a 
mortgage, because the property has not passed; this right can, 
therefore, only be described as an hypothecary interest, a sort of 
middle thing, or admixture of lien pledge and mortgage.

The pledge being a collateral security where there is no con-
tract on the part of the pledgee requiring him to sell the pledge, 
he is not compellable by common law to do so; but a court of 
equity may compel the sale, if the pledge be of a perishable 
nature, or would at the time realize sufficient to discharge the 
debt. By the Roman law the pawnee can be so compelled to 
sell, with the remark, however, invitus enim creditorem cogi ven-
dere, satis inhumanum est.

The common law gives no action for another pledge on account 
of a defect on that first given, as the Roman law does; though 
an action will lie upon the implied warranty of title. Fraud 
vitiates all contracts thus,—Si quis in pignore pro auro ás sub-
jecisset creditori, qualiter tenetur? Si quidem dato auro ás sub-
jecisset, furti tenetur; quod, si in dando ás subjecisset, turpiter 
fecisset, non furem esse; sed et hic puto pignoratitium judicium 
lucem habere; but if there be no fraud imputed, the Roman 
common law says,—Si sciens creditor accipiat vel alienum, vel obligatum, 
vel morbosum, contrarium judicium, ei non competit; and the 
common law says, in like manner, volenti non fit injuria.
§ 1495.

According to the Hebrew law, land could not be alienated by mortgage in perpetuum, the original owner or his heirs being reinstated in his or their lands, discharged from all debt, at the next jubilee, which recurred every fifty years. This regulation affected loans; and the price at which the land was redeemable in the interim was, therefore, calculated according to the value of the unexpired term, to such next ensuing quinquegesimal period.

It is not probable that the Greeks and Romans borrowed the idea from that people, this singular provision not being traceable in any of their laws on the subject; the conception arising more naturally out of the ordinary transactions of life.

The Teutonic nations, and consequently the Anglo-Saxons, were, doubtless, in the habit of pledging their lands in their native country or in that of their adoption, as may be clearly inferred even from Tacitus, long before they were acquainted with, or had even engrafted on their own, any part or principle of the Roman law, the details of which were, however, most probably adopted later, both on the continent and in this country, in development of a principle already existent, hence the difference observable subsequently in the two systems may be referred to the period at which the Roman law was introduced among the Saxon race of either country. In England it was more positive, but ceased with the connection with Rome; on the continent, that influence was exercised continuously for a far longer period, and the new regulations of the imperial law were consequently introduced and adopted.

The feodal system in checking alienations of land evidently operated some of the restrictions we find at present, although many have been relaxed by subsequent legislation.

§ 1496.

The old common law recognised two sorts of mortgage, vivum and mortuum,—both, according to Glanville, were determinable or base fees, with a right of reverter in the feoffee or heirs, on payment of a given sum.

Vivum vadium, or living pledge, is when a man borrows a sum (suppose 200l.) of another, and grants him an estate, as of 20l. per annum, to hold till the rents and profits shall repay the sum so borrowed, wherein it in some measure resembles the pactum antichreses. This is an estate conditioned to be void as soon as such sum is raised. And in this case the land or pledge is said to be living, if it subsist and survive the debt; and, immediately on the discharge thereof, results back to the borrower.

1 De mor. Ger.
9 The first of these was the statute Quia Emptores Terrarum, 18 Ed. I.; the exception reserved as to tenants in capite of the Crown, was abolished by 12 Car. II. 24.
THE ROMAN CIVIL LAW.

§ 1497.

The so-called Welsh mortgage bears a remote resemblance to the vivum vadium, but exactly corresponds to the pactum anti-


cresseas,—the rents and profits being received, as in the latter, in

satisfaction of the interest of the loan only; whereas in the former,

of the vivum vadium, they go in gradual diminution of the prin-

cipal debt; but the estate is never forfeited in either. It may,

therefore, be said that the Welsh mortgage closely resembled the

original mortuum vadium, of which hereafter.

§ 1498.

The mortuum vadium, or mortgage, ultimately recognised by the

common law, was an absolute fee, with a condition annexed,

rendering the feoffment void on payment of a given sum, which

the common law allowed if reserved to the feoffor or his heirs.

Thus, if a man borrow of another a specific sum (say 200l.),

and grant him an estate in fee, on condition that if he, the

mortgagor, repay the mortgagee the said sum of 200l. on a certain

day mentioned in the deed, the mortgagor may then re-enter on

the estate so granted in pledge.

The difference between the estates was striking. In the first

instance, the creditor took an estate, which, as soon as his debt

was satisfied, ipso facto ceased, and the feoffor might re-enter

and maintain ejectment; in the latter instance, the feoffee took

the whole estate subject to be defeated, but which, on the non-

fulfilment of a certain engagement, became his own by an in-

defeasible title. In the first case, the defeasibility was an inherent

quality of the estate; in the other case, the determination was

collateral to the estate.

Littleton and Coke appear to have lost sight of the ancient

distinction between the vivum and mortuum vadium, as also with

respect to the origin; for Glanville says,—Mortuum vadium
dicitur illud cuius fructus vel redditus interim percepti in nullo se

acquietant; viz., a feoffment to the creditor and his heirs until his

debtor paid him a given sum, until which time he received the

rents without account, whence the estate was, in the mean time,

dead and unprofitable to the mortgagor, and the mortgagee’s estate

was liable to the penalties of usury if he died possessed of the

pledge; whereupon Coote remarks, that as, at the time Glanville

wrote, land was still fettered, this explanation is more reasonable

than the subsequent one of Littleton and Coke, who say, that

on the non-fulfilment of the condition by the mortgagor, the estate

is, for ever dead to him.

§ 1499.

At present, the more usual mode of effecting a mortgage is, by a

condition that the mortgagee shall reconvey the estate to the mort-

gagor if the mortgage be in fee, or that the term of years shall

cease or be void if the mortgage be for a term only,—in which case,

1 Coote on Mortg. ch. 2, p. 8.

2 Lib. 10, c. 6.
the land which is so put in pledge has, by law, in case of non-payment at the time limited, irrevocably passed from the mortgagor, and the mortgagee's estate in the lands is then no longer conditional, but absolute. But so long as it continues conditional, that is, between the time of lending the money and the time allotted for payment, the mortgagee is called tenent in mortgage. But as it was formerly doubtful, whether, by taking such estate in fee, it did not become liable to the wife's dower and other incumbrances of the mortgagee (though that doubt has been long ago overruled by courts of equity), it therefore became usual to grant only a long term of years by way of mortgage, with condition to be void on repayment of the mortgage money; which course has been since pretty generally continued, principally because, on the death of the mortgagee, such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

As soon as the estate is created, the mortgagee may immediately enter on the lands, but is liable to be dispossessed upon performance of the condition, by payment of the mortgage money at the day limited. And, therefore, the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility at law of being afterwards evicted by the mortgagor, to whom the land is now for ever dead.

But here, again, the courts of equity interpose; and, though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at common law, yet they will consider the real value of the tenements compared with the sum borrowed. And they will allow the mortgagor, within any reasonable time less than twenty years from the last distinct acknowledgment of its being a mere mortgage, to recall or redeem his estate, on his paying to the mortgagee his principal, interest, and expenses; for otherwise, in strictness of law, an estate worth £1,000 might be forfeited for non-payment of £100, or of a less sum.

This reasonable advantage, allowed to mortgagors, is called the equity of redemption, borrowed from the civil law, and enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the mortuum into a kind of vivum vadium. But, on the other hand, the mortgagee may, if armed with a power of sale, sell the estate in order to get the whole of his money immediately, or else, by proceedings in equity, call upon the mortgagor to redeem his estate presently, or, in default thereof, to be for ever foreclosed from redeeming the same; that is, lose his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages, the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not, however, usual for mortgagees to take
possession of the mortgaged estate, unless where the security is precarious or small, or unless where the mortgagor neglects even the payment of interest, when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands in the nature of a pledge, the *pignus* of the Roman law; whereas, while it remains in the hands of the mortgagor it rather resembles the *hypotheca*, where the possession of the thing pledged remained with the debtor. But by statute, after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejectment, but may be compelled to reassign his securities.

In Glanville’s time, when the universal method of conveyance was by livery of seisin, or corporeal tradition of the lands, no gage or pledge of lands was good, unless possession was also delivered to the creditors; *si non sequatur ipsius vadii traditio, curia domini regis bujusmodi privatæ conventiones tueri non solet*: for which the reason given is to prevent subsequent and fraudulent pledges of the same land; *cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari*; and the frauds which have arisen since the abolition of this formality induce the presumption of its utility and soundness.

The common law does not then in fact recognise a gage of landed property, because the title passes to the mortgagee; but equity does recognise this as a chattel interest.

Similar to a pledge of chattels is the so-termed equitable mortgage, being a deposit of the title-deeds of a real estate as a security for money lent; in which case the court will default the payment of the interest on a loan so secured, order the sale forthwith of the property represented by such title-deeds, on sufficient evidence being adduced to connect them with the loan.

§ 1500.

A mortgage, or more properly a gage of chattels, by the common law transfers a *conditional* legal title, which becomes *absolute* at law in the mortgagee on non-redemption at the time stipulated, although equity may permit the mortgagor to redeem. By the Roman law, an hypothecation is a pledge without possession by the pledgee; and the nearest approach to it in English law is the exceptional case of the holders of bottomry bonds, &c. above alluded to, and the hypothecation of the Scottish law, which give a claim on the ship or other object in rem; for by a hypothek the dominion is not parted with by the debtor, who simply makes a certain object liable to answer, *pro tanto*, for an obligation, and the action is brought to make absolute this *jus in rem* or in *re*; and the creditor has, if it may be so expressed, a lien without possession.

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1 7 Geo. II. 20.
2 Here the deeds represent the estate itself, but the sale of such pledged estate must be judicial.
3 Chapman v. Chapman, coram Master of the Rolls, Lord Langdale, March 1851: in this case the depositary failed in connecting the deeds with the loan.
4 Story, Bail, § 387, § 308-11, ibique cit.; et vide eund. Eq. Juris. § 1030-1.
5 Story, Bail, § 288.
MORTGAGES BY MOHAMMEDAN LAW.

In Rome, the title of a bona fide purchaser prevailed against the creditor in hypothek, which is not so in the case of an English mortgage; the logic of which is obvious, inasmuch as the grant of a Roman hypothek does not transfer the dominium or legal title, which that of an English mortgage does.

The Roman and English law agree in allowing the prior creditor in mortgage to have his own debt satisfied before that of a second mortgagee.

§ 1501.

The Mohammedan law recognises no difference between the pledge of goods and the mortgage of land; and possession\(^1\) gives, therefore, in mortgage a preference over time; hence the rule is not qui prior est in tempore potior est in jure; but qui prior est in possessione potior est in jure. The agreement, indeed, is not binding before possession is given, it is merely a contract to bind. Lands held of the church that are incapable of mortgage: these in Turkey\(^3\) are termed Wakoof, in India Imaum lands, and are those whereof the Mosk Madgeed has the fee. It is a common practice for the original granter, particularly when he has no heirs, to surrender his lands to a mosk, and receive a new grant on payment of a fine, with a remainder to his nominee; such lands cannot be mortgaged.\(^4\)

Bay-bil-wafa is a conditional sale, with an equity of redemption within a given time: if the time be short, as three or four days, it is a conditional sale; if for a long period, it is to be considered a collateral security for money lent,—that is to say, a mortgage\(^5\) in the English sense, for the title passes by the deed sub conditione.

The Bay-bil-wafa must be made to the lender, not to the person through whom the loan was negociated; and the mortgagee's consent is required for alienation by the proprietor,—that is, to destroy the equity of redemption, and so to render the title absolute.

The wife of a banished Mohammedan may enforce the equity of redemption so long as she remains the wife of such banished husband, where the bond is conditioned for such equity of redemption, on a certain notice being given.\(^6\) And an heir may enforce his equity of redemption as to mortgaged lands, to the amount of his share of the inheritance.\(^7\)

The jura remum, inclusive of the jus possessionis and the jus pignoris, being now brought to a conclusion, we pass to the jura in personam, or personal rights, whereby a person is bound to give or to do something to or for another.

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\(^1\) Morley's Analyt Digest of Reported Cases in India, vol. i. p. 455, § 128, n. 1. This useful and learned work is the first attempt that has been made to digest the reported cases of native law in India. For cases, see this work.

\(^2\) Id. § 29.

\(^3\) For a full treatise on Mohammedan law of Turkey, vide D'Ohsan's work in French; there is, however, an English translation.

\(^4\) Id. § 33.

\(^5\) Id. § 31.

\(^6\) Id. § 31.

\(^7\) Id. § 34.
TITLE XVIII.


§ 1502.

The Law of Contract, or as it is generately termed the Law of Obligation, is that part of the Roman legal complex which has preserved its integrity in the jurisprudence of all nations with less change than any other; and while we are often able to trace in the jurisprudence of modern nations the basis only, and that indeed with considerable difficulty, we may, as a general rule, confidently appeal to the Roman law as furnishing the norm, and rely with confidence upon its decision in doubtful cases.

The reason of this remarkable difference must be sought in the fact of the law of personal obligations being less affected than any other parts of a legal system by forms of administration; for the Roman law of contracts does not directly result from any of the forms long lost and forgotten—of patria potestas, civitas, or the like—it subsists between persons, who of necessity are politically equal. In its nature it is more abstract than other branches of law, and its construction is unavoidably on a basis purely logical, with a view to its generalization among all nations of the habitable globe, to which the far-extended commerce of ancient Rome and of the more modern Byzantium extended.

A system framed with such care, matured by such experience, and administered with such integrity, could not fail to attain a high degree of perfection; so that, combined with the great political and strategical power of the Roman state, it found ready adoption by nations which feared its power, sought its alliance, or were dependent upon its commerce. So deeply indeed had the Roman law of obligations taken root, that the wild Mussulman Arabs and Othmans adopted it as an equitable system already acknowledged by the nations they had overrun, and suitable to supply a gap in their own imperfect code of jurisprudence; while they rejected many other parts of the Roman system as incompatible with their errant
mode of life, their newly-established religion, their ignorance, or their means of administration. For these reasons, a greater proportion of the Roman law generally has been retained in the West, where civilization has progressed, than in the East, whence it has receded. And for the same reason, while that portion which rules the reciprocal claims between men has endured with more integrity than others in the East, so it has become still further developed in the West, through the improvements in international communication, in governments guaranteeing a more perfect security for individual property, and in the inventions and refinements of a highly civilized age.

§ 1503.

The word obligation, in its most extended sense, signifies the binding of one man to another,—the bond by which two persons are bound together. Here ob, in composition, is synonymous with circum, which gives us the true meaning of obligate,—to bind around, about,—to unite in one bond; hence it is often explained by vinculum a vincire.

Civilians have adopted two grand divisions of obligations into mere naturales, mere civiles, the mixta partaking of both,—whereof the mere civiles and mixta may be mixta civiles or mixta pratoria; it is more convenient to reject the subdivision of naturales into perfectae and imperfectae, and to term them mere naturales without any further subdivision; and the two latter, civiles perfectae and imperfectae. A natural obligation is the result of mere natural equity; 6 by which, says Wood, "Kings are bound to one another, and to their subjects." Is natura debet quem jure gentium dare oportet cujus fidel secuti sumus. 3 Quibus natura debeatur, ii non sunt loco creditorum. 4 Wood, then, misunderstanding Ulpian, proceeds to divide natural obligations into effectual and ineffectual, which Halifax, following Wood or others, terms perfect and imperfect; as, however, these distinctions, as put, are calculated to mislead, being reducible to another rule, they are consigned to a note. 5 In fact, a natural, 1 Faciolatia Forcellini. 2 P. 46, 3, 95, § 4. 3 P. 50, 17, 84, § 1. 4 P. 50, 16, 10.

A natural obligation is effectual or ineffectual:—

1 "Effectual, P. 2, 14, 7, § 1, which is not sufficient to form a ground of action by the Roman law, yet it may bar by way of plea or exception; wherefore, if one is paid a sum by mistake, which was only due in conscience, it shall not be recalled if that claim be pleaded, P. 12, 6, 26, § 12. Sureties or covenants may be made for the performances of such obligations, I. 3, 21, § 1, as upon a naked promise, without cause or consideration. Stoppage, P. 16, 5, 6, of payment or compensation to an action may arise from it, and may be pleaded. It may be changed and transferred, P. 46, 2, 1, into a civil obligation of another species."

2 "Ineffectual, which has no assistance from any positive law, but consists merely in the pleasure and conscience of the party. As the obligation of gratitude, P. 5, 3, 25, § 11, to return gifts for gifts; to pay the whole legacy to every one, when by the law Falcidia the heir may deduct a fourth part. An obligation not to take advantage of a will, P. 26, 2, 5, § 15, which wants some formal solemnities to the perfection of it. An obligation to be merciful or liberal, P. 40, 7, 33. These may bind if the person pleases; but such actions cannot be forced on him. And the reason of this policy, which denies actions to some natural obligations, or any assistance at all (even so much by exceptions) to others, Origin and derivation of the word obligation.

Civilian division into natural, civil and mixt.

Erroneous view of Wood and Halifax.
which is synonymous with a moral obligation, is taken out of that category on becoming a civil one, and as such inforcible at law; and this rule will be found applicable to all the cases cited by Wood, but not to a natural obligation, which has no force at all per se, till adopted in a fuller or less full degree by the civil law.

Thus, then, an obligation is mere naturalis, purely natural, or mere civilis, founded purely on a civil law; if compounded of both, it is termed mixta. These three obligations may be illustrated as follows:—A debt contracted by a filius familias would be a natural obligation, for he cannot be called upon to discharge it, and is therefore mere naturalis. But a thief, condemned to pay double, or quadruple in certain cases, the value of the thing stolen, is so punished by the civil law merely, for natural equity would only require the return of the thing stolen, or its value; this is therefore mere civilis. A farmer is under an obligation, natural as well as civil, to pay his rent, for here both the natural and civil obligations coincide; hence such obligation is termed mixta;—though, to speak more correctly, it is purely a civil obligation, for without the civility of the obligation, the farmer could not be forced to pay, though morally bound to do so.

The civil law, then, either destroys a natural obligation, or it partially coincides with it, allowing it some consideration; or it coincides with, and confirms it absolutely.

§ 1504.

Simple natural obligations, then, are either wholly extinguished by the civil law, or only not confirmed.

The first have no legal effect, and produce no action;—as, for instance, in the case of security given by a woman, the contracts of minors, prodigals, or such as compromise out of court on account of aliment due by testament and gambling debts.

The second, though not extinguished, are still not confirmed;—as, for example, the obligation arising out of a nudum pactum (between which and contracts, natural law makes no distinction); the obligation of a filius familias to repay a loan; that between master or slave, or father and son; the right of a pupillus near puberty, or a minor near majority, to make dispositions with respect to his property without his tutors' or curators' co-operation. The advantage of this distinction is more clearly perceptible in the law of pledges, in which an obligation, not confirmed, admits of a

"is, because it lessens the occasions of suits and the power of judges over the fortunes of men; and because it is an incitement to virtue, by leaving some things merely to the integrity of the people, for which there would be but little room, if mankind acted in obedience to positive laws." This is a naif argument on the part of Dr. Wood.

1 L. A. Frommam diss. de obl.; Ant. Schulting, de nat. ob. in com. acad. vol. i. diss. 1.
2 P. 2, 15, 8, pr.; C. 2, 4, 8; for these rest on a basis purely civil.
3 Strubcn, rechtl. Bed. Th. 4, p. 354; Schulting, diss. l. c. cap. 5; Ex nudum pacto non oritur actio.
4 Id. c. 8 & g.
5 Id. c. 10.
valid pledge being given; also in the case of security, and when a sum erroneously believed to be due has been paid on an obligation utterly void, the action termed *condictio indebiti* will lie for its recovery,—not so, on an unconfirmed obligation; and so with compensation, if the debt arise on one side out of a recognised obligation, and the set-off out of an unconfirmed one, the sums may be set off against each other,—not so, if the set-off arise out of an obligation utterly extinguished.

Lastly, the civil obligation may coincide with and confirm the natural one in giving the owner of land, upon which a beast has done damage, power to destrain that beast for the amount of damage so done.

These three cases, then, may be summed up thus,—the civil obligation destroys the individual natural one when such a course is rendered necessary by a general rule of public justice, always traceable to a general equitable principle, which it partially acknowledges, by allowing an act to be proved, which, if it had been done according to legal form, would have given the obligation full civil force; but which, from a principle of equity, it allows also to be proved in bar of proceedings: or, the civil obligation coinciding with the natural one, the law adopts it, and gives it full legal force by turning it into a civil obligation.

§ 1505.

A civil obligation is that which, founded on natural equity, has acquired operative force from the civil law, and is executory in *foro civili*; while the other is merely so, *foro conscientiae*, and is hence defined thus:—*Obligatio est juris vinculum quo necessitate adstringimur aliquid rei solvenda secundum nostra civitatis jura.*

*Obligationum substantia non in eo consistitut aliquod corpus nostrum aut servitutem nostram faciat sed ut alium nobis obstringat, ad dandum aliquid, vel faciendum vel praestandum.* The term *vinculum juris* does not apply to other than civil obligations; the obligation of the latter definition admits of a wider interpretation, and may, perhaps, be more correctly termed an *aquitatis vinculum*.

If a person have a real right, or *jus in re*, to anything, the possessor thereof is, nevertheless, under obligation to do, or abstain from doing, or suffer to be done, something; this, however, is no obligation within the Roman meaning of the expression, because, not imposed upon a certain person, for an obligation attaches to a person, not to a thing,—thus, *agit unusquisque aut cum eo, qui ei obligatus est, aut cum eo agit qui nullo jure ei obligatus est, quo casu prodita actiones in rem sunt*; and hence the axiom *obligatio personam non egreditur*, thus an obligation gives no action against a third party, as an *actio vindicationis rei* lies against every possessor.

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1 I. 3, 14, pr. 2 P. 44, 7, 3, pr. 3 I. 4, 6, § 1.
§ 1506.

A simple civil obligation is also double—effectual or ineffectual: effectual in the case of the denial to deliver up a depositum miserrabile, in answer of which there is no good plea; the same in the case of double, triple, or quadruple damages, judicial sentence to pay a sum of money, or a promissory note upon which, in fact, nothing has been received.

A civil obligation will be rendered ineffectual by plea, as in case of force or fear having been used to obtain it, by the exceptio metus, or by the exceptio pacti, when a debt on a contract having been informally remitted is afterwards claimed; or, in the case of a solemn promise for a limited time, the promissor can be sued after the expiry of such period, but may plead the exceptio doli or pacti. Consequently, effectual civil obligations are those in which no plea will avail; ineffectual, such as may be successfully met by some plea.

§ 1507.

Mixed obligations are divided into civil and praetorian: the former owing their origin to the civil law, the latter to the praetorian edict; of which latter description is the obligation arising out of a contract of hypothecation which the praetor transplanted into, and made a part of the civil law by his edict, it being before but a natural obligation. The same is the case with a contract arising ex constituent, in which the praetor gave an action on a pactum nudum; but the obligation arising out of a contract of sale or exchange is civil and perfect, and the natural law here has been transplanted into the civil law by another and more formal way.

§ 1508.

Every obligation is founded on a law, but that called immediata is more particularly so, because it can be straightway referred thereto; as in the case of a person believing himself to have a just claim to property possessed by another, and having the intention to prove his title, calls upon such possessor, ad exbibendum, to exhibit it, that he may be assured as to the identity thereof previous to vindicating it.

The obligatio mediata is likewise founded on a law, but mediately only, it being first referable to a contract; of which kind is the obligation of a purchaser to pay the price agreed, which being a lawful transaction, the obligation is said to arise ex conventione, that is, out of a contract; for no one sells without the implied understanding of a quid pro quo, or a quasi contract, as the obligation of a thief to indemnify the party robbed: such obligations
are said to arise \textit{ex delicto sive maleficio, sive ex quasi delicto}, which
is the obligation arising from an unlawful transaction. Caius thus expresses the differences, \textit{Obligatio nascitur aut ex contractu, aut ex maleficio aut proprio quodam jure ex variis causam figuris.}
Where the illegal act is committed accidentally, and not designedly,
such \textit{delictam} is termed \textit{quasi}, as devoid of \textit{malus animus}; hence the quasi contract and quasi delict are supposed to be the meaning of Caius’s expression.

It now remains to consider what a contract is in its extended sense. A contract, then, is the declared consent of two or more persons in respect of some legal relation which concerns them, or, in other words, it is an accepted promise: thus, neither a will, a promise to the commonweal,\footnote{P. 44, 7, 1, pr.} nor a vow to God,\footnote{P. 30, 12, 3, in f.} \textit{Pactio est duorum pluriumque in idem placitum consensus.}\footnote{P. 50, 12, 3, § 10.} The word \textit{conventus} is also one of general signification, thus, \textit{Conventionis verbum generale est, ad omnia pertinens, de quibus negotiis contrahendi transigendi causà consentiunt, qui inter se agunt. Nam sicuti convenire dicuntur, qui ex diversis locis in unum colliguntur, et veniunt, ita et qui ex diversis animi motibus in unum consentiunt, id est, in unam sententiam decurrunt. Actio autem conventionis nomen generale est, ut eleganter dicit Pedius, nullum esse contractum, nullum obligationem, quæ non habeat in se conventionem, sive re, sive verbis fiat.}\footnote{P. 18, 1, 72.} We now come to the expression \textit{pactum}, which is \textit{duorum consensus atque conventio.}\footnote{P. 2, 14, 1, § 1.}

\textbf{§ 1509.}

\textit{Pactum obligatorium} is that by which the promissor becomes for the first time bound to do a certain thing; but \textit{pactum liberatorium}, that by which he is absolved from an obligation already existing, and is otherwise termed \textit{remissum}, or \textit{de non petendo}. The title of the Pandects, \textit{de pactio}, refers almost exclusively to this latter sort.

Again, \textit{conventiones} are \textit{onerose} or \textit{beneficia}, onerous, when both parties mutually promise what may be beneficial to them both.

\textit{Beneficial}, when the one party promises somewhat advantageous, for which the other gives nothing to the first party, but has to do some service; of which description is the \textit{commodatum depositum}, loan without interest; \textit{mandatum}, suretyship and expromission: the two may also be compounded.

Contracts, too, have their \textit{essentialia}, their \textit{naturalia}, and their \textit{accidentalia}. The first are such as cannot be dispensed with,\footnote{Ulp. Fr. 1, § 2 & 3; P. 2, 14.} for example, wares and price in money in a sale; \textit{naturalia} will be that the seller shall give up the thing bought: these two Papinian terms \textit{adminicula.}\footnote{Ulp. Fr. 3, pr.; P. 50, 12.} \textit{Accidentalia} will relate to paying, for instance,
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in a particular coin, or may have reference to time or place, and have obtained this term because they must be pre-arranged.

§ 1510.

A contract requires certain conditions to its validity, and—
Firstly, Free and intentional consent.
Secondly, Two parties at least.
Thirdly, Intention as to object.
Fourthly, Mutuality.
Fifthly, Intention as to manner and form.

Which may be summed up thus:

Constituitur contractus, consensu duorum ad minus partium in mutuum commodum voluntarie contrahentium secundum pactum formam. Intentional consent is the soul of a contract, which implies two parties at least, who contract with intent to secure, under peculiar specified conditions, to themselves certain mutual advantages not otherwise obtainable.

§ 1511.

As the consent must be free and intentional, certain persons are naturally excluded from the advantages or obligations arising out of contracts,—such as children under seven, imbecile persons, and sots.

The second class, although not bound or obliged themselves, bind those with whom they contract; such are impuberes, above seven, who contract without consent of their tutors.

D'Arnaud has collated the different opinions as to how far the Romans admitted an infant, and if under any circumstances, to be capable of a natural obligation without intervention of his tutor. To these the curious student may refer, also to those passages of the Pandects cited at the foot, and endeavor to make them agree.

D'Arnaud gives in substance the following exposition:—"If no regard be had to civil laws, but simply to equity, it is clear that a minor would be responsible. But suppose such minor to live in a community governed by civil laws, by which persons at his age are positively incapacitated from legal acts, then can he do any legal act without the concurrence of his guardian? In cases where the obligation does not depend on the consent of the debtor, ubi ex re actio venit, the pupil can be made fully liable without his tutor's authority; as, for instance, where any one shall have incurred certain expenses in the business of the pupil whereby he is advantaged. But, on the other hand, should the obligation be dependent on the consent of the guardian, and is a natural one,—that is, one merely in foro conscientiae,—and will depend upon whether the want of freedom and ripe consideration which the laws have adopted as

1 Lib. 2, var. conj. c. 22; Cuj. lib. 11, obs. 4.
2 P. 12, 6, 41; P. 44, 7, 59; P. 46, 2.
3 § 1; P. 46, 3, 44; P. 35, 2, 21; P. 36, 1, 64; P. 50, 17, 5.
4 Paulus, P. 44, 7, 46.
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a norm were in fact exercised in the particular case. But if the question be as to whether the laws have acknowledged such natural obligation, the answer must be negative as to the liability, if the real question be whether the pupillus ought or ought not to recognise the transaction."

It would seem to be denied that an infant is even bound by a natural obligation, the general rule of law on this subject being that infants and minors are not bound by anything whereby their condition or position becomes less advantageous than before; and should such result take place, they have a claim to be restored to their former condition. This rule is, however, not operative against them, should their position have been improved.

The impubes is, therefore, free from any action, and can claim the return of anything which he has given, if he have already fulfilled his promise, that is, in so far as it may be injurious to himself. With respect to third persons this obligation has its operation,—thus, if any one becomes surety for such obligation, he is compellable to payment; and this extends to the heirs of the impubes, in that the surety has no *condictio indebiti*, though he have actually paid the debt. Moreover, the creditor who shall have accepted a pupillus as his expromissor or surety, is estopped from bringing his action against the principal debtor. But the debt of a pupil admits novation.

Where, however, the contract is not injurious to the impubes, but, on the contrary, he has thereby become richer, an action lies against him.

The nature of the obligation arising out of the contracts of minors has been much disputed; two points may be decided as follows:

Firstly, A minor can enter into binding contracts if he have not a curator.

Secondly, he cannot sell or hypothekate his real property, whether he have a curator or not, without a permission from the ruling authority.

We find four several conflicting opinions as to cases which come within neither of these rules, all differing from each other, which are as follow, that—

1. A minor is bound by his contracts, except when he sells a part of his property; in which case only is the consent of his curator required.

2. A minor who has a curator is bound by no contract without his consent, except as to marriage and promise of marriage; for this is a simple conjunction of persons within the immediate

1 I. 3, 19, § 9 & 10. 2 I. 3, 29, § 3. 3 P. 46, 3, 95, § 2; P. 46, 2, 7, § 1. 4 P. 26, 8, 5, pr. P. 13, 6, 3, pr.

5 C. 2, 22, 5. 6 C. 5, 71, 16. 7 C. 5, 71, 16. 8 Cujac. D. 45, 1, 101, et in obs. lib. 19, c. 33; Fachin, contr. lib. 3, c. 9; Bronchorst, enantioph. cent. 1, assert. 33; Vulte-jus, in discep. act. c. 16, p. m. 191; Hilliger, ad Don. lib. 12, c. 22.
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power of the contrahent, and does not consist in giving or doing, or in matters as between debtor and creditor.  

3. A minor can be bound by his contracts; but if they regard his property, and have been concluded without his curator's authority, he cannot be sued during the time he is under curatela; but on attaining full age he may be sued to perform them, if he do not obtain a restitution.  

4. A contract which concerns the person of the minor is binding; that which concerns his property is not.  

In support of this last and most reasonable opinion as to the person of the minor, Paulus says,—puberes sine curatoribus sui posseunt ex stipulatu obligari as far as the important contract of marriage is concerned, ad officium curatoris administratio pupillae pertinet nubere autem suo arbitrio potest, and no law is to be found to support the contrary opinion; and now the question of the minor's property is clearly decided by the following decree of Diocletian and Maximian:—Si curatorem habens minor quinque et viginti annis post pupillarem ætatem res vendiderit, hunc contractum servari non oportet: cum non absimilis ei habeatur minor curatorem habens, cui a pratore curatore dato bonis interdictum est (this refers to a prodigal). Deaf and dumb persons may contract if they understand what they are about, and can clearly express themselves.

As consent is the soul of a contract, so it is void if founded on fraud, which is to be judged by the event as well as by the design, or when there be an error in the nature of the contract, or in the person, or in the object, or the attributes impliedly or expressly attaching to it. For in omnibus negotiis, sive bona fide sint, sive non sint, si error aliquis intervenit, ut aliud sentias (puta), qui emit, aut qui conducit; aliud qui cum bis contrabit, nihil valet, quod actum sit. Et idem in societate quoque coeunda respondendum est, ut si dissentiant, aliud alio existimante, nihil valet ea societas, quae in consensu constitit.

Hence, if the error be in the nature of the contract—that is, if one intended only to hire, the other to sell; or in the person, as if

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1 Donell, ad D. 45, 1, 101; Vinn. de pact. c. 14, n. 13; Noots, ibid. c. 20; Giedæus, de contr. step. c. 7, conclus. 14; Lyclama, mem. 6, lib. 7, 2, ch. 15; Huhn, resol. lib. 1, tract. 4, qu. 23.  
2 Huber, prælud. ad inst. lib. 3, 20, 4; Zach. Huber, diss. lib. 3, diss. 5, c. 11, § 16, p. m. 507; Marckart, interp. recep. jur. civ. lect. c. 22-4.  
3 Voet. ad Pand. 4, 4, 14; Weber nat Verblad. § 72.  
4 P. 45, 1, 101.  
5 Marckart, l. c. p. 146.  
6 C. 2, 22, 3.  
7 P. 45, 1, 6.  
8 Valleti, discip. schol. l. c.; Marckart, l. c. 150, seq.  
9 P. 50, 17, 79. A man applied for savine to a chymist, who, suspecting his object to be to procure abortion, gave him bread pills, which were administered. Quare, is the animus alone sufficient to constitute the offence in this case?  
10 P. 4, 7, 57; P. 50, 17, 116, § 2.  
11 P. 18, 1, 9; P. 45, 1, 32.
one intended to contract with A, and, in fact, contracted with B, and A appears after the bargain is concluded,—but here, of course, some interested motive is supposed in A; lastly, as to the object, as if a vendor have two houses, and contracts to sell the first, while the purchaser thinks he has bargained for the second.

There are other cases which do not render a contract void, but give rise to a claim of indemnity in some shape or other. In the case of an onerous contract, if the object have a secret defect making it utterly useless, an actio redhibitoria will lie for return of the thing on one, and the value on the other side,—in short, a restitution in integrum; but if the defect be such as only diminishes its worth, then the actio quanti minoris, or aestimatoria lies, to assess such deficiency, for the Roman law implies a warranty; and it is curious that in this action the court may give judgment, as in a case of redhibitoria,—that is, give the plaintiff more than he went for.

§ 1512. The consent must be freely given, for if it have been unduly influenced in any way, the praetor will grant a restitution in integrum for ait praetor; pacta conventa, quae neque dolo malo, neque adversus leges, plebiscita, senatus consulta, edicta principum, neque quo fraud cui eorum fiat, facta erunt servabo; but not only fraus and dolus malus, which indeed vitiates all contracts, but also force and fear, as militating against a free consent, have the effect of voiding a contract,—for nihil consensui tam contrarium est, qui ac bonae fidei judicia sustinet, quam vis atque metus, quem comprobare, contra bonos mores est; likewise error, quia non videntur, qui errant, consentire. Nevertheless, this vice is purged if the obligee expressly or tacitly accept the contract after such violence has ceased, or has allowed the limitation of restitution, ten years, to elapse,—for the contract is naturally held valid until some cause be assigned, before a competent tribunal, wherefore it should not be so. But a contract obtained through violence by a person not interested, whereby a third party benefits, is valid.

 Secondly, A contract must be sincere, or, in other words, bonae fidei; hence a simulated contract is of none effect. A simulated contract is one whereby two parties contract to all outward appearance, but without the real intention of binding themselves; such contracts are, for the most part, doubly void, since they usually have for object, the deception of some third party; hence

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1 P. 18, 1, 9, in f.; P. 45, 1, 22.  
2 P. 21, 1, 43, § 6; P. 44, 2, 25, § 1; vide et P. 21, 1; Feuerbach, civ. Vertr. Thib. n. 2 Thib. P. R. § 190.  
3 Ulp. Fr. 7, § 7; P. 50, 12.  
4 P. 45, 1.  
5 P. 50, 17, pr. & § 2. All these may be discussed as questions of moral philosophy, viz. an cum latrone vel praeone fidei servanda est.  
6 Poth. Oblig. T. 1, c. 1, § 2.  
7 P. 4, 2, 9, § 1; Poth. l. c.  
8 Hammel, rhaps. quest. obs. 684; Glicke, Pand. § 297; Thibaut, Théorie H. 4.
a simulated contract, if not really intended to be concluded, is void; but a contract simulated of sale, but really one of gift, would be good, for this is termed *contractus interne gestus*, not a simulated one properly so-called; neither can he, who is persuaded he has a right, be guilty of deceit, though he may be of mistake.¹

Thirdly, The consent must be *mutual*; hence simple treaties are not contracts, and remain inchoate until they are, by mutuality of intention, converted into contracts, &c.,—hence the term "being in treaty for," &c.; nor will it suffice that the two parties in treaty agree in the same thing at different times, as if one agree to-day and disagree to-morrow, and the other disagree to-day and agree to-morrow. Hence, also, a pollicitation is no contract, but merely a one-sided promise, or a promise then not already accepted, and gives on this account no action, except when God, the Church, or some pious foundation is the object of it, for then it is termed a vow, or *votum*, for *si quis rem aliquam voverit, voto obligatur*;² for the Church assumes a general procuration to accept on such accounts whatsoever superstitious and weak persons, and those whose minds have become impaired by distress and anxiety, can be entrapped into devoting to religious purposes, whereby its members enjoy the usufruct, without much caring in whom the legal estate vests. But the canon law goes still further, and grants an action on a *votum reale*, or vow, to give a third person something if a certain event come to pass; as, for instance, by one to endow a monastery, if his wife should be delivered of a son. But such pollicitation, if made to the State, must have a good and sufficient ground; thus, if an alderman promise to repair the city pavement, if he become mayor in the ensuing year, it suffices.

Fourthly, The consent must be clear and *definite*, demonstrative of intention; though in case of dower, the judge may afterwards assess the amount thereof.³

Fifthly, The contract must be *certain*, either by express declaration or tacit understanding; this consent may be expressed by *word* or *deed*, or neither, that is tacitly understood; either the consent may be by express words, or some act tantamount there-to, as nodding, and the like. Tacit consent is by using either words or acts termed *facta concludentia*, whence such consent may be implied—the returning a promissory note⁴ to the debtor would be of this nature, or speaking of the debt he owes, as already cancelled. *Consensus presumptus*, or presumed consent, is where it is presumed consent would be given if the party were present, on account of the advantageousness of the transaction; consequently, as is the degree of certainty or probability, so the presumed *consensus* is termed *certus* or *probabilis*.

When the consent is expressly given, the contract is termed *pactum expressum*; but when otherwise, *pactum tacitum*.

¹ P. 50, 17, 177, § 1. ² P. 50, 12. ⁴ P. 2, 14, 2, § 1; P. 34, 3, 3, § 1; P. 33, 3, 69, § 4; C. 5, 11, 3. ³ P. 32 (3), 59.
§ 1513.

As a contract supposes more than one person, a father cannot contract with his filius familias, for they are but one and the same person in the eye of the law; exceptions have been seen, however, to exist with regard to the peculium castrense, quasi castrense; but it is doubted whether the peculium adventitium form an exception. The same rule applies to the filii familias contracting together; this is, however, one of the seven leges damnatae, which bears many constructions. Slaves, as not being persons, cannot contract for themselves, but only as agents for their masters,—hence a contract made during slavery is not valid after manumission.

§ 1514.

Inasmuch as none can transfer a right to another but the possessor, who must, moreover, have the free disposition of his property, so the object must be in commercio, being neither a res sacra, religiosa, nor publica; but if the object of the contract perish in the interim, its value is due, if the possessor of it, who made the contract, be in fault. There must also be a possibility, for impossibilium nulla obligatio est.

Contracts cannot be concerning things which belong to other than to the contrahent: if a thing be pawned that belongs to another it must be delivered up, nor will the plea that it belongs to another avail; neither can a man contract for acts not depending on himself. A man may, however, contract to do his best endeavor that A do such an act, or promise to bring it about that A do something, but this is a point upon which there is much difference of opinion; a positive promise that A shall do something for another is decidedly void.

Pufendorf, animad. 61, § 4; contra, Bachov. ad Treutler, dim. 27, § 2, lib. G. H.; Faber ad Cod. lib. 5, tit. 26, def. 10; Franzk ad Inst. d. § 3, n. 8.

No obligation arises from a contract to do an unlawful act, or one against good manners: Ulpian calls such, pactum a jure communis remotum, and Papinian says, jus publicum privatorum pactis mutari non potest,—hence inheritance agreements, pacta successoria.
concerning succession to persons then alive, or any compact which has for its object to make one person the heir of another, is void; under which arrogation is, however, not included. These pacta successoria were:—affirmativa, when relating to the estate which may be left by one of the contracting parties when he makes over a right,—such affirmative contracts are also termed adquisitiva, whereby a right is acquired which formerly was not possessed, as would occur in the case of step-children; conservativa, whereby a right in fact forfeited is retained; restitutiva, whereby it is agreed to return or restore to another an inheritance which may come to the contrahent by some means or other, or indeed to leave his own property after death to one who was not a co-contracting party; the pacta successoria may be also negativa or renunciativa, being the agreement to forego a claim on an inheritance which hereafter will accrue to the contrahent.

Adquisitive, conservative, restitutive, and renunciative compactswere void in toto by the rules of Roman law; with respect to dispositive, they are valid when they have regard to the property of an uncertain party, but void if relating to that of a certain party, save such party consented thereto; there is, however, nothing to prevent the recall of such consent, and the rendering the compact thus null; these contracts are termed variously adquisitiva, when I obtain something new; conservativa, whereby I recover a forfeited right of heritage; or restitutiva, when I agree to return what has been obtained ab intestato or otherwise, or to leave own property to a third party, who was no co-contrahent. Negativa or renunciativa are those by which a future heritage is renounced; all these are invalid.

With respect to the heritage of a third party, it is termed pactum successorium dispositivum, as when I sell my uncle's inheritance during his life, to which he agrees; the contract is valid, but he may at any time render it invalid, by making his will in favor of another.

The reason the Romans held these compacts to be invalid was, first, that he who knew he was to succeed to an inheritance might be induced to attempt the life of the testator; secondly, because such compacts injured the interests of the intestate heirs, who had the first legal right in default of a testament. German lawyers are divided in opinion as to whether the Roman law is or is not binding in such cases in those states of Germany where the Roman law prevails; the majority, however, hold them to be obligatory.

2 Boehmer, dim. de fundam. pact. fam. ad fidelecom. inclin. c. 1; Ex ad Pand. c. 2, 403; Hebestreit, l. c. § 28, seq.
3 C. 6, 20, 3; P. 38, 16, f.
4 C. 2, 3, 15, & 19, ult.; C. 8, 39, 4; P. 5, 14, 5.
5 Boehmer, dim. de fundam. pact. fam. ad fidelecom. inclin. c. 1; Ex ad Pand. temp. 2, p. 403.
6 P. 38, 16, 16; C. 6, 20, 3.
7 C. 2, 3, 30.
8 P. 2, 14, 18.
9 Höffner, § 737, n. 15-18, ibique cit.
Other prohibited contracts also were those super re litigiosa; for, pendente lite, everything must remain statu quo, nor can either dispose of their rights.

Pactum de quota litis, or advancing money to carry on a law-suit on the compact to receive a certain portion of what was gained, or a similar compact between advocate and client, was un-lawfull. Qui improbe coeunt in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, Lege Julia de vi privatá tenetur. This latter was founded on the lex Cincia, which restrained counsel in respect of fees from their clients.

The lex Cincia proves that there were among the Romans, as well as at present, members of the legal profession who disgraced their order; this law prohibited an advocate from taking anything for his trouble beyond the acknowledged service by which his client was bound to him of old right; to evade this, the less scrupulous represented themselves as jointly interested in the suit, and this law remained even after they were allowed to take an honorarium; the palmarium, or present made on gaining the cause to the advocate, not being considered as within the prohibition.

The English law acknowledges the same principle under the title of Champerty, which Blackstone derives from campi partitio, and defines to be a bargain with a plaintiff or defendant, campum partire, to divide between them the land or other matter sued for, if they prevail at law, whereupon the champertor is to carry on the suit at his own expense. To prevent these suits, it is supposed that a chose in action, or jus ad rem, was made non-assignable at common law. The English law punishes such persons by fine and imprisonment; the Roman law by forfeiture of a third part of their goods and perpetual infamy. By the Roman law, inasmuch as gambling contracts are illegal, so all implied contracts arising out of them are also invalid.

§ 1515.

Contracts imply that every one should secure his own advantage; inventa sunt obligationes, says Ulpian, — ad hoc, ut unusquisque sibi adquirat quod suá interest; cæterum ut alii detur, nihil interest med. Paulus remarks, — Quaecunque gerimus, cum ex nostro contractu originem trahunt, nisi ex nostrâ personâ originem trahant, inanem actum nostrum efficient. Et ideo, neque stipulari neque emere, vendere, contrahere, ut alter suo nomine agat, possimus, shewing that no one can contract but for his own advantage. If I obtain a promise in favor of myself and A, as regards respective shares, I can demand mine, not so A his; but if I obtain a

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1 P. 48, 7, 1.
2 P. 2, 14, 53; P. 50, 13, 1, § 12.
3 C. 3, 1, 6, § 2; P. 17, 1, 73; P. 50, 23, 1, & 12; P. 2, 14, 55.
4 St. conspir. 33 Ed. I. 62. 2.
5 Rich. II. 4, and by 32 Hen. VIII. 9, a forfeiture of 10l.
6 P. 48, 7, 10.
7 P. 45, 1, 38, § 17.
8 P. 45, 1, 11.
9 I. 3, 20, § 4; P. 45, 1, 110, & 13, § 1.
promise in favor of myself or A, A has no action, but I have an action for the whole. Nevertheless, the promisor may pay the whole over to A, and leave me to recover by an actio mandati from A.  

The exceptions to this rule, that one cannot promise for another, are the following:—

A filius familias, or a slave, may obtain a promise for his father or master.  

A man may promise for his heir (this was an exception introduced by Justinian).  

By virtue of office, ex officii ratione, a tutor for his pupill, a curator for his ward, an actor civitatis or syndicus for the corporation whom he represents; this is, however, not general.  

The factor (institor) who contracts in the name of his merchant, since, to a certain degree, extended to all powers of attorney.  

The promise made to one on account of a third person who has an interest in the performance of the promise.  

Diocletian and Maximian decreed that one might promise sub modo, the modus for the benefit of a third party being introduced.  

There are several other exceptions in the Roman law.  

§ 1516.  

Lastly, the contracting parties are to be bound in the way they had intended to be bound, which may be—(a) pure, (b) sub conditione, (c) sub modo, (d) sub die. When a condition is only perfected on its fulfilment, the pactum is said to be sub conditione suspensiva; but if it lose its validity by the accomplishment of the condition, it is said to be sub conditione resolutiva. This is looked upon as puré pendente conditione, so long as the condition remains unfulfilled, deficit conditio; but so soon as conditio existit, the contract is at an end, and void from the beginning, for conventio retro nulla fit, and the possessor must deliver up the thing with all profits.  

With respect to the first, it is to be remarked that no affirmative physical impossibility can be made a condition, for Celsus says,—Impossibilium nulla est obligatio; the same, put negatively, is looked upon as an unconditional contract. The same likewise applies to morally impossible conditions, whether affirmative or negative; thus to promise to do, or to omit to do, an illegal act is equally obnoxious to the law; moreover, privatorum conventio jure publico non derogat.  

A condition may be possible, but pending in uncertainty, obligatio quidem concepta est sed in utero adhuc latet, in which case the rule is dies neque cedit neque venit. So long as this is the case, the
promisee can enforce nothing, nor can either retire from the engagement, nor can the promissor do aught that may prevent the accomplishment of the condition; the conditional contract is, moreover, obligatory on the heirs of such promissor; in this, it differs from the appointment of an heir or legacies, where the promisee must outlive the fulfillment of a condition. The fulfillment of a condition dates from the time the contract was entered into; on the other hand, as soon as it is apparent that the condition will not be fulfilled, the contract is void retrospectively, that is, ab initio.

Conventio de spe is such as can only be executed when a casual condition exists, and may be beneficial or onerous—in this case, the consent of both parties is unconditionally given, and the contract at once perfect; nor does its validity depend on a condition, or on whether that which one promises the other to be performed depend on a condition. An onerous conventio de spe may be of two kinds. If something be promised which is only due on the fulfillment of a casual condition, the contract is termed conventio de spe simplici; but if something be promised only in case a casual condition exist, and the other side promise somewhat else, but under condition that whatever was promised on the other side be performed, it is termed conventio de re sperata. To promise a fisherman a certain sum for the first draught of fish is an example of the first or simple condition; but if promised a sum certain, unconditionally, he must be paid whether he take anything or no. Whoso puts into a lottery must pay for his ticket in any case, the promise on the other side being only required to pay, conditionally, on its coming up a prize; but if one promise to give so much for every measure of corn growing the next year in a certain field, it is a conventio de re sperata; the one must deliver the corn if it grow, the other pay the price if he receive it.

A contract under a resolutive condition is perfect, pendente conditione, and is to be looked upon as a pure contract, so long as the condition do not exist, deficitente conditione; but conditione existente so soon as the condition arise whereupon the contract is to become void, it is so ab initio, and is considered as non avenu, for conventio retro nulla fit, hence the possessor must deliver up the thing with all its fruits. This condition can be appended to all transactions whatever.

§ 1517.

Modus is a clause appended only to actibus beneficiis, such as legacies and gifts, obliging the party benefited thereby to do or omit something; it differs from the last in that it is only applicable to beneficiary acts. The modus is only potestivus; for the thing required to be done is always in the power of the promisee, thus it is not casualis. When a resolutive condition exists, the validity of the promise terminates, ipso jure; not so with a modus, for here

1 P. 18, 2, 5.
the promissor must sue in order to obtain the fulfilment of the contract by the promisee, and, if this be no longer possible, may go for damages.

*Modus non suspendit obligationem,*—he who has promised *sub modo* must fulfil irrespective of the other side, which however must give security for the fulfilment of the modus.1

§ 1518.

A contract to which a period is appended is termed *sub die* generally, which may be *ex die*; in which case the obligation only arises from a certain date or *terminus a quo,* or up to a certain date *in diem,* or *terminus ad quem.* Upon these two expressions a variety of changes may be rung, beginning with the *ex die* contracts. They may be,—1, performable on a certain day; 2, on a day sure to come some time or other, but uncertain as to when; 3, on a day certain as to the exact day, but uncertain as to its ever accruing; 4, on a day uncertain in all respects as to whether and when it may arrive. In 1 and 2, a right at once accrues to the promisee, *dies statim cedit,* sed *dies venit demum tempore lapso;*2 the action only lies on the expiry of the last day of the term, *totus est dies arbitrio solventis tribui debet:*3 in 3 and 4, the day is to be looked upon as a condition.

*In diem* contracts may be so that the party perform an act once, as in the case of one becoming security for another for a year; or he may have to perform the act many times, as to pay a certain sum every week so long as he live.4

As in promises *ex die,* these *in diem* may be altogether certain, or altogether uncertain, or partaking of both. The general rule is, *pure facta obligatio intelligitur,* or *dies statim cedit et venit,*—that is, an obligation is binding on the promisee,—and as soon as the case stipulated in the contract comes to pass, a right of action accrues; but this right ceases as soon as the day comes. This does not apply to contracts entered into by solemn words.

§ 1519.

The operation of a valid contract is obligatory or liberatory; the first binding the parties to performance, the latter releasing them from their hitherto responsibility, either *ipso jure* or *ope exceptionis.* If the contract be not expressly limited to the person, as a *pactum personale,* or *in personam,* it is binding on heirs, and termed *in rem* or *reale.*5

Sume exampla:—1. I promise to pay on the Ides of March; 2. I will pay when the now king dies; 3. I will pay on the Ides of March, if I shall be then worth a thousand pounds; 4. I will pay the sum which may have become due and owing to you on your marriage-day.

1 P. 40, 44.

2 Ulpian, I. 3, § 3, says,—id quod in diem stipulatur, statim quidem debetur sed peti prius quam dies venedit non potest. That is, the legal right accrues at once, but the execution is deferred; hence in Ulpian, P. 41, § 1, dies adjectus efficit, ne de presenti pecunia debatur. The last words must be held to signify *present payment,* &c; but this is a disputed passage.

3 I. 3, 16, § 2; P. 45, 1, 41, § 1.

4 Vinn. ad I. 3, 16, § 3, n. 1.

does not extend to the heirs of the donee; and there are others connected with the personal qualities of the contracting parties as partnerships, si persona industria electa conventio singulari; persona fiduciad inita est, mandates, &c.

The successor singularis not being an heir of the grantor,1 is exempt from the effects of the contracts of his predecessor: thus, in case of the sale of a house, contracts thereupon by the former possessor cannot be inforced on the buyer. Servitutes naturally form an exception, because they attach in rem.

The law2 says, that whoseo performs not an act which he has promised to perform, can be compelled to indemnity in damages; but it is not clear whether the defendant have the choice of compelling specific performance. Vinnius3 thinks specific performance is not compellable; to others it appears unreasonable that the performance of an act should not be compulsory.

Courts of equity in England look upon things contracted for as already performed, and by that fiction compell specific performance; but courts of law can only assign damages or indemnity for the loss caused by the breach of the obligation.

§ 1520.

It is not unusual, for the greater security of the promisee, to bargain for an arrha,4 a penal sum to be presently due and payable by the terms of the contract itself in case of non-performance: thus, the promise is to do a certain act, or pay in default thereof certain penalties. In England this is termed a bond in a penalty; hence the question for the jury then simply is,—Did or did not the promissor execute the bond? If the jury find he did, then the penalty to be paid is beyond dispute, and the plaintiff obtains judgment and execution for the penal sum.

Here, however, equity originally interfered to prevent a plaintiff actually taking more of the penalty than would satisfy debt and damage—a principle which has since been adopted by statute into the common law5—and the amount of damage must consequently be assessed by the jury according to the evidence adduced; but if it appear that the penal sum is the amount which it was agreed between the parties should represent the damage to the promisee, in event of the promissor's default at the time of the making of the contract, then no assessment is required, and such sum is termed liquidated damages. In the case of a bond, the action is in debt; in the latter case, in covenant.

The arrha is something similar, for it is clearly a penalty; thus

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1 Vide § 1148, h. op.
2 P. 44, 7, 44, § 6; P. 42, 1, 13, § 1; P. 45, 1, 68, 72, pr. & 75, § 10; Cuj. ad P. 45, 1, 72.
3 Ad. I. 3, 16, § 7, n. 2.
4 The Germans term arrha, Angeld, Aufgabe, Angabe, Weinkauf, Reugeld, and vulgarily Haftpfennig, Gottespfennig, Kaufschilding, Handgeld, or Ein Darau, because given upon the bargain to bind it; the French, des arrhes; the Italians, arra or caparra; the Greeks, ἀδρασίω; the Latin is also arrhabo.
5 14 & 5 Anne, 16; 8 & 9 Will. III. 11.
Arrha pacto imperfecto dato is a sum given to ensure the conclusion of a contract then inchoate only, and its operation is, that if the giver of such arrha recede from the contract, he loses it; but if the receiver decline to complete, he must pay double,—that is, return the arrha, and pay forfeit to its amount, as though the other party had been the receiver.

If an arrha be given pacto perfecto, it is said to be pænitentialis, or a fine in lieu of performance; in other words, it represents liquidated damages, which indeed is the origin of a penalty as connected with a contract, and may be retained by the one, or recovered, in duplo, by the other party as in the above case. The term arrha confirmatoria must be rejected as void of meaning; for, though confirmatoria when given, it becomes pænitentialis when forfeited.

§ 1521.

It has been seen above, that every contract which fulfils three great requirements is valid by natural law. These are—competency to consent, actual consent given, and physical or moral possibility of execution.

The civil law has narrowed these requirements for the protection of the public with a view to prevent rash compacts, and to induce mature consideration in the contracting parties. These restrictions have the double object,—the advantage of the commonwealth and that of individuals, and hence flows the distinction between pacta and contractus. The two points, then, to be observed are, firstly, whether a pactum exists according to natural law; and secondly, whether the civil law has, by acceptance, rendered such a contractus. The Roman jurists, therefore, have termed those pacta to which no civil remedy by action2 applies; and contractus, those upon which an action can be brought.

In order to convert a pactum into a contractus, certain formalities are to be observed, hence these are termed contractus formaliori or strictiori juris, being accompanied by certain solemn formula; the execution of which is a presumption of mature consideration. But there are others in which the fulfilment of the contract itself implies a deliberation sufficiently mature to render it a binding civil contract; these are, therefore, termed reales. Lastly, the third description requires the simple mutual consent of the contrahents, hence such contracts are termed consensuales; in these, then, the natural law is simply adopted into the civil law, which confers upon them validity without further requirements. They are, however, limited in number, and specified to be emptio venditio,

2 Galvanus, de usufr. c. 17 ; Noodt, de pact. et transact. c. 9.
bargain and sale; locatio conductio, letting and hiring; societas, partnership; mandatum, agency; and emphyteusis, which is a comparatively recent introduction, and consists in letting land on a perpetual lease for the purpose of improvement, or of being reclaimed from a state of sterility and put into cultivation.

§ 1522.

A mere pactum gave no ground of action by the old law: thus Paulus says,1—Ex nudo pacto inter cives Romanos actionem nascitur; but more recent legislation modified this rule, granting an action on certain pacta, without, nevertheless, transferring them into the category of the five contracts above alluded to, these for the sake of distinction are termed pacta justa2 or non nuda; and the others, nuda, sola, simplicia, or simply pacta.3

When pacta are confirmed by any more recent law, they are termed legitima or legal; when the praetor made them operative by his edict, they are called prætoria; lastly, certain pacta obtained operative force by being adjecta, or appended to a contract acknowledged to be valid; and as such come under the title of legal pacts to which they are accessory.

Under pacta legitima came marriage compacts and donations,4 on which the later law gave an action, without, nevertheless, making them contracts. The contract for nauticum fænus5 was also a legal contract; this consisted in the person who advanced money to be transmitted beyond sea, undertaking the insurance in consideration of a higher rate of interest than is usual for simple loans. In like manner, where one lends another corn, and bargains for interest thereupon.

Under pacta prætoria are to be placed pacta remissoria, which are those pacta nuda in which the praetor granted an exception pacti on equitable grounds: thus Ulpian says,6—Nuda pactio obligationem non parit, sed parit exceptionem.

Thus, if A remit a debt to B by a pactum nudum, and, nevertheless, sue him for it thereafter, the praetor grants B the exception; the effect of this plea must be accounted for by the presumption that a valid contract can only be remitted by another as valid, and this validity the praetor chooses to presume, in order to do equity, because it is unreasonable that quod semel remisit creditor debitori suo bona fide ieterum hoc conetur destruere.

Again, the contractus hypothecæ already explained,7 the consti-

1 R. S. 2, 14; Vinn. tract. de pact. c. 6.
2 Modern jurists term these vestita.
3 Cujacius, obs. lib. 11, c. 17, et ad L. 1, D. de pact. Wachtendorf, diss. de pact. nudis in diss. triad p. 389, contend that classic jurists did not recognise these terms; but Bachov. ad prota Pand. p. 564, Vinn. l. c. 5, § 5, support the contrary opinion.
4 These are sometimes termed contracts, C. 4, 21, 17; P. 12, 1, 20; but the word must be understood in its general sense.
5 P. 22, 2, 7; P. 23, 1, 30; P. 4, 32, 17; Nov. 136, 4.
6 P. 2, 14, 7; § 4.
7 § 1464, h. op.
tutum or promise to do a certain thing dependent upon an already existent obligation termed promissory, or possessory resulting from possession, and the pactum de jure jurando, which is a promise to pay a certain amount, on the debt being sworn to be due, and when such oath has actually been made.¹

Under pacta adjecta are to be counted the pacta de retrovenendo, or agreement for the first refusal of an object sold; under the same head come the pacta, otherwise termed contractus fiduciae, usual in emancipations where a promise is interposed to reman-cipate to the natural father, in order that he may retain his jura patronatūs,—for this pactum is adjectum to the form of bargain and sale by which emancipation was performed; but this was equally applicable to all objects transferred by the ancient solemn form of mancipation in which the honorable compact or pactum fiduciae was interposed.² Justinian, in abolishing the distinction between res mancipi and nec mancipi, virtually abolished this, which is ancillary to them.

Although the prætors' edict applies to remissory, it is doubtful if it apply to obligatory pacts; all the cases cited on the decided cases are of obligatory ones, and this is one ground to infer that the exception applied to such only, the more so as the exception would not be available in the other case.³

§ 1523.

Quasi contracts arise out of acts whereby a man is obligated in like manner as he would have been by a contract: thus a tutor is obligated to the due administration of his pupill's property, who is liable on his own part to reimburse his tutor his lawful ex-penses, as though an express contract had been entered into to that effect. The obligations which thus accrue are said to origi-nate quasi ex contractu. These implied contracts are of the greatest importance, since the question then arises as to whether or not a certain act amount, in fact, to a contract, and are reserved for discussion in their proper order.

§ 1524.

Proper contracts are, then, agreements between two parties on a sufficient cause and consideration, with an action to inforce performance. Contractus est conventio, habens certum nomen vel causam sui natura obligationem ad agendum efficacem producens.⁴

Proper contracts are, furthermore, nominati; that is, may pass under certain known denominations having actionem proprium et cognominem, and named after the remedial actions which apply

to them: thus we have the condictio certi ex mutuo or action of
debt arising out of the mutuum or loan for consumption, and the
actio commodati directa or contraria, peculiar to the commodatum
or gratuitous loan for use of an imperishable object; the actio depositi
for the recovery of a thing bailed to another without hire; the
actio pignoratitiae or hypothecaria for enforcing the rights of
pledges; but all other contractus reales are innominati, or design-
nated by no particular name.

The contractus consensuales are likewise nominati: thus emptio
venditio produces the actionem empti et venditi; the locatio con-
ductio, the actionem locati et conducti; the societas, the actionem
pro socio; and lastly, the emphyteusis, the actionem emphyteuticarium.

The contractus formularii belong to the category of the nomi-
нати: thus the actio ex stipulatu arises out of the contractus
stipulationis, and is the only formular contract which survived
Justinian's legislation which abolished the other two; viz., the
solennis dotis dictio, or solemn promise of a portion by the father to
the son-in-law, and the promissio operarum a liberto facta, which
was the only case in which an action lay on a promise because
confirmed by oath. ¹

Other contracts to which a general remedy applies, viz., the
actio prascriptis verbis, or action on the case, are termed in-
nominati: and it is quite possible that a contract may have itself
a name, as the contractus permutationis, and yet be innominat,
because its belonging to one or the other category depends upon
the remedy, not upon the contract itself.

For greater clearness, the contractus innominati have been
divided into four classes:—

The first of which is represented by the expression do ut des,
which is a permutatio, or the exchange of one object for another,
as of a horse for an ox.

The second is conveyed by the term do ut facias, in which
something is given in consideration of labor to be performed, as
the giving a peasant corn in consideration of his ploughing land.

The third is the converse of the above facio ut des, in which
the peasant stands first, and ploughs the land in consideration of
receiving corn.

The fourth is facio ut facias, in which an act is done by the
first party upon the understanding of another act being performed
by the second party; the one, for instance, paints a portrait in
consideration of the other reviewing his gallery.

§ 1525.

In contracts the one party usually promises to do, grant, or
suffer something, the other accepts, and vice versa—the latter

¹ Caii, inst. 2, 9, § 4, in quem vide
Donnell, in comm. l. C. 2, 18; et A. Faber, in conject. 26, 18, vide et Mal-
blanc, in dict. de jur. eur. p. 319, sq. § 1522,
h. op. The freedman was liable to his patron
for opera officiales, but not for opera fabriles,
except thus stipulated for, § 515, h. op.
promises, the first accepts that promise; there are, nevertheless, contracts in which the one party only is bound _aliquid prestare_, but not the other. Such unilateral contracts are sometimes also termed _unilaterales_ or _simplices_, while the others pass under the denomination of _bilaterales_, _duplices_, _reciprocis_.

The _mutuum_, or loan; the _stipulatio_, or solemn formal promise; the _fidejussio_, or suretyship; the _contractus literalis_, or contract in writing; and the _contractus innominati_, before mentioned, are all of them _contractus unilaterales_; for the promise is only on one side to perform some act, such as the restoration of a loan, or to grant something, without any corresponding promise on the other side.

When two parties are at once equally _ab initio_ bound by a contract, it is termed _bilateralis aequalis_, but _inaequalis_ when the one party becomes bound by it subsequently; hence the terms refer to the inition of the contract, not to its ultimate operation. Bargain and sale is an instance of the first, for here the vendor is _ab initio_ bound to deliver the object, and the purchaser to pay the price; but a deposit is an example of the latter, because the deponent is not at once bound to any reciprocity which may hereafter arise out of some accidental circumstance, such as damage caused to the depositary by the possession of the pledge,—hence it is a _contractus bilateralis inaequalis_: it is, however, well to remember that these terms do not belong to the classic period of Roman jurisprudence.

Out of unilateral contracts arises a single action only: thus, the _mutuum_ gives the _condictionem certi ex mutuo_; the _stipulatio_, _actionem ex stipulatu_; the _literarum obligatio_, the _condictionem ex chirographo_; and the innominate contracts, _actionem de praescriptis verbis_; whereas the _contracti bilaterales aequales_ produce two _actiones directas_, as in the case of _emptio venditio_; and the _inaequales_ one _directam_, and another _contrariam_, as in the case of a _depositum_.

With respect to _actiones contrariae_, the rule is that the object of both is indemnity: as of a _depositarius_, in the case of a _depositum_; of the _commodatarius_, in the case of a _commodatum_; or of the pawiess, in cases of pledge; the _actio_ being respectively _depositi_, _commodati_, or _pignorativia contraria_.

§ 1526. A contract _stricti juris_ differs from the _bonae fidei_, in that in the former the parties are bound strictly by the letter of the oral or written contract, but in the latter expected to perform such accessory acts as may be usual in contracts of this description, but which have been considered as implied, and therefore omitted to be expressly mentioned; hence _contractus stricti juris_ came to signify such only as were concluded in a fixed form of words, all others being termed _bonae fidei_. Of the former description are _stipulationes_, _literarum obligationes_, but a _mutuum_, _commodatum_, _depositum_,
DAMNUM ET MORA CONTRACTUM. 453

pignus, emptio, locatio, societas, mandatum, and societas are of the latter, or bona fidei.

The chief distinction existing between the two kinds is, that in the stricti juris contractus no interest can be demanded, while it can in the contractus bona fidei as soon as any mora or default occurs.

A contract stricti juris, if founded on fraud, can be only destroyed by a restitutio in integrum; but the contract bona fidei was ipso facto void on the discovery of fraud in the inducement thereto.

If a creditor be reciprocally indebted in a certain sum to his debtor on a bona fidei contract, it might be set off ipso jure; not so in the case of the contract stricti juris, for then if the creditor sue, he must be first met by the exceptio doli. Justinian abolished this difference, indeed he left, as we have already seen, but one stricti juris contract, that of stipulation.1

A contract to give a previous contract additional force is termed accessorius, in distinction from the principalis; such are contracts of pledge, or of surety to insure performance of the agreement in chief.

§ 1527.

Damnum, or damage, is the loss accruing to one of two contracting parties, by the default of the other party in the performance of his obligation. It may consist in the loss of property, of advantage, or of a perfection: thus, in respect of the object, the damnum is as diverse as the object out of which it accrues, for health, a fair name, moveable or immovable property, may be injured, and hence a damage may arise.

Damnum may be positivum, otherwise emergens; that damage arising from the absolute loss of a thing by some action of another, or that which prevents the continuance of an existent or prospective profit, termed privativum, otherwise lucrum cessans. A damnum may be casuale, when arising accidentally, or the result of the lawful or unlawful act of another. In the first case, it is termed indirectum, or damnum in consequentiam veniens, lawful indirectum; damage, for qui ipse jure suo utitur nemini facit injuriam;2 but in the latter case it is termed damnum directum, unlawful damage; and such damage may be done designedly, through carelessness, or from want of forethought: hence the distinction of damnum dolosum and damnum culposum.

Damnum may arise out of a mora or delay and the circumstances of an accident, for which the obligee may be, in certain cases, rendered responsible.

§ 1528.

Of these, mora,3 or delay, first demands attention; it is a Mora.

1 In Germany, all stricti juris contracts whatever are abolished; Glück in Hellfeld, Th. 4, § 296; contra, Cocceii, jur. contr. 4, 3, 2; Puf. 4, 73, p. 276. In England a court of law will award execution on a stricti juris contract, which a court of equity will annul.

2 P. 50, 17, 49.

3 Sometimes the same conception is conveyed by the terms frustratio, cessatio, dilatio, although these are all, strictly speaking, applicable to peculiar cases.
degree, and involves certain measure of blame. The damage occasioned by the delay, on the part of the deliverer, is termed \textit{mora solvendi}, and may be \textit{noca} or \textit{innocua}, upon which fact the responsibility will depend. In the first case, the general rule being \textit{mora in morosum omne transfert periculum}: thus, if on account of a deferred delivery the thing be lost, the obligee must bear the consequences, and make indemnity; not so if it be proved that the object, even if delivered at the proper time, would equally have been lost; and here we may suppose the case of delayed transhipment where both vessels are lost, or of transfer from house to house where both are burned, then no damage has, in fact, accrued to the recipient.

\textit{Mora may be praestandi sive solvendi} on the part of the obligee, or \textit{acciipiendi} on the part of the obligor. In the first case, the debtor does not perform his contract within the proper term; in the latter, the creditor does not accept the performance by the debtor at the time agreed.

The \textit{mora}, or default, commences with the point of time at which the debtor is bound by his covenant to satisfy his part of the contract; but this is designated in three several ways, \textit{— aut lex, aut dies, aut creditor interpellat}; of these, the first two may be termed constructive, the latter actual. In certain cases the law provides a day upon which certain contracts should become due, which is a constructive demand, and since \textit{privatorum conventio juri publico non derogat} and \textit{utilitas publica praefertur contractibus privatorum}; moreover, since no private agreement can alter a solemn contract, \textit{ nec ex prætorio nec ex solenni jure privatorum conventione quicquam immutandum est}, so law has precedence in certain particular cases overriding all other circumstances: thus legacies are due within a certain time after administration, and generally in all cases where the common law has absolutely fixed a day for payment, non-payment on that day constitutes a \textit{mora}, though in certain cases the common law allows a discretion in private parties to extend or anticipate the legal term.

Secondly, \textit{dies interpellat pro homine}, this, too, is a constructive demand; for the creditor is not under the necessity of applying to his debtor when the day of payment has been fixed absolutely by testament, special agreement between the parties, or order of the court, here the day is said to apply for payment in the place of the man, and the default dates from that day. The English law agrees with this, a day fixed by deed is sufficient; but not so in the case of the maker or acceptor of a bill or note, if payable at or after sight, or “at certain persons.” The demand in these two cases is, in fact, taken as given, and is therefore constructively made on the day when the obligation becomes due; hence both these are termed \textit{mora ex re}.

Thirdly, when neither the law nor special agreement interferes,
debitor interpellandus est; and from the moment of such demand by the creditor, the debtor is in morā, which is termed ex personā.

It matters not whether the mora or default arise out of carelessness or design; the creditor may, before the debtor is in default, grant him further time if not contrary to the common law, and thereby anticipate the mora; but no mora accrues where the court has attached the object of the contract on account of a debt not presently due.¹

Sometimes delay vitiates the whole contract by special agreement, as when money be not paid at the stipulated time, or the performance of the contract delayed till it become useless to the obligator.²

If the delay diminish the worth of the object in a case of negotium strictijuris, the highest value the object bore between the commencement of the delay and that of the litis contestatio becomes due; but in judiciis bonæ fidei, whatever has accrued up to the time of condemnation;³ or, if the object perish before condemnation, then the highest value the object bore up to the time it perished; if it only suffered deterioration, then the difference between the highest value it bore before deterioration and its present value will represent the measure of indemnity.

Thus far we have considered the delay of the deliverer, now let us turn to that of the receiver, which is the negative proposition, termed mora accipiendi; here if the tender have been made, but refused without sufficient grounds, and thereupon be paid into court sealed up, whence it is stolen, the creditor bears the loss. The debtor is, moreover, absolved from usuras morae by the refusal of the creditor to receive at the stated time; on the same principle, deterioration occurring after tender must be borne by the creditor.⁴

§ 1529.

We now pass to the question of dolus, and there is perhaps none more important in a logical point of view, nor any upon which more has been written by the most able logicians and lawyers in all ages, than that of the dolus and culpa.

Donellus, Duarennsus, Cagnolus, Contius, Baro, Fornerius, Rævardus, Bargius, Titius, Lauterbach, Pothier, Thibaut, Höpfner, von Savigny, Story, Jones, Hasse, and many others have exhibited great perspicuity, and have bestowed infinite labor on this subject; the most modern are Story and Hasse. The latter has dedicated an entire work, exclusively to this matter, which extends over 600 closely printed octavo sides and exhausts the question; to this work, which contains a summary of all previous treatises,

¹ 1 Puf. T. 3, 170. 
³ P. 13, 1, 8, § 1; P. 13, 3, 3; P. 17, 1, 37; Leyser, sp. 150, m. 1, 2, 3; Glück, Pand. Th. 4, § 330, et Th. 13, § 844, p. 290. 
⁴ P. 19, 1, 3, § 4; Glück, cit. § 844, p. 297.
those who are masters of the German language are referred; but such as are not in a position to profit by that excellent work, must rest contented with the elegant treatise of Sir William Jones, and the commentary of that acute and profound American jurist Story.

The first point for consideration is the meaning of the word *dolus*. *Dolum malum* Servius quidem ita definit, machinationem quandum alterius decipiendi causa, cum aliud simulatur, aliud agitur. Inasmuch, however, as it is possible to circumvent a man without a false pretence, Ulpian\(^1\) continues,—*Labeo autem posse et sine simulatione id agi ut quis circumveniatur, posse et sine dolo malo aliud agi, aliud simulari sicuti faciunt, qui per ejusmodi dissimulationem servant, et tuentur vel sua vel aliena. Itaque ipse sic definit, dolum malum esse omnen calliditatem, fallaciam, machinationem ad circumveniendum, fallendum decipiendum alterum adhibitam;* and Ulpian hereupon remarks,—*Labeonis definitio vera est.* Now, if this definition be analyzed the exact meaning of *dolus* may be arrived at,—it is all cunning, deceit, or means employed to circumvent, deceive, or take in another; it is not strictly necessary to assume a character or circumstance other than the truth, or to conceal them. Any cunning contrivance wilfully effected, whereby it comes to pass that another is deceived, suffices to constitute a *dolus malus*, which implies a certain malicious intention to wrong another. This *dolus malus* is distinguished from *dolus bonus*, and the praetor always added the qualificatory adjective in order to define exactly what was meant. *Non fuit autem contentus praeor dolum dicere sed adjecit malum, quoniam veteres dolum etiam bonum dicabant et pro sollertia hoc nomen acceperant maximi si adversus hostem latronemve quis machinaretur.* This *dolus bonus*, then, is a justifiable deceit, and so far lawful, because permitted; it was no *dolus* to conceal money from a robber by false severations, or to circumvent an enemy by machinations, because the robber was engaged in an unlawful act, and fraud is to be met by fraud; in a moral point of view the point may be more doubtful; nevertheless, since any promise given to an enemy or to a robber is given under duress, which excludes the supposition of that free consent necessary legally to bind the contracting parties, it is no valid consent, no consent has been given in law, though it has so in fact. The means by which the end has been attained is, nevertheless, grounded on a deceit; it is, therefore, clearly a *dolus* in respect of the party upon whom it operates. *Dolus*, therefore, when used alone is equivalent to *fraus*,\(^2\) which is never used in any but a reprehensible sense. *In fraude legum, or in fraudem legum*, is to do that which the law does not forbid: in so many words, it is a circumvention of the law, and that which is

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\(^1\) P. 4, 3, 2. \\
\(^2\) Pand. 16, 3, n. 25; P. 13, 6, 5, § 2; P. 50, 17, 23. Story thinks Jones and Pothier do not use the word *dolus* in the intense sense of *fraud*. Story, Bail, § 20, a, § 65; Poth. Traité de Depot, n. 23 & 27; Id. de Mund. n. 211; Id.
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contrary to its spirit, an evasion of the law. *Fraus legum ubi id fit, quod lex fieri noluit, fieri autem non vetuit.*¹ Again, *in fraudem legis facit, qui salvus verbiis legis sententiam ejus circumvenit.*² Dolus is a more general term than *fraus*, and *tum in verbiis tum in rebus locum habet, fraus praecipe et propri in rebus*; but this distinction is rarely observed.³

This *dolus malus* is also termed *dolus ex proposito*, or *personalis*, or malice aforethought, and may be *clandestinus* or *manifestus*; but it is said to be *ex re* or *reales* where the knowledge of the damage done is acquired after the act. The *praetorian restitution* presumes the worst degree of fraud, or the *dolus ex proposito clandestinus*; nor can any condition be appended to a contract exempting the party from the consequences of his own fraud, *nec valet si convenierit ne dolus praestetur.*⁴ On the contrary, a covenant making an heir answerable for the frauds of the deceased is valid, for *in contractibus quibus doliprastatio vel bona fides inest, bares in solidum tenetur.*⁵ ⁶ ⁷ *In contractibus successors ex dolo eorum quibus successerunt non tantum in id quod pervenit, verum etiam in solidum tenentur.*⁶

This is to be understood of future fraud, *de dolo futuro pacisci non licet*, but not of a fraud past, for that may be released by the declaration of the person defrauded, that he will not claim indemnity, and by the acceptance of such offer by the other party, thus *de dolo praeterito pactio valet.*⁷

In some contracts the *dolus* involves the penalties of infamy, as in the so-called *contractus amicorum*; viz., *depositi, societatis, mandati, tutela*, because these are concluded with those supposed to be friends, and as *dolus* in such cases involves a violation of confidence.

No one can derive any benefit from the fraud of a person acting for him, *alterius circumventio alii non praebet actionem*;⁸ whether it be or be not fraud is to be judged of by the event considered in connection with the intention, *fraudis interpretatio semper in jure civili non ex eventu duntaxat, sed ex consilio quoque consideratur.*⁹

§ 1530.

The next question to be considered is that of *culpa*, upon which a diversity of opinion prevails still greater than upon the *dolus*.

*Culpa* is blame without imputation of fraud attaching to a person in respect of something he is bound to perform, in the performance of which, had he not shewn some degree of neglect, the damage accruing to another party might have been prevented.

¹ *P. 1, 3, 30, Ulpian.*  
² *Paul. R. S.; P. 1, 3, 29.*  
³ *Plaut. Rud. 3, 2, 42.*  
⁴ *P. 50, 17, 23.*  
⁵ *P. 50, 17, 152.*  
⁶ *P. 50, 17, 157, § 2.*  
⁷ *Mueller ad Leyser, obs. 858.*  
⁸ *P. 50, 17, 49.*  
⁹ *P. 50, 17, 79.*

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It must be borne in mind that culpa is used here strictly as a technical juridical, and not simply as a general term.

Connected, nay, inseparable from this technical conception of the culpa is that of diligentia or negligentia, since he who is in fault has exhibited, necessarily, a greater or less amount of diligence or negligence.

Some jurists support a quintuplex, others a triplex, and others, again, a duplex division of the culpa, while some repudiate all degrees in a grammatical sense; maintaining that, as the shades of blame vary infinitely with the nature of the contract, the reciprocal obligation of the parties to it, and with the peculiar circumstances of each individual case, no mathematical accuracy can be arrived at; which appears, indeed, to be the most reasonable view. This diversity of opinion results from the variety of expressions to be met with in the Pandects, attributing diverse adjective degrees to the culpa, as latior, magna, gravior, latissima, levis, levisima, whereupon Lauterbach on Titius remarks that this distinction hae res magis in scholis quam in foro auditur; and Otto observes, that all things having degrees cannot be distinguished with mathematical accuracy, juxta arithmetam mathematicam. Bartholus would distinguish lata, latior, and latissima, others between culpa versutia and culpa negligentia, culpa in faciendo and in non faciendo, but all these where they occur in the Digest must be considered as general, and not as special terms.

The reduction of the blame under its proper head is, therefore, a matter of great difficulty. Donellus considers it insoluble; Stryk would leave all to the arbitrium judicis; Thomasius considers the question of assigning the degree of blame the most difficult in the whole Roman law; and upon the classical passages, many of the most distinguished jurists have written separate treatises, which may be referred to; among which, those of Conitus, Rittershussius, Prousteau, Meermann, and d’Averzan, Reinold, and Gothofredus, and Thibaut, deserve particular attention.

Under these circumstances it is a matter of difficulty and legal danger to attempt the enunciation of even general rules; nevertheless, some attempt of this nature must be ventured upon: generally, then,

If a damage arise from the fault of one, between whom and another party no contract exists, the degree does not come into

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1 P. 16, 3, 32.
2 P. 4, 2, 1, § 5.
3 P. 4, 3, 54, § 2.
4 Obs. 102.
5 Diss. de praest. cas. solet. etc. 1, 11; P. 13, 6, 5, § 2; P. 50, 17, 23; P. 36, 1 (1), 47, § 5; C. 8, 14, 19.
6 Ad D. 16, 3, 32.
7 Schulting, th. 18, 8.
8 Us. mod. tit. com. § 12.
9 Diss. de usa præct. doctrin. de culp. præst. in contract, 1, § 1; Leyser, sp. 154, med. 1.
10 Arg. 1659, 4, tom. 3.
11 P. 26, de contr.
12 4, 54.
13 Diss. ad h. t. in opus. p. 303, et seq.
14 Ad tit. de R. I. in opusc. p. m. 790.
15 Pand. cit. § 250.
consideration,—for in all cases he must make an indemnification for the damage, with the exception of a bonae fidei possessor, who is not liable at all for damage; and of a ususfructuary, to whom a slight degree of blame only, culpa levis, attaches. But if the subject-matter be one of contract between the parties, there is no doubt but that the contrahents may specially pre-arrange the degree of blame either is to bear in case of default.

If no special arrangement has been come to, and the performance of an act has been agreed upon, a tacit understanding that such act will be performed in a business and workmanlike way will be presumed; and if this tacit undertaking be not complied with, the law will assign a measure of indemnity equal to the damage sustained: thus a negotiorum gestor, a tutor, a mandatarius will be held answerable in slight degree only.

If anything be given under a promise of restitution, whereby the depositary derives no benefit, but may suffer damage, all the advantage being on the side of the depositor, the depositary can only be made answerable in a slight, but the depositor in a great degree.

If both may derive advantage, and both suffer damage, then either is liable in a slight degree.

Where a disagreeable office is forced upon a party, he is answerable only where gross blame can be imputed.

Where the duty to be performed requires extraordinary diligence, the party so undertaking it is liable only in a slight degree; that is, only in the case of gross negligence.

Hence the general rule has been laid down by civilians, that secundum utilitatem contrahentium culpa est præstanda.

The above rules are deducible from the following passages in the Pandects:

Nunc videndum est, quid veniat in commodati actione; utrum dolus, an et culpa an vero et omne periculum? Here the three great divisions are propounded,—dolus, whereupon no doubt can exist; culpa, which is the question at issue; and casus, for which latter, contracting parties are liable under any particular circumstances only. Et quidem in contractibus interdum dolum solum, interdum et culpam præstamus, here the præstatio doli is put as an extreme case for dolum in deposito, nam quia nulla utilitas versatur, apud quem deponentur merito dolus præstatur solus; then comes the exception, nisi forte mora accessit, tum enim ut est et constitutum etiam culpa exhibetur. Clearly so far, then, it ceases to be a deposit, which must be gratuitous, aut si hoc ab initio convenit, ut et culpam et periculum præstet is penes quem deponentur; here comes a special undertaking, to indemnify which, being a matter respecting which a contract can be lawfully entered into, is binding on the parties. Sed ubi utriusque utilitas vertitur ut in empto, ut in locato, ut in dote, ut in pignori, ut in societate, et dolus et culpa præstatur.
About *dolus*, of course, there is no doubt; the *praestatio, culpa* in this case, is founded on the mutuality of advantage,—here such a measure of damage would be clearly due, as the circumstances of the case would justify. But who can say that it should be in all cases *latissima, latior, lata, levii, or levissima*? *Commodatum autem plerumque solam utilitatem continet eujus, cui commodatur*; et ideo *verior est Quinti Mucii sententia, existimantis, et culpam praestandum et diligentiam,—here culpa is to be answered for, but what degree is naturally not decided; but yet we find *diligentia* is put in conjunction, however, with *culpa*, shewing on good grounds that positive or due diligence will be required where there is no *mutua utilitas*.

Another disputed passage of the Pandects is also worthy of notice in connection with this question:—*Contractus quidam dolum malum duntaxat recipiunt; quidam et dolum et culpam*. Here evidently no distinction is intended to be drawn between *dolum malum* and *dolum*; *laesio* in some contracts rejects all but the extreme case of *dolus*. The mention of *dolus* at all may appear surplusage, since fraud is undoubtedly obnoxious to all contracts. These contracts are then defined:—*Dolum tantum depositum et precarium; dolum et culpam, mandatum commodatum* (and here a less degree of diligence is required for a commodatum than in the above passage), *venditum, pignori acceptum, locatum* (item), *dotis datio tutela, negotia gesta* (in his quidem et diligentiam), *societas, et rerum communio*, et dolum et culpam *recipit*. This passage has given rise to more disputes than the collective passages of the Roman law on this subject. Some maintain it to be corrupt; some that it has been interpolated by Trebonian; some will read *iis, and quidam, and quaedam*; others *diligentia*, and understand *praestatur*, repudiating *diligentiam* as a medieval amendment; some will add *sed* before *societas*; by far the majority of MSS., and amongst them the Florentine copy, read *diligentiam*, against which there appears no valid argument. With respect to this passage, then, it may be maintained that Ulpian wrote it in effect, without the words in brackets,—viz., that the *mandatum, commodatum, venditum, pignori acceptum, locatum, dotis datio tutela, and negotia gesta, societas, and rerum communio*, were satisfied by the *praestatio culpa*. That the practice had undergone a change since Ulpian's time, and that Trebonian's commission altered his text to suit the changed circumstances, is not at all impossible; and as the whole Digest was not by the same hand, discrepancies must be expected; and it may be naturally supposed, that although a passage might have been altered in one part where it has direct application, a similar passage might have escaped observation and amendment in another where its application was

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1 Celsus, P. 50, 17, 23.
2 Hasse, *über die Culpa des R. R. Ed.* 2, 1838, § 65, n. 2, in which, and in the text, this question is discussed even to confusing.
CULPA IN CONTRACTIBUS. 461
direct to another subject, and indirect in this. But why, it will
be asked, did Ulpian except the commodatum in the first passage,
and attribute diligentia to it, and pass it over without remark in
the second? Or why did not Trebonian, while he was about
it, make the two agree? Here we must suppose one of two
things: either that the opinion of Q. Mucius was imported aliunde
by Trebonian into Ulpian ad Edictum, and forgotten in Ulpian ad
Sabinum, or that Ulpian himself was not infallible; at any rate
the passage ad Edictum contained the better logic of the two.
The general object, too, of this passage must be borne in mind,—
ves., to shew in what cases dolus solum praestatur, in which
culpa, and consequently dolus also; for the passage goes on to say,
Sed haec ita, nisi si quid nominatim convenit, vel plus vel minus in
singulis contractibus; nam hoc servabitur quod initiio convenit;
legem enim contractus dedit; excepto eo quod Celsus putat, non
valere, si convenerit ne dolus praestetur; hoc enim bone fidei con-
trarium est; et ita utimur. The expression vel plus vel minus
clearly premises that no degrees of culpa have been given, yet
here we find a degree by the insertion of the term diligentia,
which clearly implies something more than culpa generally. The
passage then goes on to treat of accident: Animalium vero casus,
mortes queque sine culpa accident, fugae servorum, qui custodiri
non solent, rapinae, tumultus, incendia, aqvarum magnitudines, im-
petus praedonum, a nullo praestantur.
In summa, then, there exists here clearly an interpolation of
Trebonian adapting Ulpian to the practice of the court in this
particular.
§ 1531.

Another dispute is, whether culpa lata or latior, gross or very
gross blame—that is, lata or latior negligentia—is equivalent to
dolus; that it is not so would be sufficiently manifest if it were not
for certain passages in the Digest. In conception the two differ
widely,—dolus arising out of fraudulent intention, but culpa being
blameable neglect, devoid nevertheless of the animus fraudandi.
That any gross neglect may in its effect upon the party be equally
injurious with dolus cannot be denied, but that does not make it deceit.
The passage which has created the greatest difficulty is the follow-
ing of Celsus:—Quod Nerva diceret latiorem culpm dolum esse
Proculo displicebat mihi verissimum videtur. Nam et si quis non ad
eum modum, quem hominum natura desiderat diligens est, nisi tamen
ad suum modum curam in deposito praestat, fraude non caret; nec
enim salva fide minorem iis, quam suis rebus diligentiam praestabit.
Dolus, in this sense, cannot be taken to be more than a dishonest
action; that is to say, that if a man pays less diligent attention to
the affairs of another than he usually does to his own, it is a
dishonest neglect, amounting morally to a fraud.

1 P. 16, 3, 32.
As far as can be judged, the sect which took its name from Proculus adopted equitable principles; these began with Labo,
and were Labo, Nerva, Proculus, Pegasus, Celsus pater, Celsus
filius, and Neratius Priscus. The adverse sect, which consisted
of Capito, Cassius, Coelius Sabinus, and C. C. Longinus,
held to strict legal doctrines. Hi primum veluti diversas sectas
fecerunt; nam Ateius Capito in his qui eo tradita fuerant perse-
verabat, Labo ingenii qualitate, et fiducia doctrinae, qui et in ceteris
operam dederat, plurima innovare instituit. Here, however, those
of the same sect do not appear to have been of the same opinion,
for Celsus agrees with Nerva, and disagrees with Proculus. No
argument can then be drawn from a diversity of sect principle.
Paulus, too, enunciates the same principle: Magna negligentia
culpa est, magna culpa dolus est, which in effect makes maxima
negligentia, or the greatest imaginable degree of negligence, equiva-

tent to dolus, or doloproxima, or next door to fraud, for, Lata culpa
plane dolocomparabitur.3

In order to explain this paradox of fraud without evil intention,
logicians have invented the difference between culpa in abstracto*
and culpa in concreto,* a distinction calculated rather to confuse
than enlighten, and furnishing no reasonable explanation of these
two passages. The first is the blame attaching by reason of a
want of the care required in the particular circumstance; and the
latter, the absence of the care which the particular person is in
the habit of exhibiting.

Thibaut thinks that when the terms culpa and diligentia are
used without qualification, that they are to be understood ab-
stractedly.6

§ 1532.

Thibaut7 observes that the so-called abstract blame is divisible
into two degrees; but that the Romans admitted none in the
concrete.

There is, perhaps, no harm in this as a duplex division of
abstract blame; nevertheless, each individual case must be con-
sidered independently as to the shade of blame on its own merits,
for if any degrees be admitted, two are either too little or too
many; hence, if adopted, they must not be looked upon as degrees,
but as two great principal divisions, or classes of blame.

To illustrate the above axiom, let a case capable of many
degrees be supposed; in each, the degree of penalty which the
defaulter will merit will vary.

D B hires a barn of A at a rental; B goes into the barn at night,
suspecting robbers are plundering B’s hay and corn, with an ex-


1 P. 1, 2, 2, § 47. 2 P. 50, 16, 226.
3 P. 11, 6, 1, § 1; Jones, l. c. 21, 22, et
14, 15; P. 13, 6, 5, § 2; P. 44, 7, 1, § 5.
4 I. 3, 26, § ult.; P. 17, 3, 72.
5 Brückner, de culpa quae concretive talis
dicitur, Jen. 1693; Runge, lig. fund. culp.
6 Thib. Syst. des P. R. § 163; P. 13a
6, 18, pr.; P. 13, 7, 13, § 15; F. 9, 2, 31.
7 l. c. § 164.
CONTRACTUM CULPA.

traordinarily secure lantern, in the most careful way, instead of watching outside to catch them, and so the barn is burned. Here the greatest diligence has been used, and the blame will be correspondingly slight.

But suppose A has lent the barn to B, and the same circumstances arise,—here the absence of *mutua utilitas* will render B’s responsibility greater.

Again, suppose, under the same circumstances, B to use an ordinary lantern,—the blame attaching to him will increase; still more so if in addition the barn be lent, not rented.

Suppose him to go with an unprotected light, which being knocked out of his hand, the place is burned,—the blame increases; and still further if the barn be a loan.

Suppose be set the light down to seize the thief,—here is, again, an increase or decrease of blame, augmented still further, according to whether the barn is lent or rented.

Suppose the thief to have escaped, and that B to have set the light down in a safe place, or on a truss of hay, in a barn rented or loaned.

Suppose him to let the thieves steal the hay, and to take no notice at all.

Suppose him to be, under all the above circumstances, an unusually precise and careful man, an ordinarily careful man, a careless man, or an unusually careless man in his own matters, these supervenient facts will alter the degree of blame in every one of the fifteen variations, and so make sixty degrees. Where, then, are the shades of *culpa* to cease if degrees be insisted on?

*Lata culpa* is the degree of blame caused by *magna negligentia*, or defect of *exacta diligentia*; thus *lata culpa est níma negligentia, id est non intelligere id quod omnes intelligent.* For stupidity is not to be an excuse for damaging another, *melioris conditionis ne sint stulti quam periti.* *Quod ex culpa qua damnum sentit non intelligetur sentire,* *UNCTIQUE SUA MORA NOCET.* *Non debet quis negligentiam suam ad alienam injuriam referre.* Thus, if a man be ignorant of what has been publicly proclaimed,* and all know but himself; or if he leave doors open by night, and the like; such negligence is punishable in a degree equal to fraud in certain contracts,* and in trespasses involving a pecuniary mulct, but not where the pain is corporal.

*Culpa levis* is the blame resulting from *negligentia*, or a defect in *diligentia*; such as diligent men take of their own affairs.* And in such case, *imperitia* and *infirmitas culpa adnumeratur,* for no one should undertake what he is not capable of performing.

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1 P. 50, 16, 213, § 2.
2 P. 43, 244, 4.
3 P. 50, 17, 203.
4 P. 50, 17, 173, § 2.
5 P. 21, 15, 3.
6 P. 143, 3, 11, § 3.
7 P. 16, 3, 32; P. 43, 26, 8, § 3.
8 P. 17, 2, 72.
9 P. 50, 17, 132.
10 P. 92, 2, 8, § 1.
For the like reason, *culpa est immiscere se rei ad se non pertinenti*—that is to say, such meddler must bear the consequences arising from his voluntary interference; but he is absolved of all blame, *culpa absit, si omnia pacta sunt quae diligentissimus quisque observaturus fuisse.*

In the first case, *latissima* and *latior* must be rejected as definite degrees, and only admitted as shades of the great division of *culpa lata*; in like manner, *culpa levissima* must be repudiated as a definite degree of *culpa levis*, and be admitted only as an intensive expression.

We find also the expressions *exacta* and *exactissima* *diligentia*, *diligentia quam suis rebus adhibere solet*, *diligentia diligentis patris familias*, *diligentissimi patris familias*.

§ 1533.

Another division supported by Donellus, but which arose before his time, is that of the *culpa* into *culpa in faciendo* and *in non faciendo*, misfeasance and nonfeasance, or faults of omission and of commission. An illustration may be given from the case of the fornacarius in the Aquilian law.

A slave lights the furnace in a proper manner, and goes to sleep; committing the custody to another slave, who does no act, but letting things take their course, the villa is burned down. Held that an *actio utilis* lies against both; for the first did nothing careless, and the second did nothing at all.

There is scarcely a distinguishable difference between these two, to kill a man in anger, and not to prevent his being killed when able so to do, involves, in fact, the same moral culpability; nevertheless, it is not to be doubted but that an active murderer would be looked upon with more abhorrence far, than a passive or assentient one. To pull a man out of a river would be a meritorious act; to let him drown would be reprehensible, though not punishable. But to revert to the stoker: had he *set* the farm-house on fire, an action would lie for a *damnum injuria datum*, for *negl- genter custodiens*, an *actio utilis* only against the master of the *custos*; here the *utilis* is in the first case for nonfeasance, but in neither case is there any misfeasance. But quaere, did the stoker not undertake, impliedly, that no harm should arise from his inactivity?

Nonfeasance. *Nonfeasance*, in English law, is the omission by a person to do an act which he was bound to perform.

Misfeasance. *Misfeasance*, the negligent performance of an act incumbent upon him; and


It will, however, be more convenient, having thus introduced

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1 P. 50, 17, 36.  
2 P. 19, 2, 25, § 7.  
3 P. 9, 2, 27, § 9.  
4 P. 9, 2, 27, § 9.  
5 Hasse, über die Culpa, § de lege Aquilia. one place in the Digest, P. 9, 2, 44.
the question of *culpa*, and laid down the broad rules of distinction, to discuss under each particular contract the measure of *culpa*, whether in *faciendo* or in *non faciendo*, which properly applies to it.

§ 1534.

Now, the material question which arises upon the maxim *nemo casus præstat* evidently is, what comes strictly under the term accident; in other words, what is held to be, and what is held not to be, a *casus fortuitus*.

To come into this category, the accident must be either utterly unforeseen, and so *inevitable*; or, though foreseen, to be nevertheless *inevitable*. Both these are usually technically called the act of God, or else they must be *irresistible*.

That lightning should fall and burn down a barn, upon which there was a conductor, would be utterly unforeseen. The advance of the cholera from east to west is foreseen, but inevitable; or it may be irresistible, foreseen or not, such as the incursion of public enemies or robbers.

The first two are the result of *physical* causes, therefore termed *inevitable*; whereas those resulting from *human* causes are properly termed *irresistible*.

The inevitableness of accident from physical causes, such as those stated, is too obvious to need commentary.

With respect to those which are the effect of human agency, the incursion of the enemies of the State is held to be irresistible, such as are variously termed public enemies, but in England the queen's enemies; and any *casus fortuitus* or damage arising from such cause should in equity be repaired by the State, that is, by the public treasury. But the damage arising from such warfare as is acknowledged by the law of nations to be lawful,1 is very different from that private violence unrecognised by the law both of nations and of civil society, which is termed *rapina*, or robbery by violent seizing and carrying off, practised by pirates on the high seas, and bands of marauders by land; both these *hostes humani generis* are without the pale of all law, and may be treated as outlaws or *capita lupina* in the ancient and proper acceptation of that term, on mere proof of the act of *rapina*, defined to be *violenta ablatio rei mobilis lucrī faciendi gratia*; when the thing seized is immovable, it is termed *invasio*; and both differ from *furtum*, in that this latter is not accompanied by open violence, but is performed clandestinely and by artifice, and is altogether an offence involving a minor punishment on account of its being accompanied by less injury. *Quæ fortuitis casibus accidunt, cum prævidieri non potuerint (in quibus etiam aggressura latronum est) nulla bona fidei judicia præstantur.*2 Rapine, then, or robbery by violence, is accounted accident from irresistible violence.

1 Grot. d. I. Bet. P. 31, 5, 1; 3, 18, 2; 3, 6, 2; 3, 16, 1; 3-2, 1, 11.

2 I. 4, 2.

3 C. 5, 17, 11, § 1.
The actus Dei.

Vinnius's catalogue of casus fortuitus.

Quis sentiat casum and quis casum praestare debet.

Debitor speciei liberatur interitu rei.

In the Digest, the casus fortuitus is not subdivided into physical and human in those passages which allude to the subject.

Animalium, vero casus, mortes, quaque sine culpa accident, fugae servorum qui custodiri non solent, rapine, tumultus, incendia, aquarum magnitudines, impetus praelionum a nullo præstantur.1

But Vinnius2 details them, but places the physical first; and thus in a measure severs them.

Casus fortuiti variis sunt, veluti a vi ventorum, turbinum, pluvia, grandinum, fulminum, æstus, frigoris, et similibim calamatum, quæ calitus immititur; nostri vim divinam dixerunt; Græci Θεοδ βλαν. Item naufragia, aquirum inundationes, incendia, mortes animalium, ruinaæ ædium, fundorum chasmatarum, incursus hostium, prædonum impetus, &c., fugæ servorum qui custodiri non solent. His addam anna omnia a privatis illata, qua quo minus inferentur, nullæ cura caveri potuit. Ad casus autem fortuitos non sunt referendi illi casus, qui cum culpa conjuncti esse solent cujusmodi sunt furtæ.

Quamobrem qui rem furto amissam vel incendio verbi causâ servorum negligentiam orto, consumptam dicit idiligentiam suum præbare debet. Quod vero incendium in alienis ædibus abortum occupat ædes vicinas, aut quod fulmine excitatur, aut a grassatoribus vel incendiariis immittitur, id inter casus fortuitos numerari debet.

Hence the question arises of who suffers the accident, quis sentiat casum, and who must indemnify for the accident caused by another, quis casum praestare debet?3 Thus, let it be supposed that an act has been promised by one party, but which he cannot perform, whereby the other party is dammified, as if a servant engaged to perform certain duties fall ill. The servant in such case bears the loss of his board and wages so long as his inabilty continues;4 but if the case be reversed, and it so happen that the master cannot on account of his own illness give the servant the opportunity of performing his contract, he must still pay him his wages and give him his board; for the impediment originates on the side of the master, not on that of the servant.

The rule debitor speciei liberatur interitu rei is constant; for if one come to an understanding with another to render him a certain thing,—as, for instance, to sell him a library of books in consideration of a certain act, the payment of the price, and the object perish without any fault; the act must still be performed by the first party, because of the physical impossibility to render the object. And this is true in the case of all nominate contracts; but the question may arise with respect to innominate ones, whether that which has been given by one party as the con-

1 P. 50, 17, 23; P. 13, 6, 5, § 4.
2 Ad l. 3, 15, § 2, n. 5.
3 G. Beyer, diss. ad L. 66, solut. mat. c.
4 Lauterbach, coll. th. jur. tit. locat.
sideration for the performance of a certain act subsequently rendered impossible can be demanded back again; and it would rather appear that this can be required, because there is a *locus penitentiae* in innominate contracts.

But if one sell an object to another and retain the ownership expressly until payment of the price, and the object perish, and the purchaser become bankrupt, the seller alone is damnedified.

If an object perish by mere accident, which the borrower had upon the condition of restoration, the owner must bear the loss, as in the case of a horse borrowed which has died, and the other party loses the advantage accruing from its use; here the distinction to be taken is between the liability to render and to restore.

If one receive a commission to buy aught for another at a distant place, and is robbed of it, he must bear the loss. But if one promise another to lend or hire out a certain thing to another, *commodare* or *locare*, and such object perish by an accident, a loss accrues to both parties; the one loses his property, the other the benefit of the loan for use or hire.

It is, nevertheless, a rule that although none can bind himself, *dolum suum non prastare*, as being against public policy, he can so bind himself, *casum prastare*; that is, he can render himself liable for accident either by special or implied contract, or through the existence of an unilateral fact involving such obligation. In the first case, this resembles an insurance: thus a merchant may charter a ship, and specially undertake to pay its value if it be lost on the voyage; but this special undertaking may be implied, as in the case where goods are given to a pedlar at his request to hawk and are lost, the special bailee must indemnify the bailor the value of them.

Lastly, as regards the unilateral fact, it may involve the obligation of indemnity for accidental damage, although it arise out of a *delictum*; for a thief must indemnify the person whom he has robbed for the value of an object stolen, which has subsequently perished by accident.

In all cases where there is *mora*, it renders the party guilty of such default answerable, and takes the question out of the category of mere accident: thus, if goods be bought deliverable forthwith, but the wharfinger who has the custody thereof make default, and his warehouse is burned in the mean time, he is chargeable.

1 P. 10, 5, 1, § 11; conflicting with P. 12, § 44; I. van Neck.
2 P. 17, 1, 26, § 6; Wernher, T. 1, pr. 45, obs. 214, n. 49; Höpner, § 761, n. 6; § 931, § 768, for various cases; vide P. 43, 16, 3, § 34-35; P. 47, 2, 46, pr.; P. 13, 1, 7, § 1; Id. 8, pr. & 16, fin.; C. 4, 8, f.; P. 6, 1, 62; P. 5, 3, 25, § 2; P. 5, 3, 40, pr.; P. 42, 14, § 11, as to inheritances; P. 6, 7, 5, § f.; Coccei, jur. contrv. tit. de hered. pet. Q. 19.
3 P. 10, 5, 17, § 1.
Title XIX.

Quibus modis re contrahitur Obligatio—Contractus Reales—Mutuum, under which of Fœnum and Usura Actiones—Commodatum, under which of Precarium—Depositum, under which of Sequestrum Actiones—Contractus Pignoratitius Actiones—Of the three Contractus Innominati—Contractus ÅEstimatorius—Contractus Permutationis—Contractus Suffragii.

§ 1535. Real contracts, as has been above remarked, do not derive their denomination from any real action to which they give rise, for such accrue solely out of a *jus in re*, and a contract confers simply a personal right *jus ad rem*. The name, then, is derivable from the performance of the contract in *re*.

All real contracts arise out of *pacta nuda*, which become real contracts by the performance on one side, as in an agreement to exchange a horse against an ox, the *pactum* is changed into a *contractus realis* by the delivery of either of these animals.

Real contracts may be formular, or not so, when it may be one of these five, *emptio, locatio, societas, mandatum, emphyteusis*; in which case it is called a consensual contract, otherwise it is a *nudum pactum*, for no action arises *ex pacto de mutuo dando*; but if one party fulfill his part, it then becomes a real contract, to which an *actio mutui* belongs. The same is naturally the case with a *pactum de commodando, de deponendo, de pignore dando*.

These real contracts may be innominate, as mentioned in the preceding title, or nominate, which are *mutuum, commodatum, precarium, depositum*, of which the *sequestrum* is a species, and *pignus*, and are unilateral contracts. The *mutuum* is the gratuitous loan of perishable goods; *commodatum* is the gratuitous loan to use of an object; *precarium*, the gratuitous loan to use during the pleasure of the lender; *depositum*, the gratuitous care of a thing; *pignus*, a security for a debt.

§ 1536. The word *mutuum* is, by some, derived from the Sicilian word *muôrov*, which is explained by the word *χάρις*; but it would appear with greater reason from the word *mutuo*,\(^1\) to change, because one

\(^1\) Var. de L. L. 1, 4, 36.
thing is given *in specie*, with the understanding that another thing of like value should be given back or exchanged for it; that is to say, the expression applies where the same absolute thing is not to be returned.\(^1\)

Creditors\(^2\) used to pay *numerare* loans *ex arca*, and *domo*, at home, or more usually *de mensa*, through a trapezites, argentarius, or banker taking security.\(^3\) *Ego ad forum ibo tunc enim in foro, et de mensae scriptura magis quam ex arca domoque vel cista pecunia numerabatur.*\(^4\) It is hardly worth while to consider whether any difference was made in coined or uncoined bullion, turning upon the word *pondus*, because ancietly weighed *per as et libram*; and a coinage merely simplified this dilatory process.

§ 1537.

*Mutuum* is a real contract, by which a *res fungibilis* is so given to another as to render him proprietor thereof, on condition of a return in kind of like quality and quantity.\(^5\) *Res fungibiles* are such things as may be counted, measured, or weighed out, so called because *una res fungitur vice alterius*; nor does it matter whether it be the same thing or one of equal value, but no *pretium affectionis* is recognised.

In *mutua*, or loans, the creditor is termed *mutuans*, the debtor *mutuarius*.

Thus much having been premised, the chief points which attract attention will be the principles by which loans are ruled.

Secondly, by whom they can be contracted.

Thirdly, the obligations arising out of them.

And lastly, the actions accruing from loans.

With reference, then, to the first proposition, a loan must be of *res fungibiles*, it must come into the actual possession of the reci-
pient,— or if already so, be declared to be a loan:\(^6\) hence, a loan implies an alienation, though Salmasius\(^7\) tried to prove the con-
trary, and got into collision with the jurists of his age in conse-
quense. The correct test is by distinguishing between *quantitas* and *corpora quae mutuo dantur*. Now it will be at once evident that

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\(^1\) Plaut. Asin. 1, 3, 95; Paul. R. S. P. 12, 1, 2; Caius, 17.

\(^2\) Hein. A. R. 3, 15, § 3.

\(^3\) P. 12, 1, 40.

\(^4\) Ter. Adel. 2, 4, 13.

\(^5\) Mutui dato consistit in his rebus, quae pondere, numero, mensura consistunt, quo-
rum eorum datione possensus in creditum ire, quia (tam) in genere suo functionem reci-
piunt, prosolutionem quam speciel.—Paulus, P. 12, 1, 2, § 1 ; I. Gothofr. diss. de funct.
et aequal. in mut. et in hanc legem; Byn-
kershoek, obs. 1, 10; Idsinga, diss. de mut.
et vet. lib. obl. c. 1, § 9, in Oelrichs Thea. nov. diss. Belg. v. 1, pt 1, p. 130, seq.

\(^6\) Qui negotia Lucii Titi procurabat, is cum a debitoribus ejus pecuniam exegisset, epistolam ad eum emisit quia significaret, certium summam ex administratione apud se esse, eamque creditam sibi se debitum cum usuris semissibus. Questum est an ex ea causa credita pecunia peti possit? Et an usurae peti possint? Respondit non esse creditum; aloquin dicendum ex omni con-
tractu nuda pactione pecuniam creditam fieri posse, conflicts with P. 17, 1, 34, pr.; Vide et P. 121, 11, pr.; Id. 1, 151.

\(^7\) De usura, Bat. 1638; Walch, in controv. p. 321.
the quantity is not alienated,—in other words, the lender does not alienate the right to redeem the sum lent, but he does so with respect to the corporeal thing: hence Ulpian says,¹ *nummi non alienantur qui sic dantur ut recipiantur*; hence, also, the expression *æs alienum, res aliena*.

§ 1538.

The *mutuum* being the exchange of a perishable or mutable article for a right, alienation of the *corpus*, though not of the *jus*, is implied in the transaction; and wherever this occurs, those persons are incapacitated from granting loans who have not the free disposition of their property: thus infants, minors, and those judicially declared to be prodigals, have no power to lend their property; in other words, whoso is incapable of alienation is incapable of the grant of loans.

For the protection of minors who were in the habit of anticipating their property by means of loans, the *Senatus Consultum Macedonianum*² was passed. *Cum inter ceteras sceleris causas Macedo quas illi natura administrabat etiam æs alienum adhibisset et sæpe materiam peccandi malis moribus præstaret, qui pecuniam, ne quid amplius diceretur, incertis nominibus crederet placere ne cui, qui filio familias mutuam pecuniam dedisset, etiam post mortem parentis ejus, cujus in potestate fuisset, actio petitio daretur: ut scirent qui pessimó exemplo fænerarent, nullius posse filii familias bonum nomen expectata patris morte fieri.*³

This *Senatus Consultum*, then, deprived creditors simply of a subsequent remedy against those to whom they had lent money, as *filii familias*, not in the more legitimate commercial transactions of sale, hiring, &c.; the object being solely to prevent an anticipation of property.⁴

*Is autem solum Senatus Consultum offendit, qui mutuam pecuniam filio familias dedit, non qui alias contraxit, puta vendidit, locavit, vel alio modo contraxit. Nam pecuniæ datio perniciosa parentibus eorum visa est. Quod ita demum erit dicendum, si fraus non Senatus Consulto sit cogitata, ut, qui credere non potuit, magis ei venderet, ut ille rei pretium haberet in mutui vicem.*

§ 1539.

A distinction is drawn between *bonæ* and *malæ fidei* consumption; in the first case, the debtor is under the impression that the lender had the power to grant the loan; in the latter, this is not the case. Where, then, the consumption is in good faith, the

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¹ P. 46, 3, 55. ² P. 14, 6, 1, pr. ³ Ulpian, in. fr. 1, pr. D. xvi. 63 de Senatus Consulto Macedoniano. ⁴ In German universities no action of debt lies against a student, contracted by him while on the matrikel, all being considered minors and *filii familias*. The adoption of this system in the English universities would effectually cure the leprous of credit and debt which so perniciously exists there, and which the preventive measures hitherto taken have tended to aggravate.
condictio sine causa will lie on the actio de bene depensis for like quantity and value; where in bad faith, in addition to the above, the actio ad exhibendum will lie; which latter is the more advantageous form of action for the plaintiff. Where the loan has been granted by one who is not the owner, the contract is void, and the same actions apply. Where, however, the object lent is still in existence, in specie, the rei vindicatio lies for the recovery of the actual object lent. And all these remedies apply particularly to the cases of infants, minors, and prodigals.

The actio mutui, or condiciio certi ex mutuo, is the only action arising out of a unilateral contract or loan, and extends to the heirs of both parties for restitution of the same quantity and quality; and if this be less or the latter inferior, then the actio lege Aquilia; and in case of fraud, actio doli will lie.

It may, nevertheless, happen that other unilateral circumstances may have intervened, such as prescription or consumption, which give a colorable title, in which cases the actio mutui applies; because, then, the condition of the action, the acquisition of the property, ex causa mutui, exists.

If one party grant the money of another unilaterally as a loan to a third party, no action of vindication accrues to the owner, without a cession of action to him by the lender; and if not consumed male fidei, so as to found the action ad exhibendum, an actio in factum will only lie for the sum whereby the borrower has been advantaged.

The borrower must, upon general principles, fairly restore whatever he may have received.

The obligation which arises out of a loan is, first, the return of the same quantity and quality as that lent; an arrangement to return less is binding, because then the surplus is held to be released; not so that to return more, for then a stipulation is required, because here the obligation originates ex re, and such pactum adjectum, or ancillary contract, militates against the principal contract. Re enim non potest obligatio contrari, nisi quatenus datum sit: thus, neither can interest be demanded without a stipulation, as a general rule, certain not on a pactum adjectum; but in these cases the contract ceases to be a mutuum, and becomes one of fœnus.

Lastly, the borrower is only bound to restitution as regards him with whom he contracted for the loan; yet one remarkable exception to which Thibaut draws attention must be noted,—viz.,
that often termed *condictio juventiana*, in virtue whereof, he to whom the things lent belong, can sue for restitution the possessor, who believes he has received the object from another party.¹

§ 1540.

A *mutuum*, we have seen, is a loan without usury; and as soon as this rule was departed from, it was no longer called *mutuum*, but *fænus*, which is used to signify the capital or the interest thereon indifferently;² a loan without usury more nearly resembled a *commodatum*, that without it the *locatio conductio*.

Capital was termed *sors*,³ as distinguished from *fænus*. *Quis mihi neque fænus, neque sortem argentii danunt*,⁴ and *Hei mihi! etiam de sorte venio in dubium miser*.⁵ Capitalised interest is represented by the expression, *sors fit ex usura*.⁶ Usura, the price of use, then, may be correctly defined to be the rent paid for the hire of capital.

To judge from many classical passages,⁷ usurers were held in great abhorrence, nay, even practically put on a par with homicides;⁸ and it appears that while a thief was condemned in double, an usurer was condemned in quadruple damages. *Fœneratores* were otherwise called *argentarii*, and sat in the middle of the Temple of Janus, at the kalends or first of the month, to transact their banking business;⁹ it is supposed that the borrowers assembled at one statue of Janus, the creditors at another, and the lenders at a third; the interest was due at the kalends, hence the expression arose of promising to pay at the Greek Kalends.¹⁰ The book in which the sum, date, and name of the debtor was entered was termed *kalendarium*;¹¹ hence the *actio kalendarii*.

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¹ Thib. I. c. Conradi de Juvent. condic. Marb. 1774; contra, Leyser, sp. 130, m. 1; P. 12, 1, 32; Glück, Pand. 12 B. § 779.
² Tacit. Ann. 6, 17, 14, 53.
³ Varr. de LL. 6, 7.
⁴ Plaut. Mostell. 3, 1, 34.
⁵ Ter. Adel. 2, 2, 45; Mart. Ep. 5, 43; P. 33, 2, 24.
⁶ Plin. in Praef. H. N.
⁷ Cic. de Off. 2, 25; Cat. de Re Rust. init.; Sen. de ben. 7, 10.
⁸ Plin. N. H. 18, 5; quid fœnerari? quid hominem occidere? But this must be understood of exorbitant interest, such as is met with among Jews in bill transactions at the present day, when Jew and usurer, in the objectionable sense of one who extorts excessive interest, are exchangeable terms. The despair of one of these usurers of the last century has been thus epigrammatized in the following cutting lines:

"Oh, let me die in peace," Eumenès cried,
To the hard creditor at his bedside.
"How! die!" roared Gripus,—"thus thy debts evade!
No, no, you shall n't die till I am paid.""²

And again, after the insolvent's death:

"His last great debt is paid—he is no more.
Last debt?—he never paid a debt before."

M. Antonius reproaches Augustus with his descent from a grandfather who was a money-lender.—Argentarius Suet. Aug. 7, 10. Jews may by their own law take usura from strangers, but not from their brethren. —Deut. xxiii. 19, 20.

⁹ Hor. Epod. 2, 67; Ch. Sermon. 1, 3, 86.
¹¹ P. 30, 1(1), 33; § 1; Id. 39; P. 32, 1, (3), 41, § 6 & 62; P. 26, 7, 39, 14; P. 15, 1, 85; C. 42, 2, ult.
The chief differences, then, between *faenus* and *mutuum* were—

1. That *faenus* bore usury, *mutuum* did not.
2. *Faenus* was lent with the intention of gain, *mutuum* from motives of friendship.
3. *Faenus* is lent till a certain fixed day, *mutuum* for the time necessary.
4. From *faenus* arises the *actio kalendarii*, from *mutuum* the *actio certi ex mutuo*.

§ 1541.

No laws, either in ancient Greece or subsequently in Rome, have undergone more changes than those relating to usury and the interest of money: in Greece it was termed *tôkos*, from *tîktîo*, to produce; because interest is quasi the child of money, the principal or capital sum being termed *kefálalîon* or *ârχaîon*, *dâneîz*o being to take up money on interest. Money at Athens was lent either upon what we should call a promissory note or acceptance, *χειρόγραφον*, a simple acknowledgment of the parties, or secured by a deed, *συνγραφή*, so called because, executed by both parties in solemn form, and duly attested by witnesses, and deposited with a third party, the security might be personal by pawn or mortgage. The security on moveable property was termed *ἐνέχυρον*; that on immovable, *ὑποθήκη* or mortgage. In Attica, pillars, *άροι* or *στήλαι*, were set upon mortgaged estates with the amount and the mortgagee's name inscribed upon them; but in other parts of Greece, the sum was entered in public registers. This latter and excellent system is pursued in Germany so far as regards registration, where all mortgages must be publicly registered, which is a great security to buyers; the Scotch pursue a like system; but the English adopt it only in Middlesex and York.

§ 1542.

Bottomry bonds, *ναυτικαλ* *συνγραφή*, were another sort of deed for money lent on sea risks at Athens, which allowed a higher rate of interest called *tôko* *ναυτικοί*, for it usually included by special clauses the modern insurance, and was not demandable if the vessel were lost; but then, the places to which the vessel might go were inserted in the policy, as with us, the *ναυτική συνγραφή* is with constructive notice. Judgment debts and specialties, however, and bonds to the Crown (public accountants), are registered under 1 & 2 Vic. 110, 2 & 3 Vic. 11, 3 & 4 Vic. 82, as to Middlesex and Yorkshire; 5 Ann, 18, 6 Ann, 35, 7 Ann, 20, 8 Geo. II, 6, at the office of the Common Pleas. Deeds are generally registered in the British colonies.

1 Sen. de ben, 7, 10.
2 Aristotle says interest is illegal, because of the natural barrenness of money. So great a fallacy from so great a logician is remarkable.
4 Boekh. 1, 172; Wachsmuth, 11, 1, 225.
5 The opposition to a general system of registration is based chiefly on four grounds: —1. The expense in small transactions; 2. The publicity thus given to private affairs; 3. The virtual abrogation of the statute of uses; 4. And of limitation, by doing away with the uses; 5. And of limitation, by doing away with the uses.
such a bond, mentioned in Demosthenes's speech against Lacritus. This loan might be made on the security of the cargo, φορτίον; freights due for carrying the same, ναυτία; or the vessel itself, νάυος; and the laws respecting these agreements were very severe. And here it is to be remarked, that the Greek law formed the basis of the Roman maritime code.1

§ 1543.

Fænus, or fenus, has a like derivation:2 a fetu, quasi a fetaurâ usura, and impedium are other terms for interest; but the word fænus is always used to represent the capital bearing interest; and usurae, in the plural, the interest on such sum.

As is the unit of interest on account of the readiness of its division into parts or rates; hence the table of the rate of interest may be thus set out with the terms applying to each rate:—

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<tr>
<th>Interest table.</th>
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Centessimæ assæ meant, that the sum paid in interest in one hundred months equalled the capital; bina centessimæ, therefore, was 24 per cent., quaternæ, 48 per cent., and so on.13

The Twelve Tables fixed (b. c. 450) the unciarium fænus as the legal rate, subject to a fine of quadruple the amount if exceeded.14 The better opinion15 with respect to the amount of the unciarium is, that this was 1/3 of the As, or 1 oz. in the 12, payable for the year (then) of ten months, 81/2 per cent., or 10 per cent., for that of twelve months, the year in use at the time of the decemvirs.

1 P. 23, 2; C. 4, 33.
2 Cell. 26, 12.
4 Persius Sat. 5, 149.
5 Salm. de mod. usur. 7, 276.
6 Cic. Ep. ad Att. 4, 15; C. 4, 32, 27.
7 Salm. l. c. 277.
8 Plin. H. N. 14, 4, 6; P. 50, 12, 10; P. 23, 1, 17; P. 50, 10, 5; P. 46, 3, 108, § 31 Columella, 3, 3; Sal. l. c. 281.
9 Pers. Sat. 5, 249; P. 26, 1, 17; P. 46, 3, 102; § 3.
11 P. 23, 3, 21.
12 Tsc. An. 6, 16; Liv. 7, 27.
13 Cic. Verr. 3, 71; Juv. Sat. 9, 6; Cic. Att. 5, 21, & 6, 11; Hor. Serm. 2, 2, 12.
14 Cato de Re Rust, præst.
Versura is borrowing money at the end of the year to pay off a former creditor; centessima perpetuo faenore is 12 per cent. simple interest; centessima renovata, 12 per cent. compound interest. The word nomen is used to signify a debt; bonum nomen, "a good name on a bill;" a good debt in contradistinction from a bad one; thus Shylock calls such a man a "sufficient man:"

A modern money-lender would call him a "good man."

The disregard paid to, or evasions practised on, the law of the Twelve Tables, or the abrogation of so much of those laws as applied to usury in consequence of the scarcity of money after the Gallic War, led to the introduction of the Lex Licinia by the tribune C. Licinius Stolo, A. u. c. 378, for the protection of the plebs, enacting that all money that had been paid theretofore by way of interest should be deducted from the principal sum, and the balance repaid in three years by equal instalments.

The Lex Duillia Mania, introduced soon after by the tribunes M. Duillius and L. Mænius, restricted interest to the unciarium faenus, shews that the law of the Twelve Tables had become obsolete:

thus, fourteen years after the Licinian law, five commissioners called mensarii were appointed, empowered to offer money to debtors on security to the State, and to take cattle and other commodities at a fair valuation in payment, by which many debts were liquidated.

Five years later the interest was reduced to semiunciarium, or half the former rate; and in A. u. C. 406, several usurers were punished for contravention of this law, by a fine quadruple the interest. Niebuhr tells us, that about this time, all debts were declared void; sed quare?

In A. u. c. 411, the Lex Genucia, introduced under the consuls C. Martius Rutilus and Q. Servilius by L. Genucium, tribune, made the taking of interest absolutely illegal; but as this only applied to Roman citizens, it was readily evaded by granting loans in the names of latini and foederati.

To remedy this evasion, the tribune M. Sempronius introduced a law with authority of the senate, ut cum sociis ac nomine latino pecunia credita jus idem quod cum civibus Romanis esset. Under the consulate of L. Cornelius Merula and Q. Minucius Thermus, A. u. c. 560, this was a mere extension of the Lex Genucia to the latini and foederati in avoidance of fraud.

All attempts to repress usury appear, however, to have been futile; and debtors, perhaps, renounced the benefit of the law.

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1 Walter Ges. des R. R. § 576.
2 Liv. 6, 34.
3 Ut deducto eo de capite quod usuris pernumeratum esset, id quod superesset, triennio aquis portionibus persolveretur, Liv. 6, 35. This in England is technically termed "applying the sponge."
4 Liv. 7, 16.
5 Hein. A. R. 3, 15, § 9. Or repealed, or perhaps superseded by some more recent enactment.—T.
6 Tac. An. 6, 16.
7 Liv. 7, 28.
8 Praeter hanc invenio apud quedam L. Genucium, Tribunum plebis, tulisse ad populum, ne fonerare liceret.—Tac. An. 6, 16; Liv. 7, 42. So by 5 & 6 Ed. VI. 20, repealing 37 Hen. VII. 89, but itself repealed by 13 Eliz. 8.
9 Liv. 35, 7.
10 Liv. 35, 7.
11 Noodt. de fæt. et usur. 2, 4, p. 269.
Lex Gabinia. 

Justinian's revision of the financial system.

The Lex Gabinia appears simply to have restrained loans to provincial governors, by barring recovery; and as far as can be collected from the numerous authorities on the subject, the legal interest remained fixed at the centessima up to the imperial period; and there are even examples of that rate having been distinctly acknowledged and confirmed by Senatus Consulta and otherwise.

§ 1544.

Justinian revised the whole question of interest, and fixed the centessima for nauticum fœnus; the common interest at semisses, 6 per cent.; mercantile interest at besses, 8 per cent.; that of nobles, illustres, at trientes, 4 per cent. But he also made the centessima receivable on perishable agricultural products, prone to vary in price, such as oil, corn, &c. He allowed more than the centessima to be taken of agriculturists to whom corn, for instance, was lent, to-wit, the eighth part of the bushel—an exception still further extended by a later constitution, which he, however, subsequently abolished; and from that time, the law of the Codex de usuris was, doubtless, the law of land.

§ 1545.

Interest is often claimed in contracts, it will be therefore well to make a few remarks concerning it as applied to them.

Interest may be regarded as a rent for the use of a certain quantity of res fungibles, and is different from rent properly so called, which applies only to res non fungibles; both are, however, in the nature of fructus civiles, of the capital termed sors. Interest must be legal—in its origin,—in its measure,—in its duration.

§ 1546.

Interest may originate either in a pactum or a mora; be settled by common law, as in the case of interest paid to him who manages the affairs of another, and expends money for him; or by par-
ticular law (*privilegium*), as when paid to minors as matter of course.\(^1\)

A contract only carries interest by the Roman law in certain cases, for a stipulation to that effect can only be inserted in contracts *stricti juris* and of loan. In *negotii bona fide*, the agreement must be simultaneously appended to the contract; and in cases of interest promised to a municipality, to an *argentarius* on the loan of corn or as *fecenus nauticum*, it can be made due on a *nudum pactum*.

Certain recognised unilateral acts will create an obligation to pay interest,—as administering to a will, the maker of which has directed interest to be paid.\(^2\) A pollicitation or vow coupled with a promise of interest.\(^3\) Interest obtained by a *procurator* or *negotiorum gestor* on the money of his principal must be brought into account,\(^4\) also a buyer enjoying the fruits of the purchased article must pay interest on the price.\(^5\)

Unrecognised unilateral acts are *mora*.\(^6\) Every act by which a man is deprived of the use of his money by another,—by legal sequester, for instance. A manager must himself pay the interest he might have, but has neglected to realize.\(^7\) If a partner, mandatory, depositary, guardian, or the like, appropriates trust-mones to his own use, he is liable to pay interest for such;\(^8\) the latter at 12 per cent.\(^9\)

§ 1547.

With respect to the measure of interest, it will be necessary to premise that the Romans paid interest by the month (as is still the case in Constantinople). As the integer, a pound of brass, or later, its representative, a piece of coined money, divided into twelve parts, or *uncia*.

The law of the Twelve Tables allowed only 1 per cent., which, being disregarded, it has been seen how it rose to 12 per cent., and how Justinian settled different rates varying from 3 to 12 per cent.\(^10\) Compound interest, *anatocismus* (*áva rékos*), or interest on the last interest, added periodically to the capital, by which means an illegal pre-agreement for compound interest, as such, was evaded, is wholly forbidden, as tending to ruin and reckless usury.

§ 1548.

The rule to be observed quoad the duration of interest is, that the interest can never amount to more than the principal; when it

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\(^1\) C. 4, 49, 5; P. 22, 1, 32, pr. & 35; P. 3, 5, 20, § 11; P. 45, 7, 23 & 127.

\(^2\) Leyser, l. c. med. 4.

\(^3\) P. 50, 12, 10.

\(^4\) P. 17, 1, 10, § 4; P. 3, 5, 19, § 4.

\(^5\) P. 17, 1, 10; P. 3, 5, 19, § 4; C. 4, 49, 13, § 20, & 1, 5; P. 22, 3, 17, § 5, 43.

\(^6\) P. 16, 3, 28; P. 26, 7, 7, 10 & 12.

\(^7\) C. 5, 56, 2.

\(^8\) 11 § 1544, h. op.
does so, further interest ceases, whether it have been regularly paid as due, or left to accumulate; consequently a loan at 5 per cent. cannot be made to bear interest for more than twenty years. The New Constitution\(^1\) applies to both cases, but the passage in the Codex\(^2\) to the latter only, and as the Novella is not glossed, modern lawyers hold to the passage of the Codex which is so; as is the case with like passages in the Pandects\(^3\) and Codex which are not glossed. The principle on which this rule is founded is highly sophistical, but illogical and untrue, for it is held that the accessorium can never be greater than the principale; but could a female slave not bear twins?

\(\text{§ 1549.}\)

The next question for investigation is what is nearest allied to interest—that interest or benefit with respect to the thing, or its value, of which the owner may be deprived by non-payment, theft, destruction, &c., either in part or entirety, termed \textit{lucrum cessans}; or even the damage such want may occasion him, termed \textit{damnum emergens}, which, when combined with the former, is conveyed by the expression \textit{id quod interest}, or the interesse.

If a commodity be not delivered when specified, and the price rise, damage accrues to the promisee,—to this may be added expenses in furnishing means of transport; nay, further, it may prevent the contrahent from fulfilling his contract with a third party, which may involve the payment of forfeit,\(^4\) the loss of a pledge sold under its value,\(^5\) forfeiture of an instalment, for all which the party is responsible who was the primary cause of such loss. Value may be diminished in other ways: by killing one of a team of four match horses, whereby the value of the remaining three has been deteriorated as a team,\(^6\) the loss of all fruits and accessorium is involved, also the profit which might have accrued thereon, by the want of that sum to invest profitably in other wares.\(^7\) It is, however, to be observed that the loss must be such as it was impossible to ward off by other means. Paulus\(^8\) instances slaves dying of hunger, on account of the non-delivery of corn to be had nowhere else; so with regard to profit it must be indisputable, as also the fact that the commodity was not obtainable elsewhere.\(^9\) In the same way are to be construed Hermogenian's\(^{10}\) words, where it is said that under such circumstances the plaintiff is not entitled to damages, but only to the interest,\(^{11}\) except he can prove that he had no other money, nor was able to obtain any; in which case he can claim indemnification for special damage.

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\(^1\) Nov. 12.
\(^2\) C. 6, 32, 10.
\(^3\) P. 12, 6, 26, § 1; P. 23, 1, 9; Pr.; P. 23, 4, 4, § 1; C. 6, 32, 27, 29, 30.
\(^4\) P. 13, 4, 2, § 8.
\(^6\) P. 13, 4, 2.
\(^6\) P. 9, 2, 22, § 1.
\(^7\) P. 13, 4, 2.
\(^8\) P. 19, 1, 21, § 3.
\(^9\) P. 9, 2, 29, § 3.
\(^10\) P. 18, 6, 19.
\(^11\) P. 19, 1, 21, § 3; D. 13, 4, 2, § 8.
§ 1550.

Two actions apply to the "interesse," condicio triticiaria and de eo quod certo loco. In the case of a bona fidei contract, an action would lie for the interesse, which was not the case in one stricti juris; hence the introduction of the actio triticiaria by the praetor.

The condicio de eo quod certo loco consists in an action on a promise to perform certain acts at a certain place; but if the plaintiff be prevented from going thither, he has no recourse till the praetor by his edict allows him to sue the defendant in his domicil, and oblige him to there make the payment, or delivery, termed the interesse loci. The judge, however, in assessing damage, takes into consideration any inconvenience or loss the defendant had been put to by such change of place or venue; or if he was ready to deliver when agreed, freed him entirely from the obligation. This action is, however, not required in bona fidei contracts, inasmuch as the action lies in the contract itself, giving the same remedy which in stricti juris contractibus was only obtainable by condictione de eo quod certo loco.

By the English law it is illegal to contract for more than 5 per cent. on land in England; but elsewhere the lex loci contractus rules the transaction on a bill of exchange or note that has more than a year to run.

§ 1551.

The commodatum is the gratuitous bailment of a specific object for a certain fixed period, to be used for a particular purpose, and to be returned in specie. Here the commodatum differs from the mutuum in the speciality, for it is to be returned in specie, not in kind,—and secondly, in the fact of the use to which it is to be put being defined; whereas the conditions of the mutuum are complied with by the return of an equivalent on the expiry of the bailment, in weight, number, measure, nature, or quality.

Justinian thus defines the gratuitous loan for use:

Commodatum (cum modo datum) est contractus juris gentium, quae res aliena ad certum usum gratis conceditur, ut finito illo usu eadem res in specie restitatur. The lender is termed commodans, the receiver commodatarius; and the loan may consist in moveable or immovable, corporeal or incorporeal property, being one's own property or that of another.

The definition of the Digest does not differ in substance from that of the Institutes:

1 P. 13, 3. 2 P. 13, 4. § 1. 3 P. 13, 4, 7, 9, & 1. 4 13 Eliz. 8, avoids all contracts where more than 8 or 10 per cent. is taken; 21 Jac. I. reduces it to 8 per cent.; 1 Car. II. 13, 6 per cent.; 12 Anne, st. 2, 16,

to 5 per cent.; therewith 37 Hen. VIII. 89, and 5 & 6 Ed. VI. 6, 20, comprise the present law. As to bills and notes, 3 & 4 Will. IV. 98, 7; and 1 Vic. 80; and 2 & 3 Vic. 37. The Koran forbids usury.

Suras 2 & 30. 6 I. 3, 15, § 2. 7 P. 13, 6, 15.
Commodata autem res tunc proprie intelligitur, si nulla mercede acceptā vel constitutā res tibi utenda data est. Gratuitum enim debet esse commodatum. Id, cui res aliqua utenda datur, id est commodatur, re obligatur.1

§ 1552.
A commodatum must fulfill six requirements:
Firstly, There must be a thing to be lent.
Secondly, A capacity to lend the thing.
Thirdly, It must be lent gratuitously.
Fourthly, To be used by the borrower.
Fifthly, For the purpose for which bailed.
Sixthly, And be specifically returned on the determination of the bailment.

§ 1553.
Firstly, There must be a thing lent, which may be either moveable, immovable, or even incorporeal,2 and be neither deposited, sold, nor intrusted to the bailee, for the sole benefit of the commodans or bailor, but for that also of the bailee or commodatarius.

§ 1554.
The commodant must have at least a special or qualified property in the thing accommodated, or at least lawful possession of it.3 Commodare possimus alienam rem, quam possidemus, tametsi scientes alienam possidemus;4 nay, even a thief may make a valid commodatum of a thing stolen, which the commodatary must return, as though the bailor were a bona fide possessor.5 If the bailor have a special property in the object, he may lend it to the general owner; nor does this militate against the rule commodatum rei sua esse non potest, because it may be for a particular or temporary use, which is sufficient to found the contract of loan with the accessorial contract to restore.6

The commodatary has no ownership, but a mere possessory interest, and possesses only quâ the agent of the commodant. Rei commodatae et possionem et proprietatem retinemus; nemo enim commodando rem facit ejus cui commodat.7 Hence the commodant can recover against a third party, who has converted his property in the possession of the commodatary.

The commodatary has no lien for debt on a thing lent, prætextu debiti restitutio commodati non probabiliter recusatur,8 for then it would become a pledge; and a commodatum differs essentially from a pawn in this,—that the former is lent for use, the latter must not be used except under most special circumstances.

All persons having a legal capacity to contract, may enter into

1 P. 13, 6, 1; P. 13, 6, 17, § 3.
2 P. 13, 6, 1, § 1; Ayliffe, Pand. B. 41, tit. 16, p. 517; Poth. Pret. à usage, n. 2 & 14; Domat. B. 1, tit. 5, § 1, art. 53; Poth. Pand. 13, 6, 1, § 1.
3 Domat. 1, 5, § 1, art. 7; Poth. Pret. à us. n. 18.
4 P. 13, 6, 15 & 16.
5 Poth. 1. c. n. 19.
6 P. 15, 6, 8 & 9.
7 C. 4, 23, 4.
this obligation. Thus, married women are incapacitated; though in respect of the latter, if their husbands consent, they are bound in law, not the wife, who has in fact contracted.

Minors may avoid the contract at their option, for it is not ipso facto void.

Lunatics have no power to enter into this contract. And with respect to its innate nature, it must not be tainted with any inherent vice or illegality, for it must not be contrary to morality or general law.

§ 1555.

Thirdly, The object must be lent gratuitously; for this contract ceases to be gratuitous, if any alternate lending take place,—as the loan of a cart on the one hand, and of a horse on the other—and so ceases to be a commodatum, and becomes a contract for hire.¹

The commodatum was changed in its nature, by a remuneration being paid for use. The benefit is one-sided,—viz., on that of the commodatarius; but the property does not pass to him as in a mutuum, he having only the right to use the thing in the way prescribed, and not otherwise, to do which would be a furtum usus.

The commodatum ceases to be such on a reward being promised; nevertheless, a honorarium may be given after the use has been had. Such honorarium may either be a free gift given out of gratitude for the use of the thing, or a reward due for such service which, therefore, is not valued, and given as an equivalent, but as a proof of acknowledgment. In speaking of opera liberales, the reward is termed honorarium; but in the case of opera illiberales, the compensation is termed merx.

§ 1556.

Fourthly, The commodatum must be lent for the use of the commodatarius or bailee. Nor is it material that the use be exactly appropriate to the thing lent, as of a bed to sleep upon, or of a horse to ride; for it will not be the less a commodatum because lent to another to pledge, as a security for his own benefit.² But in this latter case it is converted into a mandate, if the lender, at the request of the bailee, directly pledge the property to a creditor of the borrower, as a security for the debt of this latter.

The borrower must use the thing according to the contract, and reasonably, otherwise he is guilty of a furtum: thus, Qui jumenta sibi commodata longius duxerit alienâve re invitodo domino, usus sit, furtum facit;³ hence the obligation to restore it in a proper condition,⁴ because the loan is gratuitous. Exactissimam diligentiam

¹ P. 19, 5, 17, § 3; Poth. Pret. à usage, n. 2, 3, 11. ² P. 13, 5, 5, § 12; Poth. Pret. à us. n. 2, 5; Domat. 1, 5, § 1, art. 6. ³ P. 47, 2, 40; P. 13, 6, 5, § 8; Poth. l. c. n. 22. ⁴ Domat. 1, 5, § 2, art. 1; Poth. l. c. n. 23.
§ 1557.

Fifthly, The thing lent must be used for the purpose for which it was borrowed; for otherwise the bailee is answerable for all chances,\(^7\) inevitable though they be;\(^8\) but not for wear and tear\(^9\) in the service for which it may have been lent,—as in the case of a horse borrowed to go to a particular place. Any case which involves a culpa is, however, different: thus, the commodatary answers for all neglect, however slight, and must make amends for damage, the contract being for his sole benefit. But if the thing be lent for the advantage of the commodant,\(^10\) as in the case of a horse lent to attend the lender on a journey, or the like, then the borrower is liable for dolus or culpa lata only, not for any inferior degree of negligence; for the loan is of as much benefit to the commodant as to the commodatary,—in other words, there must be a mutua utilitas: hence the borrower ought not to be liable if he have taken the same care of the thing borrowed as he would of his own property in like case, technically termed diligentia quam in suis.

Now, if the commodant and borrower jointly invite a common friend to supper, one undertaking to manage the party, and the
COMMODATUM.

plate be stolen which the other lent for the entertainment, such manager is chargeable to the extent of very slight blame only, or for nothing under gross negligence; but this is strictly no commodatum, but an innominate contract. Indeed, if a fire happen in a house, the owner is bound to save borrowed goods even before his own.

Although the borrower must defray all expenses incidental to the use of the thing in question, such as feeding or shoeing a horse, &c., yet he is not answerable for extraordinary expenses, which might, indeed, in many cases, exceed the cost of hiring a like object. Thus, the borrower, though obliged to cure, in a horse lent him, the distemper arising since the loan was effectet, can, nevertheless, be by no means called upon to cure a disease of old standing, or one arising from the negligence of the lender. Lastly, what is lent cannot be retained as a set-off for a debt. As regards the borrower, he is confined to the use expressly or tacitly agreed to by the lender, which cannot lawfully be exceeded; moreover, the use must be limited in point of time.

The commodatarv is not responsible for vis major, for Is vero, qui utendum acceptit, nisi majore casu, cui humana infirmitas resistere non potest, veluti incendio, ruinæ, naufragio, quam acceptit, amisit securus est; and this must be held to comprise all those accidents before set out, where no blame can be attached to the bailer, because et in majoribus casibus, si culpa ejus interveniat tenetur— that is to say, if he do not exhibit the diligence which may be reasonably expected from an ordinarily prudent man— such as venturing with the property within the range of the skirmishers of a hostile army, and the like. Thus, a thing lent must be used at proper times, and in proper places, in a reasonable and prudent manner; if, however, the commodatarv be forced, by circumstances over which he has no control, to expose the thing bailed to him, the accident will be fortuitous, and he will be exonerated from blame. To conceal the risk to which the object may be exposed, involves not only culpa, but dolus.

The following passage of the Roman law has exercised the ingenuity of commentators:— Si incendio vel ruina aliquod contigit, vel aliquod damnnum fatale non tenebitur; nisi forte quum possit res commodatas salvas facere, suas pratulit. This must be thus understood to imply, that if the fire be so sudden and violent that the commodatarv seize the first valuable which comes to hand, and which turns out to be his own, he is excused; for the words are quum possit. If he have just time for selection, and there are two similar objects, his own of greater value, and
that of a commodant of less value, he must save the article bailed to him in preference, or pay its value. ¹ But what does this all amount to? If his own be worth one hundred, and the bailed article fifty, he is clearly a gainer by saving his own property and paying for that lent or lost. But this is not a pure case of casus fortuitus, for the bailee has an option in his salvation; it, therefore, is more properly a question of diligence or negligence. ²

§ 1558.

Deterioration arising from the act of a third party, over which the commodatary has no control, does not render him in any way liable, for this is accounted a vis major: thus ad eos qui servandum aliquid conducunt, aut utendum accipiant, damnum injuriâ datum ab alio datum non pertinere procul dubio est. Quâ enim curâ aut diligentiâ conseguimus, ne aliquid damnum nobis injuriâ det; ³ otherwise the commodant is liable for the damage. Si reddita quidem sit res commodata, sed deterior reddita, quæ deterior facta redditur, nisi quod interest, præstetur. Proprie enim dicitur res non reddita, quæ deterior reddita. ⁴ It must, however, be understood that such wear and tear as is necessarily incidental to the use is allowed.

If the commodatary lose an object to him bailed, and pay its value, and the thing afterwards be restored to the commodant, the value must be refunded. Rem commodatum perdidi et pro cā pretium dedi, deinde res in potestate tua venit; Labeo ait, contrario judicio aut rem mihi præstare te debere, aut, quod a me accepi reddere. ⁵

The burden of the proof of such loss or deterioration lies negatively on the commodatary, for in exceptionibus dicendum est reum partibus actoris fungii oportere, ipsumque exceptionem, veluti intentionem implere ⁶ (id est probare debet); hence the commodatary must shew, positively, he has used due diligence, or negatively, that he has not been careless.

§ 1559.

Another disputed passage refers to valued loans. Si forte res æstimata data sit, omne periculum præstandum ab eo qui æstimationem se præstiturum receptit. ⁷ æstimationem autem periculum facit ejus qui suscepit. ⁸ The effect which the estimation has upon a loan for use, is clearly the same as a special undertaking, to hold

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¹ Vide Jones, l. c. 69, 70; Poth. Pret. à us. n. 56; Story, Bail. § 245.
² Story, l. c. § 251, puts the case of two shipwrecked persons on one plank, sufficient to save one, but not both. Is the one to leave go that the other may be saved? ³ P. 13, 6, 19.
⁴ P. 13, 6, 3, § 1.
⁵ P. 13, 6, 17, § 5.
⁶ P. 22, 3, 19; Poth. obl. n. 656.
⁷ P. 19, 3, 11, § 1; Poth. l. c. n. 62, thinks the borrower not liable for accidents.
⁸ P. 13, 6, 5, § 3.
harmless in case of accident. This case, then, is one of a qualifies commodatum, partaking of the nature of a mutuum; it allows the alternative of returning the object, or its value if lost; and it is erroneous to suppose that the fact of estimation renders the commodatory responsible, per se. This, therefore, should rather be termed a commodatum qualificatum.

Sixthly, The object lent must, at the termination of the bailment, be returned to the bailee in specie, which is one of the principal points wherein it differs from a mutuum, for non potest commodari id quod usu consumitur nisi forte ad pompam vel ostentationem quis accipiatur, as pictures to be hung up in a gallery.

The loan must be returned specifically.

The grant of an accommodation is entirely at the discretion of the commodant; but when once granted, the commodary has a right to due notice of withdrawal. Cum autem id fecit, id est, postquam commodavit, tunc finem præscribere, et retro agere, atque intempestive usum commodatæ rei auferre, non officium tantum impedit, sed et suscepta obligatio inter dandum accipiendumque. Aduavere quippe nos, non decipi beneficio oportet. The object is, that either party should suffer as little damage as possible; hence if the purpose for which the thing was lent has been fulfilled, it should be returned, though the term be not expired; otherwise, if not so, in omnibus æquitas est spectanda.

Duration of accommodation.

In returning the object, the accessories follow the principal; hence no increment of whatsoever nature can be retained by the commodary, for as he has no dominium in the principal, so he can have none in the accessorium. In deposito et commodato fructus quoque præstandi sunt; and this rule is of strict application, whether an animal have been lent or a capital sum for the purpose of pledge,—the young of the one, and the income arising from the other, must be rendered to the commodant.

To principal or agent.

Return to the authorised agent of the commodant is equivalent to restitution to the owner, commodatam rem missus qui repeteret, cum recepisset, auffugit. Si dominus ei dari jussaret, domino perit.

Place of return.

The place at which the object is to be returned is left to the discretion of the judge, si ut certo loco vel tempore reddatur commodatum, convenit officio judicis inest ut rationem loci vel temporis habeat. Common reason points out that the object must be returned at the place it was taken from, for it is personal, and follows the person; but if the commodant have changed his domicile, which the commodatary well knows, then there, if equally convenient; but if the commodatory have gone far away, the judge uses his discretion in imposing or not upon the bor-

1 P. 13, 6, 17, § 3.
2 P. 50, 17, 90, § 183.
3 P. 22, 1, 28, § 1.
4 P. 13, 6, 12, § 1.
5 P. 13, 6, 5.
rower, an inconvenience not contemplated by him at the time of contract entered into.

§ 1560.

The commodant has, likewise, obligations to perform corresponding conversely with those of the commodatory, thus he must allow quiet enjoyment according to the terms of the contract, and not use the thing commodated unnecessarily, per se hæredemque sumum non fieri, quo minus commodatorio uti liceat, or he subjects himself to an action for damages. Moreover, the warranty of the quality of the object bailed goes so far as to protect the commodatory from damage, for he accepts it to be thereby benefited, not damaged, and it is a breach of good faith to deceive him. Qui sciens vasa vitiosa commodavit, si ibi infusum vinum vel oleum corruptum effusumve, condamnandum eo nomine est.

§ 1561.

But of these transactions, being contractus bilaterales inæquales, two sorts of actions may arise,—one by the commodans, termed actio commodati directa; and one by the commodatarius, termed actio commodati contraria. Now, in the case of the commodant, bringing against the commodatory an action for neglect in the using or for misusing the thing bailed, he claims specific delivery of such thing, with the profits that may have accrued thereon, and indemnification for a slight degree even of neglect; a fortiori, if the thing be spoiled; and if it be wholly lost by fault of the commodatory, he must then restore the value. On the other hand, the borrower may sue the lender for damage accruing by reason of extraordinary expenses incurred on account of some innate vice or defect in the thing lent, wittingly concealed by the lender, whereby damage has accrued, as by a kicking horse or thieving slave; which, in fact, involves a culpa lata, and enables the commodatory to exercise the right of retention till his claim be satisfied. The commodant is also liable for damage accruing from the thing being recalled too soon.

§ 1562.

Differing from a commodatum is a precarium, which Story aptly terms a bailment at will. A precarious resembles an ordinary commodate in all respects but one, that of being redemandable at the will of the borrower; the importance of which qualification has already been seen. Precarium est quod precibus petenti utendum conceditur tamdui, quamdui is, qui concepit patitur, which

1 P. 13, 6, 17, § 3.  
2 P. 13, 6, 5, § 8.  
3 P. 13, 6, 18, § 3.  
4 P. 13, 6, 5, § 8.  
5 P. 13, 6, 17, 3.  
6 P. 13, 6, 18, § 12.  
7 P. 13, 6, 22.  
8 § 1559, h. op.
is thus explained as differing from a gift. *Qui precario concedit, sic dat quasi tunc recepitur, cum sibi liberit precarium solvere.*

A precarious accommodation may be of things corporeal or incorporeal,  mobile or immobile; thus an easement, such as a *stillicidium,* or the like, may be granted precariously.

The *precarium* may be granted personally among presentees, or by letter or message, as between absentees.

§ 1563.

A *precarium* accrues to the principal by the act of his agent duly authorized, or by the operation of the law, as in the case of adoption,  procuration,  mandate, or through a *filius familiae,* slave, or the like; but if without authority, in the first class of cases, an *actio de in rem verso* lies; but in the latter it accrues by implication, and if it be without authority, the *peculium* is liable.

A *precarium* may be granted by attorney; in like manner, the pupil obtains precarious possession without his tutor's authority, and under like conditions, as it is received.

The owner may grant a precarious accommodation of a thing then not actually in his possession; but none can be the precarious commodatory of his own property; nor can two persons possess precariously in *solidum*.

§ 1564.

The commodant is liable for the slightest degree of negligence; the bailee of a *precarium* for *culpa lata* qua dolo comparabatur only, because he is liable at any moment to be deprived of the use of the object, and is therefore in a less advantageous position than he who holds for a certain fixed time; and cannot therefore provide against the withdrawal of the object.

*Eum quoque precario tenetur voluit praeuctor, qui dolo fecit, ut habere desinerit. Illud annotatur, quod culpam non praestatis, qui precario rogavit, sed solum dolum praestat, quanquam is qui commodatum suscipit, non tantum dolum sed etiam culpam praestat. Nec immerto, dolum solum praestatis, qui precario rogavit, quum totum hoc ex liberalitate descendit ejus, qui precario concessit.*

The reason given in this passage of Ulpian is, certainly, far from being satisfactory. In England, all gratuitous loans are treated as precarious.

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1 P. 43, 26, 7, pr. & § 2; Story, l. c.
2 P. 43, 26, 7, § 2.
3 P. 43, 26, 6, § 2.
4 P. 43, 26, § 3.
5 Id. 9.
6 Id. 16.
7 Id. 6, § 1.
§ 1565.

The next species of real contract is a *depositum*, whereby the depositary undertakes to safely keep the deponent’s property without remuneration for his trouble, and to re-deliver the object to the deponent on request.

A *depositum* is sometimes termed a *commendantum* for *commendare nihil aliud est, quam deponere.*

*Depositum* est *contractus juris gentium, quo res alicui gratis custodienda relinquitur, ut eadem deponenti, quandocunque illi luberit, restituatur.*

A depositum is termed *regulare* in all common cases; but in those in which the use of the deposit is tacitly permitted to the depositary, as in the case of money left unsealed, it is termed *irregulare;* and is, strictly speaking, no *depositum*, but rather a *mutuum.*

*Deposita* were *necessaria*, otherwise *miserabilia*; or *voluntaria*, otherwise *simplicia*. In the first, the faithless depositor was punished like a thief if he denied the deposit, because it was not in the power of the depositor to make choice in a time of war, inundation, fire, shipwreck, or other sudden calamity of the person he would otherwise have preferred to trust; therefore, less blame attaches to him on account of the pressing nature of his necessity.

This is a gratuitous contract in which the depositor is termed *deponens*, and the receiver *depositarius*; the object of it consists in moveables, although some think in immovable, for this has been doubted; and it is true that in the Roman law there is no trace of the *depositum rei immobilis*, for this would be rather a *mandatum*; besides, the depositarius is answerable for *culpa lata*; the *mandatarius* for *culpa levis* only.

The gist of this contract consists in the absence of remuneration—in the depositor not parting with the property, *rei depositae proprietas apud deponentem manet sed et possessio, nisi apud sequestrem deposita est*—in the right of use not being conferred, consequently, all the onus lies on the depositarius; all the advantage on the deponent. Remuneration would convert it into a hiring, parting with the property into a sale, and the right of use into a *commodatum*: thus the using a *depositum* is looked upon as a breach of contract equal to theft; making away with a deposit subjects the depositary to a mulct of double the value by a praetorian award. *Si quidem qui rem depositam inviso domino scienteque in usus suas converterit etiam furti delictum succedit.*

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1. Huber, in *prælectad Pand. tit. depos.*
2. *P. 16, 3, 3; I. 3, 15, 3.*
3. *P. 16, 5, 25, 9.*
4. *Schulting, thes. controv. dec. 58, th.*
5. *I. 4, 5, 6.*
6. *P. 16, 3, 3, 1.*
7. *C. 4, 34, 3; P. 16, 3, 29.*
The decemviral law imposed a penalty of double the value of a deposit upon him who had fraudulently converted it to his own use. Si quid endo deposito dolo malo factum escit duplione luito. For a fraudulent depositary was looked upon in the light of a thief; indeed the breach of trust so venial in England, was, in ancient Greece and Rome, a crime of deep dye.


This is evidently a translation of the response of the Delphic Oracle to Glaucus, who asked if he might, by a false oath, retain a deposit committed to his care.

Juvenal, intending evidently to put a strong case of dishonesty, in describing the depravity of the manners of his day, says:—

Nunc si depositum non inficietur amicus, Si reddat veterum cum tota ærugine follem, Prodigiosa fides.

Sir William Jones cites the elegant maxim of an Arabian poet contemporary with Justinian, to the effect that “Life and wealth are only deposited with us by the Creator, and like all other deposits, must in due time be restored.”

The prætor, however, drew an equitable distinction between the common deposit and that termed miserabile; but if the goods be assumed by a friend to prevent their destruction, liability for fraud only obtains. Nam si affectione coactus ne bona mea distabantur, negotiis te meis obtuleris; æquissimum esse dolum duntaxat te præstare.

Quod neque tumultus, neque incendii, neque ruinae neque naufragii causa depositum sit in simplum ex earum autem rerum quæ supra

1 Goth. ad LL. xii. 77, No. 3. 2 P. 16, 3, 29; C. 4, 34, 3. 3 Juv. Sat. 13, 199. 4 Herod. 6, 86. 5 Juv. Sat. 13, 61. 6 Bailm. p. 52.
§ 1566.

Now, generally speaking, as the whole benefit, utilitas, accrues to the deponent, the culpa applying to the depositarius is of the slightest description; but, on the other hand, that which applies to the deponent, is lata. Yet particular cases may arise: for instance, as when the depositary accepts the deposit out of mere compassion, such being termed a depositum miserabile; his neglect will, in such case, be overlooked.

The depositary must take the same care of the property bailed to him as of his own.

Nam etsi quis non ad eum modum quem hominum natura desiderat, diligens est, nisi tamen ad suum modum curam in deposito praestat, fraude non caret.1 Num enim salvâ fide minorem ict, quam suis rebus, diligentiam praestabit. Sed is ex eo solo tenetur, si quid dolo commiserit. Culpa autem nomine, id est, desiderae et negligentiae, non tenetur. Itaque securus est, qui parum diligentem custodiam rem furto amiserit; quia qui negligentem amico rem custodiendam tradit, non eo sed sua facilitati id imputare debet.

Thus the depositary was not made responsible for any loss which did not carry with it a fair presumption of fraud.

Of course the depositary may voluntarily assume the responsibility, as in all other bailments. Sed etsi se quis deposito obtulit (idem Julianus scribit) periculo se depositi illigasse; ita tamen, ut non solum dolum sed etiam culpam et custodiad praestet; non tamen casus fortuitos.*

Inasmuch, too, as the property remains in the deponent, he must bear the consequences of inevitable accident, except, of course, in irregular deposits; but if the depositary delay to deliver up the deposit on demand, he renders himself liable for it in like manner as if he had agreed specially to insure the deponent against accident.

If the deposit belong to many owners, it ought to be redelivered in the presence of all such parties, if indivisible; otherwise, if divisible.5 But if one have received his portion, and the depositary become insolvent, such party is not compellable to divide such part among his co-depositors, for the loss arose from their own neglect.*

Si apud duas sit deposita res adversus unumquemque eorum agi potuit. Nec liberabitur alter si cum altero agatur. Non enim electione sed solutione liberantur.* The depositary need not return the thing

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1 P. 16, 3, 32; I. 3, 15, § 3.  
2 P. 16, 3, 1, § 35.  
3 P. 16, 3, 1, § 36; P. 16, 3, 14; Jones, Bailm. 2nd ed. 1798, p. 51. 
4 C. 4, 34, 12.  
5 P. 16, 3, 1, § 43.  

* P. 16, 3, 1, § 35.  
• P. 16, 3, 1, § 36.
DEPOSITUM.

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to other than the real owner. But if a thief deposit a thing, the
depositary must retain possession till the title thereto be estab-
lished;¹ but if the claim be open to no suspicion, the object must
be returned to the depositor without regard to his title,²—nay, not
only the deposit, but the mean profits which have accrued³ since
it may have been in his custody.

Quod si ego ad petenda ea non veniam nihilominus ei restituenda
sunt qui depositit quamvis malum asta depositit. The remedy
extends against heirs.

§ 1567.

Before quitting this subject we must refer to the luminous
disquisition on the responsibility of bail, and claims of the bailor,
by Sir William Jones.⁵

"The most ancient case that I can find in our books on the
doctrine of deposits (there were others indeed a few years earlier,
which turned on points of pleading), was adjudged in 8 Ed. II.,
and is abridged by Fitzherbert.⁶ It may be called Bonion's case,
from the name of the plaintiff, and was in substance this:—An
action of detinue was brought for seals, plate, and jewels, and the
defendent pleaded 'That the plaintiff had bailed to him a chest
to be kept, which chest was locked; that the bailor himself took
away the key without informing the bailee of the contents; that
robbers came in the night, broke open the defendant's chamber,
and carried off the chest into the fields, where they forced the
lock, and took out the contents; that the defendant was robbed at
the same time of his own goods.'

"The plaintiff replied:—

"'That the jewels were delivered in a chest not locked, to be
restored at the pleasure of the bailor.'

"And on this, it is said, issue was joined.

"Upon this case Lord Holt observes:—

"'That he cannot see why the bailee should not be charged
with goods *in* a chest, as well as with goods *out of* a chest; for, says he, 'the bailee had as little power over them as to any benefit he might have from them, and as great a power to defend them in one case as in the other.'

"The very learned judge was dissatisfied, we see, with Sir Edward Coke's reason, that when jewels were locked up in a chest the bailee was not, in fact, trusted with them." 1

"Now there was a diversity of opinion on this very point among the greatest lawyers of Rome, for 'it was a question whether, if a box sealed up had been deposited, the box only should be demanded in an action, or the clothes which it contained should be also specified.' And Trebatius insists 'that the box only, not the particular contents, must be sued for, unless the things were previously shewn, and then deposited.' But Labeo asserts 'that he who deposits the box deposits also the contents of it, and ought therefore to demand the clothes themselves.' What then if the depositary was ignorant of the contents? It seems to make no great difference. 'And I am of opinion,' says Ulpian, 'that although the box were sealed up, yet an action may be brought for what it contained.'

"This relates chiefly to the form of the libel; but surely cases may be put in which the difference may be very material as to the defence. Diamonds, gold, and precious trinkets, ought, from their nature, to be kept with peculiar care under lock and key; it would therefore be gross negligence in a depositary to leave such a deposit in an open antechamber, and ordinary neglect at least to et them remain on his table, where they might possibly tempt his servants. But no one can proportion his care without knowing the nature of the things. Perhaps, therefore, it would be no more than slight neglect to leave out a drawer, a box, or a casket, which was neither known, or could justly be suspected to contain diamonds.

"Chief Justice Thorpe is of opinion 'that a general bailee to keep is not responsible if the goods be stolen, without his gross neglect.' 4 And it appears, indeed, from Fitzherbert, that the party was driven to this issue whether the goods were taken away by robbers." 5

Thus far Sir William Jones, although the remainder of the argument on this question is well worth the trouble of reference.

The Mosaic law acquitted the defendant in case of theft, if he could swear before the judge that he had not put his hand to his neighbour's goods. 6

If there be no questions asked as to the contents, there is ground to believe the bailee is liable, for it was his duty to ask, and if he neglected to do so, to use the same care as if the box

1 Lord Raymond, 914. 2 29 Ap. 28 Bro. Abr. tit. Bailment, l. 7.
2 4 Rep. 84. 3 Ex. xxii. 7, 8.
3 P. 16, 3, 11, § 41.
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contained goods of the greatest value, for he would be responsible in case of loss for culpa lata; but if he asked, and was told an untruth, for the value only as represented, which might vary in degree according to such representation, for it might be that he would have refused to accept the deposit if it were of great value, and accept it if of slight value. And this very fact of inquiry would make him responsible, for if he had not intended to apply care equal to the value, why should he ask?

Thus the case resolves itself into an implied special acceptance in all cases; consequently, in all cases, the bailee is responsible for the value of the contents.

§ 1568.

The actions arising out of deposits are the actio depositi directa against the depositary or his heirs, by the deponent or his heirs, and involves the delivery of the rei in specie cum omni causa, with all profits and damage arising from dol or culpa lata. The exceptio compensationis is not available; but the deposit being looked upon as sacred, must be returned, and an action then brought for the debt. Neither can exceptio doli mali be pleaded. Neither can he claim a real right upon the deposit, but must deliver up the deposit, and vindicate it afterwards. Neither can the depositary exercise the right of retention till a debt be paid him. This rule is, however, relaxed when it is proved that the depositary has suffered damage on account of the deposit, or incurred such expenses as ground an actio depositi contraria, which lies in the above two instances when the depositary has not exercised his right of retention.

§ 1569.

Sequestre, says Paulus, est depositum quod a pluribus, in solidum certa conditione custodiendum reddendumque traditur. A sequestre, then, is the depositum of a thing in controversy between two or more parties in the hands of a third person, upon condition that he shall keep it safe during the continuance of the suit, and at the end thereof deliver it to him who gains the cause; then it is introduced to avoid a multiplicity of actions. The sequestre may be either voluntarium where the sequestrators are named by mutual agreement of the parties, or necessarium where directed by the magistrate, who may enforce it to prevent dilapidation or destruction of the object in issue, or to secure its being carried off, and resembles an attachment in certain

1 P. 50, 17, 23; Doctor & stud. dial. 2, ch. 38; P. 16, 3, 1, § 19. 2 C. 4, 24, post 11; C. 4, 31, 14. 3 P. 16, 3, 13; C. 4, 84, 11; Boehmer, de act. sect. 3, c. 8, § 29; Leyser, spec. 153, med. 2. 4 P. 16, 3, 6; P. 50, 16, 110. 5 P. 16, 3, 24. 6 P. 16, 3, 17. 7 P. 49, 15, 21.
To compel obedience to process.

Applicable to the person by the Canon law.

Voluntary sequester differs from a deposit in the consent. Necessary sequester against consent.

Requisites of a necessary sequester.

Duties of the sequestrator.

Actio sequestraria, directa, and contraria.

local courts in England, or indeed for contumacy in not appearing on citation: this latter is similar to the practice of distreining in England to compel appearance, distringas ad respondendum ad testificandum, and the like.

The Canon law makes it applicable to the person, where there is controversy whether he or she be or be not married to the plaintiff; and this is still done, lest the defendant should marry another in the mean time.1

§ 1570.

A voluntary sequester differs, therefore, from a deposit, in that it is done by consent of two litigant parties to abide an event; but where there is no suit, and such sequester be made by consent, Ulpian2 terms it a quasi sequestre. In the case of a necessary sequester, that it is done against such consent; but for the most part, if security or caution3 be given, the judge ought to relax such sequester and restore it to its first state: this in England is called replevin, the defendent being allowed to replevy or take back his goods, on giving sufficient security for the result of the action.

The previous requisites of a necessary sequestration are—citation, proof of the debt or right, proof of danger of losing such right if sequestration be not granted, a summary inquiry into the cause, oath of calumny, &c.; nor ought a judge too readily to grant it, being in the nature of an execution, which cannot be granted before a judgment.4

The office of the sequestrator is, therefore, to preserve the things during the suit, selling such as would perish by keeping; and to give an account5 of the sequestration at the termination of the suit; and, if the party cannot otherwise subsist, to allow him alimony thereout, and funds to carry on the suit, if the thing sequestered will bear it.

§ 1571.

When the suit is terminated, and the sequestrator have not delivered to the successful party the thing sequestered, this latter can bring his actioem sequestrariam directam for the thing itself and its profits; the actio sequestraria contraria, on the other hand, is brought by the sequestrator against the successful party for expenses on, or damage caused by, the thing in question. But if he had the administration as well as the possession, he has also an actio locati for remuneration.

The actio sequestraria can be brought either against or by the successful party, although he be not the party who delivered the goods to the sequestrator; for instance, A has a suit about a

1 C. 14, x. de spon. et mart.
2 P. 19, 51, 18.
3 P. 2, 8, 7, § 2.
4 C. 7, 53, 1.
5 P. 16, 5, 6.
garden with B, which he sequesters to C, but loses the suit. B can bring an action against C, or vice versa; for B is supposed to have concurred in the delivery to C, and to have contracted with him, and to have an interest.

§ 1572.

It has been already premised that the word *pignus* has a triple meaning—that of a right, a thing, and a contract; in its last signification it is a real contract, inasmuch as the debtor delivers the thing, upon which a real right attaches, to his creditor as a security for a claim, coupled with the condition of restoration, on payment of the debt. It would appear that the Romans, in more ancient times, used a solemn contract of pledge, termed *nexus*, and effected *per as et libram*; and, inasmuch as this is an accessory contract, it presupposes a debt. It has, moreover, been seen that all things can be the object of this contract which afford the creditor a security; that the creditor cannot use the pawn, but must possess and take care of it—hence that the object must be delivered to the creditor; and lastly, that this is a contract of mutual advantage, for the debtor’s profit consists in the fact of his obtaining a credit which he could not obtain without the pledge; and the creditor, in the security, for what is due to him.

§ 1573.

From the first position it results that the contract is void where no debt exists, or where such debt has been cancelled: thus, that if one make on another a claim supposed by the debtor to be well founded, but which turns out not to have been so; that either the obligation had never accrued or had been satisfied; that in such case the contract of pledge is void, but that it is not necessary the debt should be confirmed by the civil law; for a contract and pledge will be good if given for a natural obligation, if not utterly cancelled; then the contract will be valid to cover an obligation originating in a *nudum pactum*, such obligation being simply natural, but, nevertheless, not wholly cancelled. But that the contract will be invalid if, for instance, an obligation arising out of a suretyship transaction attach upon a woman, inasmuch as all debts attaching upon women from such transactions are natural and wholly avoided by the civil law.

That so soon as the debt is obliterated, the pawn may be demanded back. The Emperor Gordian passed a curious enactment in this respect, to the effect that, if a man be indebted on various accounts, having given a pawn as a security for one of them only, such pawn is not redemandable till all be discharged;

1 § 1462, h. op.  
2 C. 8, 27, etiam ob chirographarim pecuniari pignus teneri posse.  

seq.
for that although the pawn applies only to the particular debt for which it was given, yet that the pawnee may exercise the right of lien or retention till fully satisfied, including interest and legal expenses, or a pœnal sum; nay, a man can even pawn his right of pawn.

§ 1574.

From this and the last axiom, it follows that both incorporeal as well as corporeal things can be pawned. An usufruct or a right of tithe might be pawned, although a real servitude cannot be so, without the reality and a claim in debt, by the praetorian equity. Occasionally, however, with respect to immoveables, a right of pawn accrued without possession, pignus in specie iridictum; for Ulpian says,—Proprie pignus dicitur, quod ad creditorem transit; hypothecam cum non transit, nec possessio ad creditorem. The thing belonging to another, as well as that belonging to oneself, can be the subject of a pawn with consent of the owner; naturally, things not in commerce cannot be pawned, as free persons, one's children, and the like, nor things as to the title to which a suit is pending; for so long as this is the case, they must remain in statu quo.

From the third axiom is deduced that the pawnee cannot legally use the pawn, although this may be tacitly permitted, as would be the case of the product of a garden or field pawned by way of interest; but if this be specially agreed, it is termed a pactum anticréticum; and this antichretic contract is often clothed in the form of a re-sale, and is termed tacit, when the creditor may withhold as much of the produce as is equal to the interest of the sum lent.

From this last axiom it follows that a culpa levis attaches on either side; it is true that we find venit in hac actione (pignoratitiam directam), et dolus, et culpa ut in commodato, which renders the baillee responsible for the slightest possible neglect; hence Wieling supposes hac actione to apply to some other law cited in the proaemium, though others dispute this position.

§ 1575.

As in the former cases, two actions, one direct and the other contrary, arise out of this contract.

1 P. 13, 7, 8, § 5; C. 4, 32, 4; C. 8, 14, 6.
2 P. 20, 1, 12, § 2; P. 20, 1, 15, pr.; P. 20, 6, 8, pr.
3 P. 20, 1, 11, § 3; Schulting. thes. controv. dec. 78, th. 8.
4 P. 13, 7, 18, pr.
5 P. 13, 7, 9, § 2.
6 Ch. Gottl. Gmelin, commentatio de jur. pig. vel hyp. quod cred. deb. in re sibi non prop. constituit, Ulm. 1768, 8.
7 P. 20, 2, 8.
8 C. 4, 32, 14, & 17.
9 P. 20, 2, 8; Noodt. de fœn. et usur. l. 2, c. 9.
10 Lect. jur. civ. 1, 7.
11 Marckart, prob. recept. lect, part 1, p. 101; Lamprecht, diss. cit. 10 & 19.
The pawnor has the actio pignoratitia directa against the pawnnee for non-delivery of the pawn and all that appertaineth thereunto on payment of the debt, together with indemnity for damage arising from culpa lata, or levis.

The actio pignoratitia contraria lies for such expenses as were necessarily incurred in the keeping of the pawn; but expenses of improvement are only demandable when such have been made by consent of the pawnor, or are not inconvenient to him to repay; or when the pawnnee has suffered by the culpa levis of the pawnor, or wishes the thing of a third party pawned to be replaced by some other object; or when the thing which should have been delivered has not been so; lastly, when the pawnnee has allowed the pawnor a temporary use of the pawn which he refuses then to return.

Although, then, strictly speaking, a contractus pignoratitius is supposed on account of the personal nature of the liabilities involved in other liens, yet the law has permitted an actio pignoratitia utilis and in factum to lie as a personal action; the directa, of course, can naturally not be instituted against a third party after termination of the lien, such must be reached by a possessory action. It is equally clear that the pignoratitia directa lies against a third party to whom the creditor has pledged the thing in question by authorization of the debtor, or in the case where he may have ceded his right of action to the latter; legally, however, this is as little an exception to that principle as the admission of an actio in factum, where the third party has made himself, as representative of the pawnor, in some degree personally responsible for the return of the thing to the latter.

In the Institutes no particular title is dedicated to innominate contracts, which have already been generally alluded to, and found to be in their genus duplex, in their species quadruplex. In the first two, do ut des and do ut facias, the giving is the condition precedent, the consideration for which is an act to be thereafter performed; but in the case of the second species, facio ut facias and facio ut des, the fact precedes, whether that fact is to be compensated by another act, or by a gift.

The peculiar feature in innominate contracts is, that they allow a locus paenitentiae—that is to say, the party thereto of the first

1 The actio hypothecaria must not be confounded with the pignoratitia directa or contraria, being a real action against every possessor for delivery on payment of the debt; while the act. pig. directa lies only by the pawnor to recover a pawn, and the contraria against the pawnor for damages and indemnity.

2 P. 13, 7, 11, § 5; P. 39, 2, 34; P. 42, § 9.

3 P. 13, 7, 13, pr. & 27; C. 8, 24, 2; C. 8, 30, 2-3-4; x. de pig. (3, 21).

4 Höpfner very properly rejects the distinction between regular and irregular contracts: the first being such as have no particular designation such as the others have, and observes that a paradox is involved in giving a nameless contract a name, § 800 & § 802. The distinction is unknown to the Roman law, vide Florerck de contractu aestimatorio, tanquam contractu nominato, Hal. 1756.
Right of withdrawal.

Contractus astimatorius.

Permutatio.

§ 1576.

The contractus astimatorius is a contract for sale on commission; the object is delivered to another conditionally for a certain price, for the purpose of resale, or to be returned at option. In such contracts, the chief question that arises is, in whom the legal ownership vests. Until the price is paid, the ownership is clearly not transferred, but the conditional purchaser holds as the owner's agent until the transaction shall have become finally complete. When the object has been obtained in a petitory way, it is clear that the possessor is responsible to the owner for accident, but otherwise for ordinary negligence, being bound to diligentia q. i. s.\footnote{The contractus astimatorius is unknown to the civil law by that name, but it is to be met with in certain expressions, \textit{ex gr.} \textit{si rem astimatum tibi dedero}, etc.—P. 19, 3, 3, pr.}

§ 1577.

The next innominate contract which possesses some peculiarities is the \textit{permutatio}, or exchange, where one object is bartered for another. \textit{Permutatio} may be considered in a triplex point of view:—

Firstly, The \textit{pactum de permutando} as a \textit{nudum pactum},—as an innominate contract,—and as a contract fulfilled.

Secondly, A \textit{nudum pactum}, for it consists of reciprocal promises, and not on a nameless contract.

Thirdly, Where the one party has performed his part, but not so the other, it is a simple nameless contract of \textit{do ut des}.

The second is the \textit{permutatio}, which belongs to this place; for

\footnote{\textit{Quam in suis} thus shortly quoted by 
\textit{civilians}.}
the first is no more than a naked agreement for an exchange, which is a mere inchoate idea of the permutatio. The latter is as much on the other side, for it is a contract fulfilled already by both parties: and although it is not clear in what precise sense the classical jurists used this word, yet it is sufficiently certain that it could have been, in a legal sense, no other than this second signification.

Not only a thing itself, but likewise the use of a thing, was exposed to this contract. Thus, a thing can be loaned, on condition of another thing being lent in exchange, or of a loan being made to a third party, which is another phase of the do ut des; but still it is a permutation of use.

§ 1578.

Another species of nameless contract is that termed the contractus suffragii, which is also a contract do ut facias, and consists in a remuneration being given to an aulicus, or person attached to the court, in order to secure his interest si qui desideria sua explicare cupientes ferri sibi a quoquam suffragium postulaverint,¹ in a matter which he was not obliged to support virtute officii; for if he be under such obligation officially, than the acceptation of any equivalent for his service becomes an illegal act.

¹ C. 4, 3, 1. The short title contractus suffragii does not appear in the body of the Roman law.
§ 1579.

Real contracts derive their obligatory power from performance on the part of one of the contracting parties; but the contracts of subject matter of the present title are rendered binding by a solemn form of words; such form, having been drawn up by some man learned in the law, became obligatory on recitation by the parties thereto.

§ 1580.

In ancient times there were three sorts of verbal contracts:—The solemnis dotis dictio, or promise by the father to the son-in-law; the promissio operarum à liberto facta, or the promise of opera officiales to a patron; fabriles not being his bounden duty to promise, although this was also done occasionally and confirmed by an oath, which, in this particular case only, was foundation for an action,¹—for an oath usually did not render the contract more stringent; and stipulatio, which alone was allowed to remain when the others were abolished.

§ 1581.

Stipulation is performed by way of question and answer—hence its general applicability. Verborum obligatio seu stipulatio est contractus juris civilis, qui precedente interrogatione et subsecutâ statim responsione congrua perficitur.²

Stipulum has the same signification as firmum;³ and various derivations are supposed as from stipes,—that is, res pecuniaria, because this was the usual object of the contract; stipes, the stamp on coin;⁴ or from stipare, to stow or press;⁵ or from a

¹ Caii, Inst. 2, 9, § 4; Donell, in com. jur. civ. lib. 2, c. 16.
² I. 3, 16, pr.
³ Paul. R. S. 5, 7, 1, pr.
⁴ Festus, stipes, 139.
⁵ Varro, de L. L. 4, 16, 30.
supposed practice of the ancients of breaking a *stipula*, or straw, and rejoining the same, and acknowledging their promises. As, however, Justinian has preferred the first, that is possibly the true one.

The one party puts an *interrogatio* as to whether the party will sell, to which he makes a fitting reply, that he will; whereupon the party thereto of the first part asks if he will pay the price, and upon an affirmative answer being returned, the bargain is concluded; its most common application is to confer on *pacta nuda* the right of action for breach by such confirmation.

Many of these formulae are found by classical authors:

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Ps. *Roga me viginti minas,*

*Ut ne effecturum tibi, quod promisi, scias,*

*Roga abscebro, hercle; gestio promittere.*

Cal. *Dabisne argenti mibi hodie viginti minas?*

Ps. *Dabo.*

Tim. *Nullum periculum est, quod sciam stipularier,*

*Ut concepi sti verba viginti minas,*

*Daben*? BA *dabuntur.*

Ly. *Spondeo ergo tuam gnaton uxorem mibi.*

Ch. *Spondeo, et mille auris Phillipum dotis.*

Ly. *Istac legi filiam tuam spondeo mi uxorem dari?*

Ch. *Spondeo.*

§ 1582.

Both parties thereto are termed *rei*; the first, *reus stipulandi*; the other, *reus promittendi*, who used the words *spondeo promittis? promitto dabis? dabo facies? faciam.* But the Leonine constitution abolished the particular form of words, rendering sufficient intendment binding, yet it is difficult to suppose any form of words at once more explicit and more terse, from one party being designated as *stipulator*, and the other *promissor*—the former word is often used for to promise; now it is a double reciprocal unilateral contract, for each promises the other, consequently it comprises two contracts.

§ 1583.

A stipulation requires of the parties a fitting answer thus forth—

with given, in the presence of one another, in intelligible language

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1 Isodorus, orig. 4, 24, 930.
2 Plaut. Psæudol. 1, 1, 112.
3 Pl. l. c. 4, 6, 14.
4 Pl. Trinun, 5, 5, 32, & 39.
5 C. G. 38, 10, omnes stipulationes, etiam si non solennibus vel directis sed quibuscumque verbis consensu contrahentium compositae sunt vel legibus agnites suam habeant fermatatem. I. 3, 15, § 1, sed haec solennia verba olim quidem in usu fuerunt, postea autem Leoniana constitutio lata est, quae verborum solennitatem sublata, sensum et consonantiam intellectum ab utraque parte solum desiderat, quibus- cumque tamen verbis expressum est.
7 P. 45, 1, 35, § 2.
respecting a legal matter. Thus, as to the first, if the one party say *dabisne equum*, and the other answer *dabo bovem*, such is evidently a bull, and no fitting answer. Moreover, the answer must be ready, first, because both must be actuated by the like *animus* and agreed; both question and answer must be verbal in the presence of one another, consequently deaf and dumb persons were incapable; the parties were not bound to the solemn words, so that those used were clear, positive, and intelligible. Lastly, the cause of the stipulation must be a just condition precedent.

Notwithstanding that it is immaterial whether the stipulation be made in Greek or in Latin, and that it sufficesthat the parties understand each other by interpreter or otherwise; it is, nevertheless, indispensable that the stipulation be made *ora tenus*; nor will it avail that the one interrogate and that the other nod assent; nor that it be performed by letter, where the parties are absent.

§ 1584.

Those who can contract, can also validly stipulate; hence lunatics and persons under mental disabilities are prohibited; and a slave stipulating acquires not for himself, but on behalf of his master, except an act be stipulated for. A *servus hæreditarius* in so far formed an exception as to be enabled to stipulate validly, before he had actually administered to the estate; this was necessary to support the fiction *hæreditas jacens persona defunctæ vicem sustinens*.

Pupilli, whether infants or *pubertati propiores*, can neither promise nor stipulate, this power vesting in their tutors; but an infant can acquire by his slave, consequently the slave’s stipulation resulted to the infant. But it would seem that the *pubertati proximi* have in so far an advantage as to obligate others, but to be incapable of binding themselves without the authority of their tutors.

Children under power can stipulate validly, and accept promises from others in like manner, except in cases of loan, in which they are restrained by the *Senatus Consultum Macedonianum*. The *unitas personaæ* allowed no stipulation to be binding between the father and son under power.

Stipulations for another person are invalid, it being a maxim of Roman lawyers that an obligation arising *ex contractu* only binds the contracting parties, except such third party be interested; hence a tutor can stipulate for his co-tutor. To evade this, it

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1 Godd. em. d. 21, p. 266, seq.
2 P. 44. 4, 5, 6 3; P. 46. 1, 15, pr.
3 I. 315, § 1.
4 P. 45. 1, 5, § 2.
5 Ibid.
6 I. 3, 15, § 11.
7 I. 3, 17, pr. § 1 & 2.
was usual to stipulate for a penalty to be paid if a certain other be not satisfied.\(^1\)

§ 1585.

The *stipulatio* is said to be *incerta\(^2\)* when one of a genus is promised, but *certa* when a *species* is the object of the contract, *jura* without any condition, or *conditionata* with a condition attached *in diem* for a certain period; but whoso promised for such certain period was held to have promised for ever, of which the unsatisfactory explanation is given, *tempus non est modus tollendi obligations*. But why? Again, *ad tempus non potest debere?\(^3\)* But the *praetor*, doubtful of the justice of this rule, granted relief, by allowing the plea of *exceptio doli mali, or pacti conventi*.

A stipulation may be for a certain sum, from a certain period, or at a certain day, and the whole must be paid before performance is due,\(^4\) though strictly due at the time of the contract; but if an impossible day be added, such condition is disregarded, and the debt is due forthwith, as the day after the day of judgment. It may be due at a certain place, and then time is to be allowed for the journey. Lastly, it may lie in gift or in feasance—that is, consist in giving or doing, but nonfeasance, not doing must also be understood.

The distinction of *vera* and *ficta*, an action *ex stipulatu* by a woman for the recovery of dower, is of modern introduction.

§ 1586.

The *actio ex stipulatu* extends to heirs, and is *actio incerti* with respect to a *genus*, and *actio certi* when an *individuum* is in question.

The *stipulans*, or he to whom the promise is given or his heirs, has his action against the promisor, or his heirs, for the *res* or *factum* promised.

§ 1587.

Two rules applied to obligations on stipulations *in solidum*; these, however, are not without exceptions. The first rule is, that parties are answerable *pro rata*; thus, if a person die, leaving three heirs, each is responsible for one-third of the integral debt. The exceptions are when there are many contracting parties, each of whom are subject for the whole on the contract. Payment by one will release the rest. In this case such co-obligatees are termed *rei* or *correi debendi*, and the co-obligors *correi credendi*: such obligation is termed *obligatio correalis activa*, if creditors,—or *obligatio correalis passiva*, if debtors. And here it may be remarked that it is not incorrect to call a debtor as well as a creditor *reus*, for the word in its primary meaning imports him who has an interest either way in the subject matter quasi *a re*.

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\(^1\) I. 3, 19, § 18.  
\(^2\) I. 3, 16, § 3.  
\(^3\) I. 3, 16, pr. et seq.  
\(^4\) P. 50, 17, 186.
THE ROMAN CIVIL LAW.

Object of the correal obligation.

The correal obligation may result not only from contracts or testamentary dispositions, but from positive legal enactments. This obligation is for the protection of a creditor, that he may, of many debtors bound in solutum, sue him whom he may be able to find, or him who may be solvent: thus, a testator may bind his heirs in solutum for the payment of legacies. The following points have been also established by law:

The correal obligations—1. Bind many who have caused damage by illegal acts, or for private penalties. 2. Bind many tutors or curators to their pupil in solutum. 3. Make mercantile partnerships answerable for the acts of their agents. 4. Bind co-depositaries. 5. Bind many sureties jointly as well as severally. Thus the Romans term the co-debtors on such stipulation, in solutum correipromittendi, and the co-creditors, in solutum correistipulandi.

§ 1588.

As to the form in the case of correipromittendi, each promised for the whole sum severally, the promittee saying, dabismibimillo? And the promititors severally answering dabo, the other et ego dabo. And in that of correistipulandi, the promisee asked, spondesemibimillo? And the promisor answered, utriquvestrum dare spondeo.

§ 1589.

Such is then the nature of the correal obligation; but Justinian added the beneficiumdvisionis, which consists in a tender of the share of him applied to, and a promise to pay the remainder if the creditor cannot obtain it from his co-obligees; it has been doubted if this extended to a lease, but it would seem it does. Under certain conditions, which are—1. That the other co-obligees be present. 2. That they be solvent. 3. That the obligation do not arise out of an illegal act. 4. That the advantage have not been renounced expressly. The payment by one, it has been observed, releases the rest.

§ 1590.

Now the creditor correus credendi can demand the whole debt or thing from one of those bound in solutum; nor can the latter reply that he will pay the proportion due to that particular creditor, but having paid him, the right of the creditor is extinguished. The correustipulandi can release his debtor not only by his receipt, but by acceptilatio, novatio, or juramentum delatum; neither can a creditor refuse to accept without good ground.

1 P. 30, 1, 8, § 1. 2 P. 16, 3, 1, § 43; P. 13, 6, 5, § 15. 3 Pro Puf. t. 2, obs. 77; contra Nov. 99; Heinec. Pand. p. 7, § 22. 4 Vinn. ad I. 3, 17, 1, n. 2.
The correus debendi, or debtor in solidum, who has paid, releases himself and his co-debtors, whom he cannot, however, sue for contribution, for he has taken the whole debt on himself; but if he be in partnership, he can bring the sum paid into the partnership account, and so recover by contribution, or by obtaining a cession or assignment of the creditor’s right. But even without this, he has an actionem negotiorum gestorum utile magainst his co-debtors; for had he not paid, they must have done so. Of course the debt must not arise out of a delictum.

A correus credendi who has obtained a greater share than that to which he was justly entitled, is not obliged to share it, except in cases of partnership, where he must carry the sum to account, or where it has been agreed among the correi that whoever might obtain payment, should refund to each his due proportion.

§ 1591.

No man could stipulate on the part of another, except he were a filius familias, or a slave: the first being, by the Roman fiction, the same person as the father acquired for him; and whatever the slave obtained was looked upon as an accessorium.

The slave in many cases derived the right of stipulation from his master. The heritage so far represents the defunct, that whatever the servus hareditarius stipulates for accrues to the inheritance; hence it also accrues to him who ultimately becomes heir. Nevertheless an usufruct cannot be acquired in this way; nor an heritage for which act the jussus of the master during his lifetime is necessary.

In the case of a servus communis or the slave of many masters, whatever he may stipulate for becomes the joint property of all, in the absence of any stipulation on his part in favor, or by order, of any of his masters in particular.

Ulpianus ad Sabinum holds that the slave of a universitas, such as a reipublicæ municipii, or colonia, may acquire for those bodies by stipulation.

§ 1592.

Stipulations are for the most part voluntary. The constituted authorities, however, sometimes called upon a party to give security by stipulation; hence the distinction between voluntariae, or conventional, and necessariae.

Necessariae are of three descriptions,—prætoriae, judiciales, and communæ. The first are directed by the prætor, the second by the judex pedaneus, and the latter indifferently by either. The præ-
The praetorian are usually effected by bondsmen and pawn, but those under the jurisdiction of the ædile are likewise praetorian; and although they may be perpetual—that is, for thirty years—yet they are more usually annales, as where a penalty is appended; but the judiciales are effected by a bare promise only, and are always perpetual.

§ 1593.

The praetorian includes ædilian, or matters of police; thus, the seller of a beast must give security animal esse sanum (edere) bibere ut oportet; or if a slave, that he be not a fugitivus, erroneus, &c. But these questions properly appertain to the province of the ædile, in his character of surveyor of the markets.

§ 1594.

The first praetorian caution is de damno infecto, which is applied in cases where a house is in a dangerous state, in order to force the owner thereof to give security for the amount of damage that the falling of his house may cause to his neighbour's property. For as he has the choice of repairing the damage, or resigning the materials in indemnification which may have fallen on his neighbour's premises, and as this might be insufficient to cover the damage done, the matter is referred to the praetor, who may order that the owner of the house find security; but if it be neglected, the plaintiff may be put into joint possession of the premises, called immissio ex primo decreto, which, if the defendant remained obstinate, is followed by immissio ex secundo decreto, which involved full possession.

If the tenant be not proprietor, he must give security by bondsmen; but if he be the real owner, by simple promise.1 This caution lasted only a year, at the expiry of which time, if the danger continued, the immissio must be prayed anew.2

§ 1595.

Cautio legatorum nomine, or cautio legatorum servandorum causa, is prayed for caution on the part of the heir, that he squander not a legacy left ex die. The same is applicable to a legatee who may have to pay over a legacy.

§ 1596.

The cautio de dolo is judicial, and nothing more than an injunction to stay waste until such time as the suit pending with respect to any object shall have been terminated.3 The same end may be attained by sequestration.4

1 P. 39, 2; 17, pr.; 13, pr. § 1; 15, § 2; 30, § 2.
§ 2.
2 P. 39, 2; 15.
3 Goddeus, com. de con. et com. stip. cap. 5, n. 202; P. 6, 1, 20, & 45; P. 4, 2, 7, & 9, § 5.
4 Vid. § 1569.
§ 1597.

Cautio de persequendo servo consists in a security being given by the possessor for searching for a slave who has run away, after sentence pronounced that he is the property of another.

Cautio de persequendo servo.

§ 1598.

Cautio de pretio restituendo is prayed when a service is promised. Each co-heir is responsible for the entire service, consequently each co-heir can, on the division of the inheritance, demand caution from the other co-heirs that they will hold him harmless if he be condemned to the entire service.

Cautio de pretio restituendo.

§ 1599.

The cautio rem pupilli salvam fore belongs to the category of common stipulations, and is the security demanded from a guardian that he will duly and truly administer.

Cautio rem pupilli salvam fore.

The cautio de rato is given by an agent or attorney who appears for another without a formal power of attorney, to the end that the principal will ratify what has been done in his name.

Cautio de rato.

§ 1600.

Stipulationes conventionales are manifold, and applicable to all contracts, and so called from their being based on the mutual consent of contracting parties.

Stipulationes conventionales.

§ 1601.

A stipulatio, to be binding, should possess generally all the attributes of a valid contract; consequently, one that has not these is ineffectual in law,—that is, no action arises out of it, and it is hence called a stipulatio inutilis. A verbal contract is inutilis if the answer be unfitting,¹ as when to the question dabis nemille? ltwasinutilis, dabo centum be returned; for it is clear the contracting parties have definitively settled nothing. Or if the parties be absent, for then no words can pass.² Or if it contain something contrary to established principle. The case of a stipulation to take its effect on the death of the party³ is obnoxious to the principle obligationes et actiones, quæ non caerunt à defuncto vel contra defunctum, a persona hæredis vel contra eum incipere non possunt. Upon this principle, tibi dabo centum pridie quam moriar, or pridie quam morieris, is bad, for this presupposes the day of the death to be known.⁴ Justinian rendered this stipulation, however, valid,⁵ and ruled that the obligation acquired, retrospectively, force from that moment. An impossible, called præpostera, stipu-

¹ I. 3, 20, § 5.
² I. 3, 20, § 11.
³ I. 3, 20, § 14, & § 15.
⁴ I. 3, 20, 12; Caii, In. 2, 9, 7, & 8.
⁵ C. 8, 36, § 11; C. 4, 11, 1.
Suretyship, termed fidejussio, is a form of stipulation, and appears under various phases. Its object is to furnish the lender with a collateral security, in the alternative, that if the principal debtor should be unable to satisfy the obligation, another who had previously agreed in that behalf should step into his place, and be subject to his liabilities.

Suretyship may form an ingredient in all contracts, and it often happens, that the real credit is given rather to the surety than to the principal obligee. In commercial transactions in the present day this is generally the case, and appears in various forms; the most common of which is the case of bills of exchange, in which the responsibility of the drawer is less considered than the credit of the drawee, and of the drawee less than of the indorsors, and of the indorsors less than of the acceptors when the drawee has become such. For the first thing looked to is, whether there be the names of solvent and responsible persons upon the back of the bill, who being presumed to have received value, have made the debt their own. But as soon as the drawee has accepted, he has definitely bound himself to pay.

Guarantees are another species of suretyship, and their only essential is, that a sufficient cause or consideration should appear on the face of them. In bonds, on the contrary, this is not requisite. The co-securities in a bond being presumed by the

1 Vinn. ad I. 3, 20, § 13.
2 I. 3, 20, § 1.
3 I. 3, 20, pr.
4 I. 3, 20, § 3.
6 I. 3, 20, § 6, 7 & 8.
7 I. 3, 20, § 9.
8 I. 3, 20, § 21.
9 I. 3, 20, § 23.
very nature of the instrument to have received a due consideration for their suretyship.

Statute law and usage concur in England in requiring that most collateral securities should be reduced to writing, to avoid fraud and render the evidence of the fact more certain and clear. Nevertheless the oral promise of one party to pay the debt of another was formerly binding, but it now comes within a provision of general law, which requires that such promise to be effective should be in writing.¹

Verbal contracts are evidently the most ancient of all, because they were usual during a period in which education was in its infancy, and writing rather an accomplishment than a matter of course, as it is in all of the more civilized countries of modern Europe. In the classical times, too, writing was, on account of the materials used, both expensive and troublesome. To complete, however, the evidence of the fact, witnesses took the place of writing; and in order to impress it upon the memory, solemn forms were introduced. So long, then, as the parties lived there was pretty complete evidence of a promise made. Nor is it improbable, that this mode of contract contributed very considerably to the development of the law of prescription, rendered less necessary when a more permanent sort of evidence was introduced.

It now remains to see what provisions applied to suretyship under the law of Rome.

§ 1603.

Suretyship is defined to be an obligation by word of mouth, whereby one party pledges his credit for the obligation of another, in such a manner, however, as not to release the principal obligee.

Fidejussio est verborum obligatio quâ quis alienam obligationem in Fidem suam suscipit ita ut debitor principalis maneât obligatus.²

Fidejussion, surety, or guardianship, is then performed by a repromissor, adpromissor, sponsor, prens, vades, or subvades, binding himself together with the principal debtor, for the greater security of the creditor. In the first place, he undertakes an obligation not originally his own. In the second, he does it by stipulation, and without novation, so that the principal debtor is not discharged,—for if any one undertake the debt of another without stipulation, nudis verbis,³ it is called constituendum alienum;⁴ if by commission, a mandatum;⁵ or if ex promissione, the principal debtor was entirely freed novoando, a new debt being in fact created.⁶ Hence it follows that fidejussio being an accessory contract, the fidejussor being only in subsidium, can require that the

¹ 29 Car. 2, 3, § 4, Statute of Frauds.
² I. 5, 21, pr. § 1.
³ I. 4, 6, § 9.
⁴ Vid. § 1617.
⁵ Vid. tit. xxv. post de mandatis.
⁶ P. 12, 4, 4.
principal debtor be first sued to judgment, and that execution be taken against him before he or his heirs\(^1\) can be rendered liable.

§ 1604.

During the earlier periods of Roman history it appears that a creditor must first sue the principal debtor, which Justinian\(^2\) informs us was the provision of an ancient law, according to Cujacus\(^3\) of the Twelve Tables; but in the middle period it was competent to the creditor to begin by suing either, or even to vary, that is, begin by suing the principal debtor, and then abandon that action, and proceed against the securities. This was certainly the practice in Cicero’s\(^4\) time; but it is not known when it originated. Justinian revived the old law declaring, that if present, the principal debtor should be first sued; or that, if the surety were first proceeded against, he might plead the exceptionem ordinis et excussionis.\(^5\) The surety in this case is proceeded against, actio ex stipulatu;\(^6\) but in any case, he has his regress against the principal debtor, but not before he has paid for him.

§ 1605.

If the judicium or suit be a public one, this security is required from the plaintiff also,\(^7\) termed subvades; and whoso is bound for the reus in a public judgment is termed vas, but præs in civil suits: this distinction fell into disuse in later times; and the term præs, or vades, came to be used indiscriminately for all bail for appearance. Varro\(^8\) defines vas to be qui pro altero vadimonium promittit; but prades\(^9\) to be such as gave security for tax-gatherers or farmers of the revenue, publicani, or those who were surety for the payment of fines to the nation: in short, public accountants.

§ 1606.

Those bound extra-judicially, as sponsores, adpromissores, fidei promissores, fidejussores, differ chiefly as to the form:\(^10\) thus, if the question be spondes, the answer is spondeo, and the answerer hence termed sponsor; if adpromittis, fidei promittis, or fidejubes, the answer is respectively adpromitto, fidei promitto, fidejubeo; if the promise be made in Greek, ρη έμη πιστει κελέω εγώ, θέλω, βούλομαι, φημι or λέγω are held to be terms\(^11\) equivalent to the foregoing. In judicial fidejussions there are also certain forms requisite to be observed.

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1. I. 3, 21, § 2.
2. Nov. 4.
3. Ad Nov. 4.
5. Vid. § 1610.
6. Puf. tom. 4 obs. 86.
§ 1607.

Such as bound themselves judicially for others, were termed *vindices, vades, subvades, prædes*; the rest bound extra-judicially, *sponsores, adpromissores, fidei promissores, fide jussores*; all which terms, except the last, Trebonian zealously excluded from the Digest.¹

*Vindex* is he who appears at the instance of a private individual before the court to bind himself; for if any one summon another before the court by the words *ambula in jus*, he must either go or be dragged thither; to save himself from which disgrace, he must give bail. The law of the Twelve Tables provided *si ensiet, qui in jus vocatum vindicit, mittito, assiduo vindex assiduus esto: proletario, cuique volet, vindex esto.*² By *assiduu*, is here meant *locuples*, quasi ab *asse dare*; by *proletario*, a poor man: in a word, every one’s bail must be adequate to his wealth and position in life; a rich man to give bail for a rich, and any one for a poor man.

§ 1608.

A surety can be bound neither more firmly, *magis efficacius*, nor for a greater sum, *in majus*, than his principal; and thus say the Institutes,—*fide jussores ita obligari non possunt ut plus debeant, quam debet is, pro quo obligantur*; to which follows the reasoning *nam eorum obligatio accessio est principalis obligationis; nec plus in accessorium potest esse quam in principali re.* If the surety bind himself to pay at a place at which it may be more difficult to make such payment, or at a *time* before the principal debtor can be sued, or in a *certain manner* differing from the obligation of the principal debtor, or a *certain amount* more than the principal, all such contracts are absolutely void the entire security, where the *fidejussionis* is made by stipulation; for Ulpian* says expressly,—*qui in duriorem causam accipierunt omnino non obligantur.* The *thing* must also be the same: thus, if A have promised to pay 100 aurei, the surety cannot promise a cask of wine on that account; and Javolenus* says on this point,—*si ita fidejussorum acciperat, quod ego decem credidi, de ea pecunia modios triticifide tua esse jubes, non obligatur fidejissor, quia in aliam rem quam quaé credita eiat fidejissor obligari non potest.*

§ 1609.

Since *fidejussionis* is applicable to all obligations as an *accessory contract*,⁶ and as it cannot be for a greater sum than the principal, so it does not apply to a purely natural obligation if such be destroyed by the civil law; as, for instance, to a gambling debt. It also applies to civil obligations if such be actionable; but if they be not so, the surety may protect himself by the same plea as the

¹ Salmas. de mod. usur. 16.
² Gell. noct. Att. 16, 10.
³ I. 3, 21, § 5.
⁴ P. 46, 1, 8, § 7.
⁵ P. 46, 1, 42.
⁶ P. 45, 3, 6, § 1, 35.
principal debtor. In the case of personal pains or penalties (fines) arising \textit{ex delicto}, suretyship is inadmissible, the object being to punish the individual, and warn him to good behaviour in future. But the security given by the husband to his wife on account of the portion she brings is void, not so pledges; \textsuperscript{1} but the reason, \textit{ne causa perfidiae in connubio generetur}, is unsatisfactory, \textsuperscript{8} and the logic that the pledge is in fact a \textit{donatio propter nuptias} as attaching in re, subtile.

§ 1610.

Justinian, as has been before observed, by his Fourth Novella introduced the \textit{beneficium ordinis}, by which the surety required that the principal debtor be sued in his order; and \textit{excussionis, ut excutiatur debitor principalis}, or sued to judgment, and that execution be had: thus it is not unlawful to attack the surety first, nor can the judge, \textit{ex officio}, stay the action, but leaves the defendant to his plea; of which, if he take no advantage, judgment went against him. The creditor can, however, refuse security without a clause, renouncing this privilege, and allowing him to sue either at choice; and such clause was legal. Berlich\textsuperscript{3} enumerates ninety-four cases in which this \textit{beneficium} did not apply, but which it would be out of place to enumerate here. The general rule is, that in all cases where the creditor would be damnified, or it be useless, that he should sue the principal, the surety cannot claim the \textit{beneficium}.

§ 1611.

The surety can take advantage of another benefit, if he suspect the pecuniary affairs of the principal debtor be getting into a bad state, and that insolvency be likely to follow, viz., by making application, \textit{ex officio}, to a judge to move the creditor to sue the debtor, termed \textit{provocatio ex lege si contendat}; \textsuperscript{4} if, then, he sue the surety, and this latter plead his \textit{exceptio ordinis}, he is relieved by the principal debtor paying; but if the creditor neglect to sue till the debtor become insolvent, the \textit{exceptio ordinis}, having been declared \textit{pro perpetua}, can be pleaded in bar at any subsequent period.

§ 1612.

When there are many co-securities, they are all jointly and severally bound (\textit{in solidum}), whether expressly \textit{conaliter obligati jointly and severally} or not, and the creditor may select any one and force him to pay the whole sum; such payment by him, however, absolves his co-securities. He has, however, not only the usual recourse against the principal debtor, but also against each of the sureties, so that if one only be solvent, the creditor is secured from loss.

\footnotesize

\textsuperscript{1} P. 24, 1, 7, \S 6.
\textsuperscript{2} C. 5, 20, 2. The husband received the \textit{dos}, which vested in him absolutely; as a set-off, he settled on the wife the \textit{donatio propter nuptias}, which she on separation retained, if he did not duly return the \textit{dos}.
\textsuperscript{3} Part 2, Conclus. 24.
\textsuperscript{4} P. 45, 3, 28.
§ 1613.
By the beneficium divisionis ex epistolá D. Hadriani, if all the co-sureties be present and are solvent, he of them who is sued can require that his share, ratam, be accepted by the creditor, and that such creditor sue the others for their proportions in like manner; but if he neglect this, and pay the whole, he cannot sue his co-securities for contribution, for he is alone responsible for the whole without reference to them, and this is the logical reason why partners cannot sue each other at common law.

§ 1614.
The beneficium cedendarum actionum is operative in respect of the principal debtor; and here three cases may be supposed:— That the debtor required the security; in which case an actio mandati contraria lies against the debtor if the surety pay the debt for him; nor is it necessary that the creditor cede to the surety his right of action to enable him to sue the principal debtor, although it may be advantageous in cases where such action is preferable to the actio mandati. Moreover, supposing the debtor have given an hypothek as extra security, the cession is beneficial, since it enables the surety to commence a real action (actio hypothecaria), which is always preferable to a personal one, such as the actio mandati. The second case which may be imagined is, that the security has been given without the debtor’s knowledge, and that the surety has been called upon to pay for his principal’s default; the actio in this case is negotiorum gestorum contraria, hence no cession is required, for the security is for the debtor’s benefit; it may, nevertheless, be advantageous under the same circumstances as above. But if we suppose the security to have been given against the debtor’s wish, then the cessio is necessary, as there exists no other valid ground of action. Thirdly, the question arises, in how far the cessio affects co-securities. Let it be supposed that one of the co-securities is sued in solidum, and the others are absent, so that the beneficium divisionis cannot be resorted to by him, such joint surety has, by the Roman law, no regress against his brother bondsmen without the cession.

§ 1615.
The cession, according to strict law, must be made by the creditor before the payment, since his right is extinguished with the satisfaction of the debt. The Roman lawyers, however, import some equity into this case, deciding, that if the surety pay under the condition that the creditor cede him his right, such cession is valid after payment made. The case, however, becomes

1 I. 3, 21, § 4.
2 Roman, like English equity, which is indeed almost entirely derived from it, looks upon “conditions to be performed as actually performed,” for a fiction is necessary for the sake of logic.
very doubtful when no express condition pre-existed, and the opinions of the best lawyers are at variance\(^1\) on the passages of Modestinus\(^2\) which refer to this case. To quote all their arguments pro and contra would be out of place here; Höpfner\(^3\) thinks it is to be looked upon as a *pactum tacitum de cedendis actionibus*, inasmuch as the surety pays with the expectation that the cession will be made, but Höpfner has clearly been misled in giving so great an extent to equity.

\section*{§ 1616.}

The *constitutum* may be possessory or promissory, which is a promise to do a certain thing, founded on an obligation already contracted; it is termed *proprium* when founded on the party's own, and *alienum* when on another's obligation. Its peculiarity of a *constitutum* was, that the former obligation might be varied by it, that is, increased, another place fixed for its fulfilment, or even the person of the debtor changed.\(^4\) It is not a *geminatum pactum*, because an obligation arising out of a *delictum* may be the foundation of it. The promise must refer to a former promise, not a repromising of the thing in question. A *constitutum*, though conceived *nudis verbis*, grounds an action, because\(^5\) *constitutum semper debitum aliquod præsupponit, illique accedit, ad eoque in eo de seriâ et maximâ promitteris voluntate certius patet (quam in alis nudis pactis). Ulpian says,\(^6\) *Hoc edito pretor faveit naturali aquitati qui constituta ex consensu facta custodiat quoniam grave est, fidem fallere.*

\begin{itemize}
\item \textbf{Constitutum alienum.}
\end{itemize}

The *constitutum alienum* differs from the *fidejussio* in form, being conceived in ordinary words. *Fidejussio* is utterly invalidated—1. By the surety binding himself to harder conditions; 2. For a higher sum; 3. Of other things. A *constitutum* is not so in the first two cases; the *constitutum*, though not good for more, is yet good under the same conditions, or for the same sum, as in the original obligation; but in the last case, he is bound to give such other thing; for instance, A to give a horse if B do not pay the debt.

\begin{itemize}
\item \textbf{Constitutum alienum.}
\end{itemize}

The *constitutum alienum*, moreover, differs in some measure as to the object being more calculated to accommodate the creditor with respect to time and place of payment.\(^7\) The action arising out of this *actio constitutoria* or *de constitutâ pecuniarâ* was most advantageous in the Roman law, being a method of obtaining a ground for action which, otherwise, did not exist.

\begin{itemize}
\item 1 Molinæus in lect. Dolan, p. 5-37.
\item 2 P. 46, 3, 76; P. 46, 4, 36.
\item 3 § 745, ad fin.; Carpozov, P. 2, C. 17, D. 16; Strev. ex 47, th. 45; Puf. t. 1, obs. 130; Wernher, l. c. n. 124; Brunnenmann, c. 3, dec. 48; Zanger, de except. pt. 2, c. 16, n. 32.
\item 4 P. 13, 5; 1, § 2, 5; 3, § 2; 5; 13; 14, § 1, 2; 19; C. 4, 18, 2, pr.
\item 5 Franzk ad Pand. tit. de const. nec. n. 7.
\item 6 P. 13, 5, 1, pr.
\item 7 L. 3, 21, pr.; P. 41, 3, 2, 7, § 8; P. 2, 8, 1; P. 13, 5; 3, § 2; 4; 5; pr.; 16, § 1.
\end{itemize}
We have seen that all who can stipulate can give security for others. Women, however, are excepted from this rule, for they cannot even be received in fidejussionibus judiciaibus, it being considered infamous to bring a woman into the forum, or that she should there conduct her own cause; suretyship is regarded as a masculine and civil affair with which women have no concern. So severe, indeed, is this prohibition, that women were anciently not allowed, under any circumstances, to renounce this privilege; hence women were safe in all cases, except where they had become security for the tutors of their children, or had become so with intent to defraud; this invalidity extended to all the so-called intercessiones, or obligations by women in favor of a third party upon any contract whatever.

§ 1618.

The Senatus Consultum Velleianum, before alluded to, was drawn up under the Consuls M. Silanus and Velleius Tutor, A. U. C. 771 (A. D. 18). The names of these consuls, however, are not found in the Fasti Consulares; the name of the first appears in the reign of Claudius, A. D. 46. Accordingly to Ulpian, Silanus was consul by the Fasti, in A. D. 19. Ulpian tells us that it was first interdicted in the time of Augustus; and again, in that of Claudius, ne fæmina pro viris suis intercederent, and that a Sctm. was subsequently passed as follows:—Quod M. Silanus et Velleius Tutor, Consules, verba fecerunt ne obligationibus fæminarum, quæ pro aliis reæ fierent, quid de eæ re fieri oportet de eæ re ita consulerunt. Quod ad fidejussiones et mutui dationes pro aliis, quibus intercesserint fæminaæ, pertinet, tometsi ante videtur ita jus dictum esse, ne eo nomine ab his petitione neve in eas actio detur, cum eas virilibus officiis fungi, et ejus generis obligationibus obstringi non sit eæ quærum, arbitrari Senatum recti atque ordine factures, ad quos de eæ re in jure aditum erit, si dederint operam, ut in eæ re Senatus voluntas servetur.

Heinecius supposes Augustus and Claudius to have introduced this measure to restore the ancient law, which had become obsolete. Perhaps, however, some of the laws of Augustus, in favor of married women with families of three children, may have rendered the force of the old law doubtful or inoperative; hence the old law was expressly revived to give it precedence over later enactments.

Justinian has the following passage in the Codex:—Ne autem
The exceptions to the Velleian Sctm. are as follow:—Generally when privileged against this Sctm.—in case of a minor—the ransom of a slave—or dower. Other exceptions admitted by law are,—the intention of the woman to defraud by offering her invalid security to induce the creditor to lend,—when she borrows, and gives the thing to a third party,—when her property is pawned without the creditor's knowledge,—when she has received a consideration for the act, or has repeated it within two years, &c.—in a word, cases of fraud, when she is punished, and the fraud rendered futile by the intercession being declared legal. On comparing the authorities and commentators on the subject, it would appear that a woman could not renounce her exemption.

The eighth chapter of the 134th Novel strengthens the Sctm. Vell, as regards the intercessio of a woman for her husband; that for other men must be referred to the extract from the Codex above.

A soldier is no good security;² persons in holy orders, ut non per banc occasionem et sanctis domibus damnun fiat, et sacra ministeria impediantur.


² C. 4, 65, 8, & 11; Jo. Lud. Schmidt, de fidejuss. plane non oblig. § 71, sq.; Ayer, progr. de fidj. milit. § 10, sq. in opusc. tom. 1, n. 7.
§ 1619. As real contracts require fulfilment by one; consensual, of which hereafter, by both of the contracting parties; and as verbal contracts derive their validity from a certain form of words; so in like manner, literal contracts, as the name imports, must, to effect the same end, be reduced to writing. The early history and the origin of this form of contract is said by commentators to be exceedingly uncertain, and to rest, in a great measure, on deductive evidence and surmise.

It has been supposed, that, inasmuch as a contract affected by stipulation was not capable of variation, any change in the terms was brought about by first discharging the original obligation and substituting for it a new contract in writing, varied as desired, such written evidence superseding the prior verbal agreement.

§ 1620. The literary obligation had, it would appear, three distinct operations.

First, it was used as a means of modifying a former contract.

Secondly, to convert a common contract debt into a specialty or bond debt.

Thirdly, for the purpose of transferring a credit to another person.

But it may be asked if the obligation be discharged, and the substituted agreement be not contracted in the same manner as it was in the first instance, namely, by stipulation, how reducing a verbal agreement to writing could be binding vigore scripturae, if not so vigore verborum? Where, therefore, a literal obligation superseded a prior verbal one, it did so not by reason of the reduction to writing, but because a new stipulation, or at least agreement, was entered into in evidence, of which a note in writing was made; and this view is amply supported by Theophilus, who says, λίτερα εἶστι τὸ παλαιὸν χρέος ἐἰς καμῖν.
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dáνειον μεταληματιζόμενον ῥήματι καὶ γράμμασι τοπικοῖς,—that is to say, an obligation in writing consists in the old debt being converted into a new loan by formal words in writing.

The writing alone was not sufficient to effect the novation; it was merely incidental to it, and probably introduced at a time when writing became more customary, with the view of affording permanent evidence of the points of variation whereby it could be readily demonstrated, wherein the second contract deviated from the first.

This, then, may be termed the most simple form of literary obligations. There are, however, two other purposes for which this species of contract appears to have been used; and although both possessed the same element of change, they were, nevertheless, widely different from each other.

§ 1621.

It may readily be supposed that a creditor might wish to have some more lasting testimony of the debt due to him than that supplied by mere oral evidence, especially when the debt had been due for a period running near the term of prescription; he might wish to keep alive the security without pressing the debtor to pay him, and the literarum obligation supplied a ready means for effecting such an object. To judge from the formulae which have survived, it would appear that the consideration for the debt must appear on the face of the document, and that once admitted in this formal way, the debtor was estopped from pleading a want of consideration; and if this were so, it was, quoad its effect, on all fours with a deed by the law of England.

In illustration of the foregoing remarks, we read—Nam si quum quis mibi centum aureos deberet exemptione aut locatione, aut mutuo, aut stipulazione (multis enim modis nobis aliquid deberei potest): voluisset hunc mibi obligatum esse literarum obligatione: necesse erat verba hae dicere et scribere ad eum quem literarum obligatione: obligatum habere volebant. Sunt autem hae verba quae aut dicebantur aut scribabantur; hence we learn that bargain and sale, contracts of letting and hiring, of loan or stipulation, could be novated in this manner; that centum aureos quos mibi ex causa locationis debes, expensos tibi tuli? were words constituting a sufficient question, and expensos mibi tulisti a sufficient answer. D. Gothofried gives the Greek paraphrase of this passage:—τοὺς ἐκατὸν χρόνιον, ὅσ᾿ ἔμοι ἐκ ἀντίας μισθώσαμες χρεωτής, σὺ ἐκ συνθήκης καὶ ὁμολογίας δόσεις τῶν ὀικείων γραμμάτων.

To this the reply was—ἐκ τῆς συνθήκης ὀφέιλω τῶν ὀικείων γραμμάτων.

1 Theophil. ed. Fabrot. Jac. Oisiel ad Caii Inst. 2, 9, 12, p. m. 161; Schulting, Jurispr. vet. Antejust. p. 163; Barn Brison. de Form. lib. 6, p. 537, et Salm. de Usur. Inst. 2, 9, 12, p. m. 161; Schulting, 6; Heinec. A. R. 3, 22, § 6.
The literal obligation was, therefore, nothing more than an acknowledgment in writing of a debt admitted to exist, and arising out of some legitimate contract. The stipulation consisted in a promise to give or pay, and is therefore evidence of a future contract or obligation to be performed; but the literal contract is evidence of an obligation completed by one side.

The same author then concludes, Et tum prior obligatio extinguatur, novaque ex literis nascetur obligatio, qua ex eo nomen habet quod literis consistit; but this would, therefore, scarcely appear to be correctly stated,—for no new obligation is by these means entered into; the one promises to lend another a sum of money for his rent by stipulation, and does so, whereupon his obligation is extinguished by performance, but he also requires security for repayment; and one mode of effecting this was by a receipt or acknowledgment in writing, which was either coupled with a new stipulation, or which the law held to be so far a consequence and not to be too remote, but to be sufficiently nearly connected with the original stipulation to render it valid as an accessorius contract.

§ 1622.

A third use of the literal obligation was to transfer a debt from one to another, delegare; and this might arise in two ways—either it might be desirable to transfer the debt due upon a transaction purposeful, or to make over to a third party the debt on obligation, termed a persona in personam. The discovery of Caius' works has thrown considerable light upon this subject; he writes—Literis fieri obligationem aut a re in personam, aut a persona in personam. A re in personam, veluti si id, quod ex emptione aut conductione, aut societate debes, alii reddas. A persona in personam, veluti si id quod mihi alter debet, alteri persona delegem, ut reddere debet.

§ 1623.

From Cicero's testimony it appears that, to be sued for, the money must first be pecunia certa, which debt may arise either out of a stipulation—and if so, the place, day, time, must be stated, also in whose presence the stipulation was entered into and the witnesses called; if pecunia data, or, as an English pleader would express it, "lent by the plaintiff to the defendant at his request," or "money had and received," it must be confessed, probably sworn to by the plaintiff; or it might be lata expensa, "money laid out and expended for the use of the defendant," or "money found to be due from the defendant to the plaintiff on an account then stated between them;" in which case it must be

1 Theoph. ed. Fab. 1. c. 3 C. pro Rosc. Comed. 5.
2 Caii Inst. 2, 9, 12.
3 Stephens on Pleading, p. 42, 5th ed.
proved by some entry in the books of partnership or ledger of trust account, guardianship, &c., in codice of the plaintiff, shewing the debtor and creditor account between the parties (which the English law of evidence does not admit), and such book produced in court, otherwise the proof was not admissible, as it is indeed with us, who require written evidence to be “put in” if it exist, and such memorandum to be signed by the party to be bound thereby, and no secondary evidence given of the fact, without proof of the loss or destruction of such written evidence being first given: thus Cicero says,—Expensum tulisse non dicit, cum tabulas non recitat; he does not support his plea of money laid out and expended, who does not give oyer of the bond.

Theophilus further tells us, that such a literal obligation may be contracted by a letter from the debtor to the creditor, or vice verâ; and his reply, whence we may infer that an entry in the creditor’s book, with the debtor’s consent, would originate an obligation.

The expressions adnumeratio, expensi latio, and stipulatio¹ are met with in classical authors,—the first implies a formal counting out of the money to the debtor; the second, an expenditure incurred by the creditor for and on behalf of the debtor; the last has been already discussed. It appears, therefore, that to maintain an action, the production of the writing, chirographi exhibitio, was requisite; that the tablets should bear a signature or a seal, tabularum obsignatio, which may be doubtful; but the propositio ob would seem rather to imply sealing, the more so as the word chirographum of itself imports own proper handwriting, and the presence of witnesses, testium intercessio,² to prove these facts. So far there is some authority for our guidance, but there is none respecting the number of witnesses to this bond, whether the same required in other transactions in which witnesses were necessary, such as quiritian transfers, testaments, and the like, whether seven male Roman citizens of full age who opposed their seals together with their names to the bond, as in wills or a less number, it is impossible now to determine. It may be objected that it would be next to impossible to call together seven legal witnesses for every transaction of this nature; but that difficulty, in a great measure disappears, when we consider the lounging, gossiping life led by the civilized nations of that age; by the Romans in the forum, and the Athenians in the Agora, employing their whole day in inquiring the news.³ This form was probably invented to avoid the necessity of proving a consideration or causa, since so solemn an act implied of itself a consideration; and that a want of it could as little be pleaded as to these Roman bonds after the

¹ Cic. pro Q. Rosc. Com. 4; Ascon Preadian in Cic. Verr. 3 p. 1848.
² Gell. N. A. 14, 2.
³ τι κατεγραφ. But it is also possible, though not probable, that the witnesses were not called till the bond was put in suit for the purpose of proving the handwriting of the parties.
expiration of two years as to English bonds at any time. These must, therefore, be looked upon rather as unconditional bonds, to pay absolutely a certain fixed sum therein mentioned, than in any other light.

It may probably be going too far to compare a certain class at least of these literary obligations to promissory notes for simple money lent, namely, those given to the argentarii, in connection with whom they are most frequently mentioned; indeed, nothing could be more simple or expeditious than the process or handing over the money by the banker to the debtor, together with the account of the transaction, which the latter also signed with the formalities required by law to constitute a valid obligation.

§ 1624.

Lastly, Justinian mentions the nomina, which formed an ingredient of this contract; and states that this part of it was discontinued olim scripturā fiesat obligatio, quae nominibus fieri dicebatur, quae nomina bodie non sunt in usu. What then were these nomina? Some suppose them to have been nothing more than the formal signature of the contracting parties to the debtor and creditor account, in tabulis excepti et expensi, in token of its correctness, or in testimony of such being the account referred to; but this is hardly satisfactory, although it doubtless often formed an element in the transaction: and it was perhaps in this manner that nomen technically came to denote a debt. Hence it appears that such bonds were applicable to money had and received, or laid out and expended; to purchases, hirings, or partnership (emptiones, locationes, societates); to the cession of debts, an obligation in writing which Caius illustrates by the expression nomina transcriptitía. In any of the three above cases, the entry in his book (codices or tabulae expensi et accepti) as debt is evidence; this was called a nomen transcriptitium a re in personam, a debt transferred, but transcriptitio à personā in personam, when the debt of the debtor’s debtor had been made over to the creditor by the principal debtor, and entered as between the creditor and the third party as principals; it was termed delegatio, the transfer or making over a debt.

The original literarum obligatio, however, appears gradually to

1 Rich patricians and capitalists carried on this profitable trade indirectly by their slaves, and it must have been by such means that the lower classes became so deeply indebted to the higher.

2 L. 3, 21, pr.

3 Articles of account, quia in tabulis rationum perscribitur nomen ejus qui pecunia accepti, Ascon. in Verr. 3, 10. Tituli debitorum nominā dicentur, Cic. pro Rosc. Com. 1. To pay a debt, nomen solvere, id. in 6 et 16, ad Att. 2. Call in his debts, Nominā suæ exigere, Liv. 35, F. Strike a debt out of the books, expungere nomen.

Cic. 7, Verr. 7; transfer a debt, nomen transcribere in alium, Pl. Catull. 1, 3, 40; in obligations and land, fundis nominibusque depositum; pecunia sibi esse in nominibus, in fundis, Petron. Sat. 117; create debts, nomen facere, p. 15, 1, 4. The debtor, too, is nomen, Cic. fam. 5, 6. A solvent debtor, bonum nomen, Senec. 5 de benef. 22. Sure debtors, optima nomen, Senec. 7, de bon. 29. Slow paymasters, lenta nomen, Colum. 1, 7, 4. Quære was the literarum obligatio a stipulation reduced to writing.

4 Cic. de Off. 3, 14.

5 3, 128.
have undergone various changes and modifications, and to have been rendered much more simple than it originally was; and the law upon this subject was consolidated and declared by Justinian.

§ 1625.

An obligation in writing might be either a cautio, a documentum, or a scriptura, wherein an obligation is stated to exist; but when it is stated to be satisfied, it is termed an apocha, or a discharge.

The obligatory documents, however, may be either a syngrapha to which both are parties, and of which bilateral species are contracts of marriage, agreements for sale, or leases; or chirographa, in which one party only acknowledges unilaterally his obligation, as a promissory note to pay a sum arising out of some transaction or loan.

These documents serve merely as proofs of themselves, consequently an obligation is taken to exist because clothed in this form; no respect being had to the age of them, but in cases of loan and assignment of dower, datio dotis, the document does not constitute a proof before the lapse of a certain time, after which it becomes operative.

The obligations arising, after the lapse of a certain time, out of such handwritings, are termed literarum obligationes.

§ 1626.

On admission of a loan in writing, the defendant may be sued either before or after the expiration of two years; to which, if in the first case, exceptio non numerata pecunia be pleaded, the plaintiff is driven to another mode of proof, viz., by witnesses, and by the juramentum dilatum, or putting the defendant to swear that he had never received the money; but if the plaintiff do not proceed, the defendant may bring his querela non numerata pecunia, and recover his promissory note by condictio sine causâ; the object of this being to protect the debtor, who had given a note for which he had not received any value. In the latter case—that is, after the expiry of two years—this plea is no longer available, for it is held to be improbable that the debtor should allow two years to elapse without getting a consideration for his note; but if the creditor be absent, and the maker of the note fear the two years will expire, he may go before a judge, and on protest against consequences, his exceptio n. n. p. is rendered perpetual,—that is, available at any time, however distant, after the expiration of two years.¹

The plea of non numerata pecunia may, as above, be not pleadable or lose its effect in certain cases, as when, in addition to the promissory note, the maker thereof at a subsequent period delivers a receipt to the creditor for the money as additional security, or by express or tacit admission of the receipt of the money before witnesses, or by any act, such as a payment of interest on the loan, or as an instalment of the gross sum lent. Confession of the debt, in the will of a testator, also deprives the heir of his plea of n. n. p.

¹ C. 6, 30, 7, 8, & 9, § 4.
Lastly, if all fail, as above remarked, the creditor can call upon the debtor to swear that he never did receive the money in question. The plea of non numeratae pecuniae was not available against bankers or money-lenders, termed argentarii, who transacted their business in the forum, because no one would trust them with a promissory note without receiving the value at the time; in addition to which, it was their custom to pay the money at once over the counter.

The plea n. n. p. is available in abatement within two years, when an obligation has been given for a sum greater than that actually received; the special plea being minorem pecuniam te accepisse et majorem cautionem interposuisse si apud eum, qui super ea re cogniturus est, constiterit, nihil ultra quam accepisti, cum usuris in stipulatum deductis, restituet e tutebit.

Where an obligee, having made his note of hand, but not having received value for it, demands it back, and is assured that it is lost or destroyed, he may obtain a certificate or note under hand wherein the fact is stated, and which protects him from an action on it, should it ultimately turn up.

§ 1627. The next question is that of dower; receipt of the dower may be acknowledged, termed dos cauta, in the contract of marriage, without having in fact been received. A dissolution of the marriage may take place before the expiry of two years, or after that period; or within ten years, or after ten years.

In the first case, if the father-in-law sue within the year, he may be driven by the defendant to proof of actual payment, aliquid, by the exceptio n. n. p.; not so, if he sue after the expiry of the year,—in which case, the son-in-law must repay without appeal; and Justinian gives the reason of this constitution thus: si tacere elegit maritus, palum est, voluisse, et si non accept dotem, omnino eum aut suas reddere heredes.

In the second case, where the dissolution took place after two, but within ten years, if the father-in-law sue within three months, he may be met by the ex. n. n. dotis; but if he sue later, the son-in-law must pay without remedy.

In the third case, after ten years, if the father-in-law sue, the son-in-law has no course left open but payment.

In all these cases the same exceptions apply.

§ 1628. The condictio ex chirographo may be brought by the holder of an acknowledgment of a loan, or of a dotis datio received, which acknowledgment had attained the legal age of two years, or in case of dower: it is, firstly, a year after the termination of the

1 Nov. 136, 5.
2 C. 4, 30, 9, placita creditor non dederit;
Harm. 2, 2, 1, & 2; C. 4, 30, 2.
3 P. 3, 14, 47; § 1.
4 Nov. 106, 1.
coverture; or, secondly, within three months after the termination of the coverture; or, lastly, the decennial duration of the coverture.

§ 1629.

Inasmuch as the promissory note occurs only in the case of debts and datio dotis, the plea n. n. p. is consequently not available in other transactions,—such, for instance, as that of a deposit,¹ for no person would acknowledge having received one without its being in his possession; hence the law is positive on this point, so far at least as throwing the onus probandi of payment on the plaintiff: thus, in other transactions, this exceptio may be indeed pleaded, but the defendant must himself prove its truth, not the plaintiff; neither can he be put on his oath, if other modes of proof fail. Illud semper observandum est, in quibus casibus non promittitur exceptionem n. n. p. proponere, vel ab initio, vel post taxatum tempus elapsum in bis nec ius jurandum offerre liceat.⁶ This extends to any period within ten years, after which lapse of time, as we have seen, the debt will be prescribed, or, as an English lawyer would term it, statute run.

§ 1630.

A receipt at once furnishes proof of payment in the case of argentarii, who, as they were never trusted, gave in like manner no trust in other cases, when it is desired to impugn the validity of a receipt, if the action be brought within thirty days after date of such receipt, the maker thereof may reply, that he never received the money; this is termed replicam non numerata pecuniae, which requires some proof of payment over and above the receipt. But if the action be brought after thirty days have elapsed, the receipt is in itself sufficient proof of payment, and excludes all evidence to the contrary.

§ 1631.

Some jurists, among others Zoll,³ have endeavoured to impugn this doctrine, asserting that an action on a note may be brought after the legal time, but must always be proved, which they found on a confusion between the exceptio n. n. p.,⁴ and the ex. deficientis causa debendi; but this latter is a perpetual plea, the former limited to two years. Nor do the above laws speak of the want of cause of debt, deficienti causa debendi.

Others think⁵ the plea n. n. p. applies to other obligations besides loans and dower, for which there is however no ground in the law, which is explicit.⁶

¹ C. 4, 30, 14, § 1.
² C. 4, 30, 14, § 3.
³ Diss, de ex. n. n. p. Th. 5 ; Boehmer, intr. in jus dig. tit. de reb. cred. § 22.
⁴ C. 4, 30, 3, & 10.
⁵ Lauterbach, coll. th. pr. tit. de reb. cred. §§ 63 ; Cocceii, jur. cont. cod. tit. qu. 23.
⁶ Gothofr. ad C. 4, 30, 6 ; Huber, ad Inst, 3, 22, n. 1.
The *exceptio n. n. p.* is said to be *privilegiata*, when, in case of a note which has not attained the legal age, the plaintiff must prove the payment; but if the note has attained the legal age, the defendant, who pleads *ex. n. n. p.*, must prove his plea: this is termed *minus privilegiata*.

The following passages are the principal ones which refer to this subject:— *Si quis debeberes scripserit quod sibi numeratum non est, post multum temporis exceptionem opponere non potest. Hoc enim sapissimé constitutum est.* Sic fit ut et hodie, dum quaere non potest scriptura obligetur.¹ *Qui negat numerationem esse factam nisi intra biennium aut convenietur, aut ea de re protestetur nullam habet defensionem.*²

§ 1632.

Neither in Rome nor in modern Europe can it be said that an obligation arises out of any writing, for, on reflection, it will be found that the writing amounts to nothing more than such evidence of a contract, as the law has declared to be of itself conclusive evidence of the facts described in it. Thus, a promissory or accepted bill of exchange is evidence of a promise to pay a certain sum at a certain time absolutely, and is the only instance of the transfer of a chose in action in the English law; and being, as Mr. Baron Parke remarks, with his usual logical acuteness, unknown to the common law, all questions not statutorily provided for, which arise upon bills of exchange, must be resolved by reference to the law of the country whence they drew their origin.³

English bills do not require any consideration to be stated upon the face of them, a sufficient consideration being presumed; but, on the other hand, they may, when due, be met by a plea of want of consideration.

Foreign bills, on the contrary, are exempted from this inconvenience, because they must bear on the face of them evidence of value; and in some countries, as in France and Belgium, for what, as *valeur reçue en espèces, en effets, &c.*

A date is not required to English bills, it being permitted to supply it by evidence; but foreign bills⁴ are invalid if the date be omitted. Generally, then, a foreign bill of exchange is a far more stringent and exact instrument than an English one, upon the principle that bills should not be given rashly or without due reflection, but that it is of vital importance to the commercial community that they should be open as little as possible to subsequent impeachment.

Bills of exchange are generally asserted to be an invention of

¹ I. 3, 22.
² Harmenop. 2, 12. 4, Donell, com. 14, 38; Henn. resolut. I. 3, pt. 6, q. 2, p. 794; Fachin controv. l. 2, c. 81; Vinn. Com. h. t. n. f. sq. et in quest. sel. l. 1, c. 41; Nebelkræ decis. 22; Coccei, jur. controv. q. 29; Wernher, pt. 1, obs. 6.
⁴ Die neue allgemeine deutsche Wechselverordnung, 1851, § 4, p. 270; Code de Com. tit. viii. sec. 1, § 110.
the Lombard Jews of the middle age, and unknown to classic
nations; and Pothier, quoted by Mr. Serjeant Byles, in the preface
to his Treatise on Bills, alludes to the letter of credit by Cicero to his
son Atticus, transferring to him a debt due in Athens, as the nearest
approach to a system of bills. By bills must be understood the
transfer to a third person of a credit due, further transferable by
such third person, or his transferee, ad infinitum; and there is
certainly some evidence of this having been practised at Rome.

For in the fragment of Caius, before alluded to, we find *a
persona in personam, veluti si id quod mihi alter debet alteri per-
sonea delegem ut reddere debeat.* What is this but an indorsement or
assignment over to another? which is the essence of a bill of ex-
change. On the other hand, no one will contend that bills existed
with exactly the same formalities as at present, of notings and
protestings; for if they did exist, they were transferable bonds.
Nor is there any more reason that these should not have been
exchanged in the Forum at Rome than at the Börse of Ant-
twerp, Hamburgh, or Amsterdam, or in the Exchange of London.
It is notorious that the Jewish population was considerable at
Rome, even at a very early period; and it is difficult to imagine
the possibility of the existence of that race without its bills of
exchange.

The Senatus Consultum Macedonianum was avowedly passed
to prevent minors anticipating their paternal inheritance, by what
at the present day would be called "doing bills."

§ 1633.

A bond, like a bill, is mere evidence of a contract, originally an
obligation between the parties to it; and the solemn execution, by
signing, sealing, and delivering, as act and deed, probably follows a
similar transaction in Rome much more Nearly than we are at all
aware. The origin of sealing has been already developed, and
had its practical worth in ancient Rome, while it has become in
England a senseless formality, which might conveniently be dis-
pensed with. Abroad, the use of seals is much more frequent
than in England, and preserved for the purpose of improving the
evidence of execution, an effect which it certainly has in the case
of the official seals of all public authorities. The instrument, how-
ever, if valid per se, is not, as in England, of a different nature
because under seal. But in England, sealing as such has been
reduced to an absurdity by the practice of using a common
wafer, incapable of special identification.

1 The first of these is the most ancient,
the other three by far the most important in
the world. The origin of this word is
curious. The merchants of Antwerp for-
merly used to meet at a tavern of the sign
of the "Purse," for the purpose of transact-
ing their exchange business; as the place
rose in commercial importance, it was found
requisite to enclose a space near for the pur-
pose, which however retained the name.
The Börse of Antwerp is, therefore, the
godfather of all exchanges, which latter
term is confined to London.

§ 1221, h. op. p. 214.
Seals were used in Europe instead of signatures at a period when few were able to write, though it is denied that this is the origin of seals, which must be referred to the Roman practice of sealing up the tablets to avoid falsification of the contents, the witnesses writing their names opposite to their seals, in order that they might be summoned when the tablets were opened, to verify the fact of the document not having been tampered with in the interval; they, too, were allowed to use seals not their own, but then these were seals capable of identification, and not mere wafers stuck on a patent document. Eastern nations do not subscribe instruments, or even common letters, but, whether literate or illiterate, appose a seal, smeared with ink, and bearing the name, it being asserted that any one may forge a signature, but that it is very difficult to forge a seal; the office of seal-bearer to great functionaries is, consequently, an office of the highest confidence.

1 The important letters of great men in the East are usually enclosed in a piece of muslin, knotted at the four corners, and connected with a seal of soft red wax.

2 The author has, nevertheless, seen forgeries. This is done by breathing on the impression, and taking off the seal with the thumb, over which a kid glove is tightly stretched, which is then pressed upon the part of the forged document, damped to receive it. The ink being a composition of sugar, gum, and lamp black.

3 Moheurdah.
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