married with his father's approbation could be no longer sold as a slave[r]. By another law of the same king, which has been preserved, and affords a curious specimen of the ancient Latin language, a concubine was forbidden to marry, unless in an habit of repentance with her hair dishevelled she offered a propitiatory sacrifice of a female lamb to Juno, the goddess of chaste and wedded love[s]. After the abrogation of the monarchy the same objects were attended to by the senate and people. Early proofs are to be found of the privileges granted to those who had children[t]. It was a part of the

[r] Plut. Numa, p. 155. Ed. Bry.

[s] Pellex asam Junonis ne tagito, sei tagit, Junonei crenebus dimisseis acnom feminam cædito. Festus, voce Pellex. In after times, this word acquired a peculiar signification. It was then equivalent to Amica. L. 144. ff. De Verb. Sig.

[t] Liv. l. 2. c. 9.

The law, made in honor of the curiatii, and which subsisted in the time of Dionysius Halicarnassensis, that they who had three children at a birth should be maintained at the expence of the public, may be referred likewise to this head. Ed. Hudf. p. 154.

censorial

censorial office to prevent celibacy, by a distribution of rewards and punishments, and the fine which was imposed, under the name of Aes Uxorium, served at once to enforce the laws and to enrich the treasury [u]. When Quintus Metellus filled that high station [w], he proposed a law that every man should be compelled to marry. The event of this attempt has not been handed down to us, but a part of the oration which he delivered upon the occasion is still extant amongst the valuable fragments of antiquity, and was repeated by Augustus upon a similar occasion [x].

The Romans averse from marriage.

Notwithstanding these regulations, an aversion from marriage was an inherent and unconquerable defect in the manners and ideas of the Romans. It is ascribed to the general profligacy of the men, the pride, extravagance, and wantonness of the ma-

The reason.

Cælibes esse prohibento. Cic. de Leg. A. Gel. lib. 4. c. 20. Plut. Camill. p. 286. [w] A. U. C. 622.

[x] Epit. Liv. l. 59. A. Gell. lib. 1. c. 6.

trons,

trons, and the uncommon attentions and honours which were paid to thoſe who were rich and childleſs. Theſe might be the immediate cauſes, and they exiſted as early as the ſecond Punic war [y]; but we may perceive that the real foundation was laid much deeper, in the laws themſelves. The matrimonial yoke, in the ſolemn marriages which were firſt in uſe, was too ſtreight and galling; in the leſs ceremonious kind, which gradually ſuperceded them, it was too lax. Originally, the huſband purchaſed his wife of her father for a valuable conſideration, and ſhe was transferred, in full right of property [z], like any other domeſtic animal. Such a ſtate of ſlavery was incompatible with the notions of a poliſhed people, and the matrimonial connexion of an eaſier nature was introduced. It was an equal contract, between two independent perſons, and

[y] In Plautus, Mil. Glorios. Act. 3. Sc. 1. Periplectomenes, a benevolent, but ſomewhat loquacious, old man, gives a lively deſcription of the Roman wives, and the intereſted kindneſs of his relations.

[z] Res mancipi.

bore

bore much resemblance to an ordinary partnership. Either party might dissolve it at pleasure, and whilst it continued the union was very imperfect. Each had their distinct property; the husband acquired nothing but what was expresly defined by agreement; even of the marriage portion he was allowed only the usufruct, and in case of death, or separation, was rigidly accountable for the substance. All the laws looked rather to the possibility of a dissolution, than of the continuance of the connexion; and, in that view, married persons, to prevent the advantages which might be taken of an unguarded affection in the fond hours of conjugal dalliance, were even incapable of making valid donations to each other, which might prove injurious to themselves or families.

Such loose bands were not likely to contribute to the happiness of the married state, A lady, who had brought with her, and retained, a large fortune, which she could transfer to any other object her inclinations

might lead her to prefer, was not likely to make a very dutiful or obedient wife. A husband who had married a rich woman, who might divorce him when she pleased, must have been in a state of submission and slavery not much to be envied. The satyrists, comic writers, and epigrammatists, have raised both our indignation and our mirth, at the many horrid and ludicrous scenes which such absurd situations must necessarily have given rise to. It is from this independence of the Roman wives, that we may easily deduce that impropriety of conduct, which was the great obstacle to marriage.

Regulations by Julius Cæsar.

Two thirds of the citizens of Rome had perished in the contests for power which ensanguined the latter days of the republic [a]. This exhausted condition of the state, which appeared upon the census made by Julius Cæsar, suggested to that great man the necessity of employing new expedients to en-

[a] In the year of Rome 682, the number of citizens was 450,000. (Epit. Liv. lib. 98.); in 708, they were reduced to 150,000. (Id. lib. 115.)

courage

courage marriage and population[b]. The particulars of his regulations are not extant, except that he divided the Campanian territory amongst twenty thousand citizens, who had three children or more[c]; and prohibited women, who were unmarried or childless, and under forty-five years of age, from the use of litters, purple garments, and pearls[d].

By Augustus. Lex Julia, and Papia Poppæa. The history of those laws.

His successor Augustus pursued with vigour and perseverance the same principles of policy. The history of his celebrated laws upon this subject, the Lex Julia and the Lex Papia Poppæa, affords some curious circumstances, highly illustrative of the spirit and the manners of the times. The artful conduct of that able prince to conceal his power, by preserving the ancient forms of the republic, is well known. Those forms required that every law should be ap-

[b] Dio. lib. 43. p. 256. Ἐπειδὴ δεινὴ ὀλιγανθρωπία, διὰ τὸ τῶν ἀπολωλότων πλῆθος, &c. πολυπαιδίας ἆθλα ἐπέθηκε.

[c] Suet. c. 20. [d] Id. c. 43. and Eusebius there quoted in the note of the learned editors.

proved

proved by the ſenate, before it was propoſed in the aſſembly of the people. When the queſtion was brought forwards, it met with violent oppoſition from the ſenators, they complained much of the profligacy of both ſexes, which was the great impediment to matrimony, and hinted in pretty broad terms at Auguſtus himſelf, who was certainly not the pureſt example of conjugal chaſtity. The emperor replied, "that nothing more was in his power than to "provide ſuch laws as were moſt beneficial "to the ſtate; but that the correction and "amendment of the private morals of "wives depended more upon the conduct "of huſbands themſelves, whoſe duty it "was to reſtrain their improper behaviour "by ſalutary precepts and admonitions, as "he had never failed to do in his own fa-"mily." His opponents were curious to know what were the leſſons which he had inſtilled unto his Livia.—"They related to "her dreſs, her frequenting public places "and the general modeſty of her beha-

"viour;"

"viour;" and they who were unacquainted with the character of the empress and the private life of their sovereign might have given credit to his assertions. With great difficulty, however, he procured a decree of the senate *; but when it was submitted to the assembly of the people it was rejected with great vehemence. It was proposed again however twenty years afterwards, and with some mitigation of the penalties, and a clause that it should not take effect till after three, which was afterwards extended to five, years, and after great opposition, it received the full sanction of a law, under the title of Lex Julia de maritandis ordinibus. This law was always odious, particularly to the equestrian order, and great tumults were excited at the public games exhibited after the Pannonian and Dalmatic victories to procure a repeal. At the expiration of the five years a new law was passed, comprehending, with some alterations, all the former,

* To this Horace alludes,—Diva, producas sobolem, &c. A. U. C. 736.

regulations,

regulations, and providing more particularly for the improvement of the revenues [f].

Lex Papia Poppæa.

This law, the Lex Papia Poppæa, derives its name from the consuls of the year [g]. It is no longer extant in the mass, but the law itself, or the many commentaries of the ancient lawyers of authority who wrote upon it, are quoted in one hundred and ninety-nine places in the Code and Digest. From these fragments, and the numerous references and allusions which are made to it, in the historians and other writers, the substance at least of perhaps the whole has been restored, with tolerable correctness, by the successive industry, learning, and ingenuity of James Gothofred [h] and Heineccius [i].

[f] The history of these laws is fully related in Dion. Cassius Lib. 54 and 56. together with Gellius. Lib. 1. c. 6. Liv. Epit. Lib. 59. Suet. Aug. c. 89. Rejection by the people. Suet. Aug. C. 34, 35.

[g] Marcus Papius Mutilus and Quintus Poppæus Secundus.

[h] Fontes Quatuor Juris Civilis. This was a juvenile and imperfect performance of that celebrated lawyer.

[i] Ad Legem Juliam et Papiam Poppæam Commentarius.

Its contents. Penalties upon Celibacy.

This law [k], whose professed object it was to encourage marriage, to punish celibacy, and to enrich the treasury, consisted of two corresponding parts, and extended to many different subjects, some of which had little relation to the only point of view under which it is now considered. All persons, who were capable of performing the conjugal duties, were bound to marry, and they who neglected to comply with this injunction, whether males or females, whether in a state of virginity, widowhood, or divorce, were declared incapable of taking any property by will, except what was bequeathed to them by a relation within the sixth degree. Their right of inheritance, in the case of intestacy, was not affected, and, after a legacy became due, they were allowed an hundred days for deliberation, within which time they might remove the disqualification, or otherwise what was so left, in defiance of the laws, was confiscated to the service of the state

[k] Tacit. Ann. L. 3. 27.

Eunuchs,

Who were liable to them.

Eunuchs, infants under the age of puberty, men beyond ſixty, and women who exceeded fifty years[l], were the only perſons exempted from this penalty. After the death or divorce of his wife, the man was allowed no interval of privilege[m], but a woman could not exceed two years from her widowhood, or one year and an half from a divorce, without being again liable to the incapacities of a ſingle ſtate. Eſpouſals in almoſt every part of the Roman Law were conſidered as equivalent to marriage.

Other regulations.

A condition of celibacy or widowhood annexed to a bequeſt was void; as was an oath entered into by a ſlave to that effect, as the terms upon which he was manumitted[n].

[l] Though men did not marry before ſixty, or women before fifty, after that age they were free from the penalties of celibacy by the Papian Poppæan law. But by the Pernician Senatus conſultum, in the reign of Tiberius, they were ſtill liable to them. By that of Claudius, a man of ſixty might avoid them by marrying a woman under fifty; though, on the other hand, a woman above fifty was not diſcharged by marrying a younger man. Ulpian. tit. 16.

[m] See note [r] poſt. [n] L. 6. ff. § 4. De Juré Patron.

If parents, without reaſon, prohibited their children from marrying, their conſent might be ſupplied by the magiſtrate[a]; and, to prevent evaſion, no man could entitle himſelf to the benefit of the law, by eſpouſing a girl under puberty, or by any eſpouſals which were not carried into effect within two years.

Penalties removed in part by marriage.

Where there was ſuch an univerſal corruption of manners, the purpoſe of theſe regulations would have been defeated by nominal marriages, by the horrid arts of abortion, and the deſtruction of children. Theſe penalties therefore were only removed in part by entering into matrimony, and married perſons between the reſpective ages of twenty and fifty, if females, or between twenty-five and ſixty, if males, who had no iſſue, were intitled only to one half of the bequeſt of ſtrangers. They could likewiſe only leave to each other one tenth, and the uſufruct of one third, part

[a] By a ſubſequent conſtitution of Severus and Antoninus, the magiſtrate might aſſign them a reaſonable portion, if their parents refuſed. L. 19. ff. De Rit. Nupt.

of

of their property, unlefs they were related within the fixth degree, or the hufband was abfent in the fervice of his country, and for one year after[p].

Gradually and totally removed by children.

If their efforts proved fortunate in the production of citizens, thefe incapacities were gradually removed.

As to bequefts between hufband and wife; for every child of a former marriage that was living, they could add another tenth; of the children by the fubfifting marriage, one, or two, who furvived to the ninth day from their birth, but not otherwife, enabled them to bequeath fo many more tenths. And one common child, who was in being at the death of the party, three which had died at nine days old, two, after the age of three years, or one which had furvived the period of puberty, gave them a power of making mutual bequefts to any amount[q]. And

[p] Vide note [r]. poft.

[q] Ulpian. tit. 16, 17. Thefe laws, relating to the capacity of taking by will between hufband and wife, were called Leges Decimariæ.

 every

every disqualification was totally taken away, with respect to the father of a single living child, to a free-born female citizen who had three, and a libertine, that is, a freed woman, or manumitted slave, who was the mother of four children; who were discharged likewise from the restraint of their perpetual tutor, whilst that office subsisted.

Rewards for children.

Besides the exemption from the penalties of celibacy, other privileges and honours awaited the father of a family. A man who had three children born at Rome, four in Italy, or five in the provinces, was excused from all those burdensome and unprofitable offices in the state, which were merely personal, that is, such as were executed, without expence, by the exertions only of the mind or body, though not from such as were patrimonial or mixed [r]. In the competition for public honours, he who was blessed with the most numerous progeny was preferred to his rival candidates, and every child deducted a year from the legal age of qualifi-

[r] For the distinction see L. 18. ff. De Muner.

cation

cation of his parent. The ſame circumſtance determined the precedence between the conſuls in bearing the faſces, and in the choice of provinces [s], and in the colleges of decurions gave the priority in voting [t].

The condition of libertines or freed men was improved likewiſe by their fertility. By a certain number of children they were diſ-

To libertines, female patrons, ſlaves, and thoſe who had the jus latinum.

[s] Tacit. An. Lib. 15. c. 19. But it does not appear whether this privilege was given by the Papian Poppæan law.

[t] L. 6. § 5. ff. De Decur. In the abſtract of this law which Monteſquieu has given, Liv. 23. ch. 21. three errors may be obſerved. 1. He ſays, that huſbands, as well as wives, were allowed an interval of time, after their marriage was diſſolved, by death, or divorce. But all that is known of this clauſe, is contained in a fragment of Ulpian, title 14. who mentions only the wiſe, Feminis lex, &c. tribuit vacationem. 2dly, He has been miſled by Gothofred to ſtate, that if an huſband abſented himſelf from his wiſe for any other cauſe than the buſineſs of the republic, he could not be her heir. Ulpian (tit. 16.) ſays no ſuch thing; and the error has long ſince been confuted by Schulting, Juris. Ante-Jus. Heineccius, &c. &c. 3dly, "The ſenator who had moſt children was enrolled firſt in the catalogue, and voted firſt." The law, to which he refers, does not ſpeak of the ſenate, but of the colleges of decurions. L. 6. § 5. ff. De Decur.

 charged

charged from their ſervices to their patron; a female libertine who married with his conſent was entitled to the ſame privilege; the ſucceſſion to their property was reduced to a certain proportion only, or entirely aboliſhed, in proportion to the circumſtances. The rights of female patrons, which in general were inferior to thoſe of male patrons, were enlarged, and even a cuſtom prevailed that a female ſlave, by three parturitions, acquired an exemption from the ſeverities of labour, and, by more, her liberty. A child who lived to be a year old, beſtowed on his father, who had the imperfect rights of latinity, the full privileges of a Roman citizen [u].

Other ſubſequent privileges.

Of the Tertullian decree of the ſenate, paſſed in the reign of Hadrian, by which a freeborn mother of three, and a libertine who had four children, ſucceeded to the inheritance of their children, there will be occaſion to

[u] For the authorities upon which this account of the contents of the Papian-Poppæan law are founded, and the order in which the different clauſes were there arranged, I muſt refer to the learned and ſatisfactory commentary of Heineccius.

ſpeak hereafter. Some other privileges, in ſubſequent times, may be gleaned from the books of the civil law; but they are either comprehended under theſe more general regulations, related only to ſome particular offices or claſſes of men, or were of the nature of voluntary benefactions or private grants and not binding in other caſes [w].

The Jus Liberorum.

But the laws had reſerved to themſelves a power of ſupplying the defects of nature; the privileges reſulting from children might be granted to thoſe whoſe endeavours to contribute their proportion to the number of citizens had not been crowned with ſucceſs.

[w] Such as L. 1. C. Qui num. lib. ſe excus. L. 2. § 2. ff. De Excuſat. L. 1. C. De Legation. L. 132. C. Theod. De Decur. L. ult. C. De Decur. Suet. Auguſt. c. 46.—Id. Claud. c. 21. L. 8. ff. de Vacat. Muner. L. 103. C. Th. De Decur. L. 1. C. De Sumpt. Recup. L. 3. 4. De Vacat. L. 5. C. De his qui num. lib. L. 55. C. Th. De Decur. L. 24. C. eod. L. 5. § 2. ff. De Jur. immun. L. 3. § quamvis. L. 6. § quæmunera ff. De muner.

The

By whom granted.

The right of conferring this privilege was firſt veſted in the ſenate, and afterwards uſurped by the prince. The ſenate had always exerciſed a power of diſpenſing with the laws in particular caſes; and though, in the earlieſt times of the republic, it was neceſſary that the decree ſhould be confirmed in the aſſembly of the people, this ratification ſoon grew out of uſe. A law was propoſed by Caius Cornelius, the tribune (A. U. C. 686.) to reſtore this right to the people. It was however rejected; and the power continued therefore to be exerciſed by the ſenate, in the inſtances of Brutus, Pompey, and Julius Cæſar, and ſubſiſted in the reign of Auguſtus; but it was too important a part of the ſovereignty to be adminiſtered by ſubjects, and was completely annexed to the imperial authority before the time of Domitian [x].

What it was.

Married perſons, who had obtained the Jus Liberorum might make each other their

[x] Martial. 11. 91.

heirs,

heirs, to the full extent of their property; they might take likewiſe under the teſtaments of ſtrangers, and the wife could tranſact her legal buſineſs without the intervention of her tutor. It had however been the cuſtom to grant this privilege only where the ages of the parties amounted together to one hundred years, but by a conſtitution of Arcadius and Honorius, perſons of all ages were capable of it [y]. It was allowed without an expreſs grant, to builders of merchant ſhips, by Claudius [z], to ſoldiers [a], ſailors [b], and decurions, by Conſtantine and Theodoſius the Great.

Extended.

Perſons privileged.

The ſimplicity of chriſtianity had been conſiderably corrupted, when it became the predominant religion of the empire, and in nothing more than in the monaſtic inſtitutions. The penalties which attached upon celibacy were totally adverſe to the ſuperſtitious veneration at that time entertained for the

Changes made in this law.

Penalties of celibacy aboliſhed by Conſtantine.

[y] L. 1. C. Theod. De Jure Lib. [z] Suet. Claud. c. 20.
[a] L. 13. L. 16. ff. De Caſtrenſ. Pecul.
[b] L. 7. C. Th. De Navicülariis.

the supposed merits, and sanctity of a virgin state, and they were therefore abolished by Constantine, together with the incapacities as to taking by the wills of strangers, which affected those married persons who had no children [c d].

Jus liberorum granted to all, by Theodosius.

But he did not remove their incapacities as to the power of bequeathing to each other, nor abolish the rewards of marriage [e]. These remaining restrictions were finally swept away by Theodosius the younger, who expressly repealed those heads of the Papian-Poppæan law, which related to this subject [f].

[c] L. 1. C. Theod. De Inf. Pæn. Cælib.

[d] Justinian even gave encouragement to widows and widowers not to marry again. Nov. 127. c. 3.

[e] Verum hujus beneficii maritis et uxoribus inter se usurpatio non patebit, quorum fallaces plerumque blanditiæ vix etiam opposito juris rigore cohibentur. C. Theod. De inf. pæn. cæl.

[f] L. 2. 3. C. Th. De Jur. Lib. L. un. de his qui num. lib. excus. L. 1. C. De Jur. Lib. L. 2. C. de Inf. pæn. cæl. et orb. et dec. subl. Decernimus inter virum et uxorem rationem cessare ex lege Papiâ decimarum.

All

All penalties upon celibacy, and all diſtinction between ſingle and married perſons, and whether they had iſſue or not, were therefore entirely removed before the time of Juſtinian, as to the capacity of taking by will. But other differences, and the privileges which were enjoyed by thoſe who had the number of children required by law, ſtill continued; and thoſe privileges might ſtill be communicated by a grant of the jus liberorum [g].

The next head of inquiry, into the means employed amongſt the Romans to promote marriage, by diſcouraging every other con-

2. Laws to diſcourage other connexions.

[g] This is clear from L. 2. C. De Jur. Lib. A. D. 528. A mother could not ſucceed under the ſenatus conſultum Tertullianum, unleſs ſhe had three (or four) children. That reſtriction, therefore, was not removed by the law of Theodoſius, ſince this conſtitution was iſſued by Juſtinian for that purpoſe. And mention is made of the jus liberorum in other places as ſtill ſubſiſting. The term jus liberorum was uſed in the civil law to denote the privileges of thoſe perſons who really had children, as well as of thoſe who obtained them by grant; I have employed it in the latter ſenſe only.

nexion between the sexes, will lead us to consider the laws relating to concubines, and illegitimate children.

Who were bastards.
1. The children of marriages prohibited by law.
What marriages were prohibited.

All children who were not born in lawful matrimony were bastards. But the pale of legitimate wedlock was confined to narrow bounds. Originally it extended only to the union of two Roman citizens, of the respective ages of puberty, not within the prohibited degrees of consanguinity, or affinity, who were joined, by the requisite ceremonies, with their own consent, and that of their parents, tutors, or relations, according to the circumstances of the case.

The law of the twelve tables, that patricians and plebeians should not intermarry was soon repealed, but many other restrictions were introduced from time to time. The Papian-Poppæan law permitted the marriage of free-born citizens with freed women[a], which was before prohibited by law,

[a] L. 23. ff. De Ritu Nuptiarum. Against a mode of referring to the civil law lately introduced, by the number only

law, or cuſtom; whilſt, on the other hand, the dignity of the ſenatorial order was conſulted by forbidding perſons of that rank, and their children, to marry freed women or actreſſes [b]. The ſame law excluded from the nuptial bed of all free-born citizens, proſtitutes, procureſſes, and ſlaves who had been manumitted by perſons of that deſcription; women who had been convicted upon a popular accuſation, who had exhibited

only of the book, title, and law, I muſt enter my proteſt in favour of the old way of quoting the beginning of the law, or of the title itſelf. For, 1. Perpetual blunders are committed by printers, tranſcribers, and even authors themſelves, in references of mere figures; words can never be miſtaken. 2. Figures alone are not eaſily remembered, but the firſt words of the titles or laws, which, from the ſhort and pithy language in which they are expreſſed, uſually contain much of their ſubject matter, neceſſarily impreſs themſelves upon the mind. 3. They who have much acquaintance with the civil law ſoon learn to refer to the principal titles, from knowing the arrangement and method of the Digeſt and Code; and ſtrangers to the country will be amply rewarded for the additional trouble of turning to the table, by the certainty that they are not hunting upon a wrong ſcent.

[b] L. 44. ff. De Rit. Nupt.

them-

themſelves upon the ſtage, or had been detected in adultery [c]. In the reign of Tiberius, men above ſixty, and women beyond fifty years of age, were forbidden to marry; though Claudius permitted men of that age to unite themſelves with younger women, becauſe there was a poſſibility of iſſue [d]. Other prohibitions ſucceeded in after times; that of the marriage of the preſident, or other perſons in authority under his government, with any woman of the province that was entruſted to his care [e]; of a tutor and curator, or their ſon, with his ward, till he had paſſed his accounts, and ſhe was twenty-five years of age [f]; of a raviſher with the unfortunate object of his violence [g]; of an adulterer with the woman whom he had cohabited with [h]; and laſtly, from a ſimilitude to the natural relation, of a godfather with his godchild [i].

[c] L. 43. eod. Ulp. tit. 13. [d] Ulp. tit. 16.

[e] L. 38. ff. eod. L. 57. L. 63.

[f] L. 59. 64. 66. ff. eod. Code, title De interdicto mat. int. pup. et tut. [g] L. un. C. De Rapt. Virg.

[h] L. 13. ff. De His quæ ut indig. Nov. 134. c. 12.

[i] L. 26. C. De Nupt.

But

Not void till Antoninus.

But marriages contracted contrary to these provisions were not at first absolutely void, and they had even many of the effects of a legal connexion. Donations and bequests between the parties were not valid [k]; and if the wife proved unfaithful, the husband was intitled to his action for adultery [l]. Though they acquired none of the other rights of husband and wife [m], and were liable to all the penalties and incapacities of celibacy, the children were illegimate [n], and the marriage portion of the wife was confiscated to the treasury at her death [o]. By a decree of Antoninus and Commodus the prohibited marriages of the senatorial order were expressly annulled [p]; and it has usually been understood that the same change was

[k] L. 3. § 1. De Donat. int. Vir. et Ux. Ulp. Frag. tit. 16. § 2.

[l] L. 13. Ad. leg. Jul. de Adul.

[m] Inst. tit. 10. § 12.

[n] Jul. Paul. Recept. Sent. lib. 4. tit. 8. § 4.

[o] L. 61, ff. De Ritu Nupt.

[p] L. 16. ff. de Sponsal, l. 16. pr. ff. De Rit. Nup. l. 42. eod.

effected in the law relating to all the other prohibited marriages.

Changes in the laws of marriage.

Many alterations took place in subsequent periods. The capability of contracting lawful marriage was communicated, with the other privileges of citizenship, to all the inhabitants of the Roman world, by the constitution of Caracalla[q]. Though Barbarians were afterwards excepted[r]. But so indispensable was that quality, that if a man and his wife were made prisoners by the enemy, a child born during their captivity, if they all three returned to their own country, was legitimate by a postliminium; but if the mother and child only returned, the child was a bastard; because the father had lost his rights as a Roman citizen by captivity, and had not recovered them by a postliminium[s].

The salutary restrictions to prevent improper marriages gradually became obsolete

[q] L. 17. ff. De Statu.

[r] L. un. C. Th. de Nupt Gen.

[s] L. 25. De Capt. et Post.

as

as the diſtinctions of the different orders began to be diſregarded, and the meaneſt of men were admitted into the ſenate, and to every honour in the ſtate. Thoſe which related to perſons of rank were again revived, extended, and inforced under ſeverer penalties by Conſtantine[t]. The decrepid Juſtin was inſtigated by Juſtinian to repeal the law which prohibited perſons of ſenatorial rank from uniting themſelves with actreſſes, to prepare the way for his marriage with Theodora, the moſt public and abandoned of proſtitutes[u]; and after he ſucceeded to the empire all the reſtrictions of the Papian Poppœan law, and of Conſtantine, were ſwept away by a ſeries of conſtitutions[w]. He decreed likewiſe that age ſhould be no impediment to matrimony[x], but the unnatural marriage of eunuchs ſtill continued to be practiſed even under the Chriſtian emperors, till it was totally prohibited by Leo[y].

It

[t] L. 1. C. De Nat. Lib. [u] L. 23. C. De Nupt. Procop. Anecd. p. 45. [w] Novel. 89. c. 15. 78. c. 3. 117. c. 4. 6. [x] L. 27. C. De Nupt.

[y] Juvenal. Quum tener uxorem ducat ſpado.

 Claud.

2. The children of concubines.

Concubines permitted by Law.

It was the professed object of marriage to supply the state with citizens, and these restrictions were calculated to preserve the purity of the Roman blood, and the distinctions of rank and family. But it was thought expedient to make some allowance for the frailty of human nature; many persons might be desirous of enjoying the consolation and domestic cares of an amiable female, who were unwilling to hazard

Claud. in Eutrop. l. 2. 88.

Si quid portentis creditur, uxor
Mulcebat matres epulis, et more pudicæ
Conjugis eunuchi celebrabat vota mariti.
Hanc amat, &c.

Nov. Leon. 98. This constitution affords a true example of the argumentative and declamatory style which false taste introduced into the laws of the lower empire; so different from the concise and elegant simplicity of the earlier periods. Amongst a multiplicity of reasons against the marriage of eunuchs is the following curious comparison: Ειτα κ̀ χωραν μεν, εξ ἧς αν τις ἑτερος καρπον δρεψαιτο, ει τις οφθειη διαλυμαινομενος, κ̀ προς το ακρον, (probably a corrupt reading for αχρηςον, the word having been written contractedly αχςον, or according to the conjectures of H. Stephens and Agylæus, αργον), αυτη χρωμενος, ὡς πονηρον κ̀ λυμεωνα μισησομεν, και, ει δυνατον, ειρξομεν αυτον της προαιρεσεως· τον δ᾽ ει τις εξ ἧς ὁ λογικος αναβλαςανει ςαχυς, χωραν εξηρημενην κ̀ αχρηςον δεικνυσι, τουτῳ ὡς μηδεν αδικον δρωντι παραχωρησομεν;

the

the expence and burden of a ſolemn engagement, and concubinage was therefore acknowledged, and allowed, as an intermediate ſtate between the dignity of marriage, and the profligacy of meretricious amours[z]. This connexion every unmarried man was at liberty to form with one ſingle woman[a], and no other reſtraints were impoſed than thoſe which were founded in nature, and the diſapprobation of polygamy. No one was allowed to take a miſtreſs, who was related to him within the degrees of conſanguinity[b] which conſtituted inceſt, or during the immature period antecedent to puberty[c]. Upon the ſame principles, ſons were forbidden to take to wife the concubine of their father[d]. It has been thought that married men were firſt prohibited from keeping concubines by Conſtantine[e]; but it appears from a paſſage

Laws relating to them.

[z] L. 49. § 4. ff. De Legat. 3. l. 5. C. ad S. C. Orphil, l. 144. De Verb. Sig.

[a] Nov. 18. c. 5.—89. c. 12. § 5.

[b] L. 1. § 3. ff. De Concub. l. 56. ff. De Rit. Nupt.

[c] L. 1. § 4. ff. De Concub. [d] L. 4. C. De Nupt.

[e] L. un. C. De Concub. L. ex ea. 121. § 1. Mulier, ff. De Verb. Obl.

 in

in Julius Paulus[f] to have been the eſtabliſhed law in the reign of Severus. With only theſe exceptions, a man was at liberty to take as his concubine any of thoſe perſons with whom he was forbidden to marry[g].

A doubt reſpecting an opinion of Heineccius.

It is expreſsly ſaid, in the Digeſt and Code, that concubinage was known to and eſtabliſhed by the laws[h]; but I am by no means ſatisfied with the ſuppoſition of the learned Heineccius[i], that it was introduced and rendered legal by the Papian Poppæan law. 1. It ſeems hardly probable that a law, which was intended even to compel marriage, ſhould have directly promoted a practice which had the ſtrongeſt tendency to encourage celibacy. 2. The general words,

[f] Recept. Sen. 11. 20. Eo tempore quo quis uxorem habet, concubinam habere non poteſt. L. 3. C. Com. de Man. Ulpian in l. 11. § 2. ff. De Divortiis.

[g] The whole title, ff. De Concub. l. 16. De his quæ ut indig. l. 38. p. ff. De Reb. auct. Jud. poſſ.

[h] L. 3. § 1. ff. De Concub. Quia concubinatus per leges nomen aſſumpſit; extra legis pænam eſt, l. 5. C. Ad. Sen. Orſit. Licita conſuetudo.

[i] Ad. Leg. Pap. Pop. lib. 11. cap. 4.

per

per leges, do not neceſſarily refer to that law in every caſe, though they poſſibly may be ſo underſtood in many paſſages, which immediately relate to the ſubject of marriage. 3. Neither does it follow from this, that Ulpian and Paulus have treated upon concubinage, in their commentaries upon that law; unleſs it can be proved that commentators never digreſs from the ſubject which they are profeſſedly writing upon to other topics of a kindred, or even of a diſſimilar nature. In the diſcuſſion of a multifarious law relating to marriage, many queſtions ariſing out of the collateral ſtate of concubinage would unavoidably preſent themſelves for conſideration; and there is no paſſage in the only two remaining fragments relating to that head, in thoſe treatiſes [k], from which it can be directly inferred that there were any proviſions of that kind in the law itſelf. 4. The exiſtence of ſuch a clauſe eſcaped the reſearches and conjectures of Gothofred and Gravina, though they were familiar

[k] L. 1. & L. 2. ff. De Concubinis.

with the quotations which are adduced in proof of it.

Their rights.

But by whatever laws this ſtate was eſtabliſhed, they muſt have been merely of a negative or permiſſive nature, for it was followed by no legal conſequences, and created no new rights. With whatever reſpect the name of a concubine might be treated, ſhe acquired none of the advantages or diſadvantages of a wife. The intimate union of property, and the participation in the ſacred rites of the huſband's family, indeed, were confined ſolely to the ſolemn marriages by co-emption, confarreation, and preſcription; but ſhe had none of the other privileges of the more uſual kinds of matrimony. If ſhe embezzled the goods of her keeper, ſhe was liable to an action of theft, from which a wife was exempt [l]. Donations were valid between them to any extent [m]. She retained her proper domicil

[l] L. Si Concubina, 17. ff. De Action. Rer. Amot.

[m] L. 31. ff. De Donat.

and

and forum, whereas a wife was transferred to thofe of her hufband[n]. None of the laws relating to marriage portions applied to them, and the connexion might be diffolved at pleafure, even without the eafy forms of a divorce. If indeed the union was of fuch an honourable nature, that the woman did not forfeit the refpectable title of a matron, as where a freed-woman was concubine to her patron, in cafe of her infidelity, he might inftitute an accufation of adultery, upon the Julian Law[o]; not indeed jure mariti, but jure extranei. But the only cafe mentioned in the law, in which this took place, was that of a patron and his freed-woman, which feems to have been favoured beyond every other kind of concubinage. And Giannone is not fupported by the paffage which he quotes, when he afferts generally that adultery might be committed by concubines, as well as wives, and that the only difference confifted in the mode of

[n] L. 22. § 1. L. 37. § 2. ff. Ad Municipal. L. 65. ff. De Judic.

[o] L. 13. ff. Ad Leg. Jul. de Adul.

accu-

accuſation [p]. So if a ſlave was retained in that capacity by her maſter, ſhe acquired her liberty at his death without manumiſſion [q]; and it appears by a fragment of Ulpian, which has not found its way into the digeſt, that in his time, when a man's goods were ſold under the ſentence of a court, his concubine and natural children were excepted [r].

Concubinage aboliſhed by Leo.

Concubinage maintained its ground during the republic, the heathen emperors, and for a long period after the eſtabliſhment of Chriſtianity. It was finally aboliſhed, in the Eaſtern empire, by the emperor Leo the ſixth, in the ninth century, as an offence not only inconſiſtent with religion, but contrary to nature. "Why," ſays the philoſophic monarch, "ſhould a man prefer

[p] Non meno nelle mogli, che nelle concubine, potea conſiderarſi adulterio, ma la differenza conſiſteva nel modo di accuſarſi, i. e. either, jure mariti, or jure extranei, p. 168.

[q] L. ult. C. Commun. de Manumiſs.

[r] Bonis venditis, excipiuntur concubina et liberi naturales, lib. 1. tit. 13.

muddy

"muddy water when he may ſatisfy his "thirſt from the pure ſtream[s]?" How far his conduct was conformable to his laws and doctrines, may be ſeen in the hiſtorians of his life.

Rights and incapacities of baſtards.

The offspring then of all theſe different conjunctions, of illegal marriages, concubinage, or promiſcuous amours, were comprehended under the general appellation of baſtards, ſpurii, or nothi. Different names or epithets diſtinguiſhed the concubinage, the proſtitution, the inceſt, or other modes of illegal union of the parents, but I apprehend that the children, before the time of Conſtantine, had all, without diſtinction, the ſame general rights and incapacities[t].

To aſcertain theſe rights and incapacities, it is neceſſary to diſtinguiſh their condition

[s] Novel. Leon. 91. Οἷον, ἐξὸν καθαρῶν ἀπαρύεσθαι ναμάτων, σὺ προκρίνεις τὸν βόρβορον;

[t] It is to inferred from l. 6. ff. De Decur. Hotman. de Spuriis, p. 500. Quinque ſpuriorum genera æque omnia probabantur veteri jure.

before

before the time of Conſtantine, the alterations which then took place, and afterwards, till the law was finally ſettled by Juſtinian.

Before Conſtantine.

The legal condition of baſtards during the firſt period flowed naturally from two principles: firſt, that the law did not recognize any connection whatever between the father and the child; but, in the ſecond place, the relation ſubſiſting between the mother and her offspring was acknowledged as perfectly as in the caſe of legitimate children [a].

1ſt Principle. No connexion with the father.

The ground of the firſt principle aroſe, not only from the general policy of encouraging marriage, but likewiſe from the uncertainty of the perſon. He only could be conſidered as the father, who was demonſtrated to be ſo by the rites of matrimony. When an inheritance was bequeathed to Claudius, an illegitimate child, if he could prove himſelf to be the ſon of the teſtator,

[a] Inſt. lib. 3. tit. 5. § 4. L. 19. 23. 24. ff. De Statu. L. 2. 4. 8. ff. Unde Cog. &c. &c.

Paulus

Paulus was of opinion that the bequeſt was void, becauſe the condition was impoſſible to be performed [w].

From hence it followed that the very extraordinary paternal power, which was peculiar to Roman fathers, did not extend to their illegitimate children. If they enjoyed, or exercifed any authority, it aroſe from natural affection, and the influence of a dependant ſituation.

The father was not compellable to endow his natural daughter [x]. If he died inteſtate, his natural children could inherit no part of his property. He had no power of appointing guardians for them, becauſe that right depended upon the paternal autho-

[w] L. 83. ff. De Condit. et Demonſt. Lucius Titius ita teſtamentum fecit, "Aurelius Claudius natus ex illa muliere ſi filium meum ſe eſſe judici probaverit, hæres mihi eſto." Paulus reſpondit, filium de quo quæreretur, non ſub ea conditione inſtitutum videri, quæ in poteſtate ejus eſt, et ideo teſtamentum nullius eſſe momenti.

[x] Inferred from L. 41. § 11. ff. De Legat. 3.

rity[y]. Neither could the agnates, or the relations on the father's ſide, be entitled to the legal guardianſhip[z]; becauſe, the firſt link failing, the chain of conſanguinity was entirely broken, and no agnation ſubſiſted. But the Atilian law, which directed the proper magiſtrates, where there was no teſtamentary, or legal guardian, to appoint one, and the further regulations upon that head extended no doubt to natural children[a]. With reſpect to marriage the laws of nature, and decency were obſerved, and the prohibition of inceſt comprehended the illegitimate as well as the legitimate relations within the ſame degrees[b].

But theſe incapacities were carried no further. The free right of diſpoſing of his

[y] Inſt. l. 1. 13. § 3. De Tutelis. L. 1. ff. De Teſtamentaria tutela. L. 40. fin. ff. De Adm. Tut. L. 7. id. De Confirmando Tutore.

[z] L. 3. C. Quando Mulier. in fin. Legitima tutela evaneſcit. L. 4. ff. Unde Cogn. Inſt. 3. 5. § 4.

[a] Inſt. 1. 20. § 6. L. Ult. C. qui pet. tut.

[b] L. 54. l. 14. § 2. ff. De Ritu Nupt.

pro-

property, which every citizen enjoyed by the law of the twelve tables, was not infringed upon in this caſe. He was at liberty to provide for them or his concubine, either in his life time, or by will to any extent, with no other reſtrictions than thoſe which applied to all ſtrangers to his blood in general [c].

2d Principle. Connexion with the mother perfect.

On the contrary the relationſhip to the mother was perfect and complete in every reſpect.

As to her condition.

She communicated to them her condition or ſtate in ſociety [d]. If the unfortunate offspring of a female ſlave were the property of her maſter, the children of a free woman, whoever might be the father, or however diſapproved, or even prohibited the connexion, inherited from her all the rights and prerogatives of a Roman citizen [e]. No infamy or legal blemiſh attached to the ille-

[c] This is clear from L. 45. Lucius. ff. De Vulg. Subſtit.

[d] L. 24. ff. De Statu.

[e] Inſt. l. 1. tit. 4. L. 5. L. 19. ff. De Statu.

gitimacy

gitimacy of their birth, they were capable of taking by will[f], and were not even disqualified for holding the moſt honourable offices in the ſtate[g], though in the competition between the candidates they who could boaſt a more virtuous origin were intitled to the preference[h]. For it was humanely obſerved that they who were ſufferers by the fault of others were deſerving of compaſſion rather than puniſhment.

Her property.

As to the ſucceſſion to her property they were preciſely upon the ſame footing with legitimate children, and ſucceeded equally with them.

[f] L. 45. ff. De Vulg. Sub. L. 17. § 1. ff. Quæ in Fraud. Cred.

[g] Amongſt Gruter's Inſcriptions, p. 434. is a monument to the memory of C. Mamercius Januarius, who is ſtyled ſine patre filius, and filius naturalis, and yet ſucceſſively enjoyed the honors of Quæſtor, Ædile, Prætor, and Duumvir in his colony.

[h] L. 6. L. 9. L. 3. § 2. ff. De Decurion. L. 14. § 3. ff. De Muner. et Honor.

By

By the laws of the twelve tables all ſucceſſion to the eſtate of inteſtates was confined to the narrow limits of ſuch children only as were under the power of the parent, from whom they claimed an inheritance, and of agnates, or ſuch kindred as were related in the male line only. It followed that mothers and their children could not reciprocally ſucceed to each others property, or the children to their relations on the mothers ſide. A remedy, however, was applied by the Prætor, whoſe office it was to relax the harſh rules of ſtrict law by the milder principles of equity. He could not indeed veſt in them the legal eſtate, which the law had denied, but he admitted them to the *poſſeſſio bonorum*, a ſort of poſſeſſory right, which in effect was equally beneficial, and which he extended to illegitimate as well as lawful children [i]. In ſucceeding times, this Prætorian was converted into a legal title by the Tertyllian and Orphitian decrees of the ſenate, in the reigns of Hadrian and Antoninus, and by other laws

[i] L. 2. 4. 8. ff. Unde Cogn. Inſt. lib. 3. tit. 5. § 4.

and conftitutions, in which illegitimate chil-dren were likewife included [k].

In other refpects.

So if their mother omitted them in her will, or difinherited them without juft caufe, and did not leave them a legitime portion, they might inftitute a fuit to annul the in-officious teftament [l]. She was obliged to apply to the magiftrate for the appointment of a tutor to her children, in the fame man-ner as if they were legitimate [m], and they were equally bound by the reciprocal duties of maintenance [n]. Except in very particu-lar cafes, of which the Prætor was to judge, it was thought inconfiftent with the duty of a child to bring an action againft its parents. The fame reverence was enforced, and the fame prohibition was extended to the natu-ral mother, though perhaps not to the fa-ther [o].

[k] L. 5. C. Ad S. C. Orphit. in fin. L. 1. § 2. ff. Ad Sen. Tertyll. L. 2. L. 18. ff. De Bon. Libert.

[l] L. 29. § 1. ff. De Inoff. Teft.

[m] L. Ult. C. Qui pet. tut.

[n] L. 5. § 4. De Agn. lib.

[o] L. 4, 5, 6. ff. De In Juf. Vocat.

If

How far the consent of parents was required to their marriage.

If it be asked how far the consent of parents was required to the marriage of bastards, a little consideration of the law, in that respect, concerning legitimate children, will enable us to give a satisfactory answer. In these, a distinction must be made between sons and daughters. As to the first, the necessity of the father's consent being solely founded upon his paternal power[p], it was only commensurate with it. And his approbation was dispensed with after three years captivity, or absence without being heard of, and might be supplied by the magistrate, in case of madness, or even of an unreasonable refusal[q]. When the paternal power was dissolved, by emancipation, or other means, the son became perfectly his own master, the arbiter of his own destiny in the matrimonial connexion[r]. After the father's death, the consent of the tutor was quite out of the question, as to the validity

p Inst. De Nupt. L. 2. ff. De Rit. Nupt.

q L. 25. C. De Nupt. L. 9, 10, 11. ff. De R. N. L. 19. ff. eod.

r L. 25. ff. eod.

 of

of a contract which could not be entered into till the age of puberty, when his authority became totally extinct; nor was that of curators required, whose office might then commence, since their power was limited to the care of the minor's property only, and did not affect his personal liberty[s]. The mother was not at all consulted either during the life, or after the death, of the father[t].

The

[s] L. 8. C. De Nupt. L. 20. ff. De Rit. Nupt.

[t] 10 Inst. De Adopt. I cannot help noticing a passage in Sir William Blackstone's Commentaries, book the first, chapter the seventeenth, in which he gives an account of the civil law relating to tutors and curators. He says, "The guardian with us performs the office both of the "*tutor* and *curator* of the Roman laws; the former of "which had the charge of the maintenance and educa-"tion of the minor, the latter the care of his fortune; "or, according to the language of the court of chan-"cery, the *tutor* was the committee of the person, the "*curator* the committee of the estate. But this office "was frequently united in the civil law; as it always is in "our law with regard to minors." But it is perfectly clear; *first*, that the authority of a tutor necessarily expired when the infant arrived at years of puberty; that of a curator might then commence, and continued till twenty-five.

The amiable facility of the female ſex required a longer continuance of the parental care. Amongſt the laws indeed upon this head, as they now ſtand in the Code of Juſtinian, there are ſome contradictions, which have occaſioned conſiderable perplexity amongſt the commentators. The difficulty has ariſen from a ſuppoſition that, at whatever periods the reſpective conſtitutions there introduced may have been originally promulgated,

five. "Pupilli cum puberes eſſe cœperint a tutela liberantur. "L. 1. C. Quando tut. vel cur. eſſe deſinunt." *Secondly*, that the tutor had the entire management of the infant's property, as well as of his perſon. See all the titles relating to this ſubject, from which theſe laws may be ſelected. "Datus tutor ad univerſum patrimonium datus eſt. L. 21. "ff. De Excuſat. Tutor domini loco haberi debet. L. 27. "ff. De Adminiſt. Tut. Cum tutor non rebus duntaxat ſed "etiam moribus pupilli præponatur. L. 12. § 3. De Adm. "Tut. A tutoribus, &c. pupillorum eadem diligentia exi-"genda eſt circa adminiſtrationem rerum pupillorum quam "paterfamilias rebus ſuis præſtare debet. L. 33. eod. tit. "Inventario facto res ei traduntur. L. Ult. § 1. C. Arbit. "Tut." *Thirdly*, that no curator was ever appointed whilſt there was an effective tutor; and only in the caſes of his incapacity, abſence reipublicæ cauſa, when he was excuſed, ſuſ-

mulgated, they all acquired a new, equal, contemporary authority from this republication. The evident oppofition between them has been accounted for, by taking a diftinction between advice, and pofitive injunction, and by fuppofing that the confent of certain perfons, required by one law, which another declares to be perfectly needlefs, was directed to be obtained, for the fake of decency only, and not as of legal neceffity. But this interpretation can fcarcely be admitted, becaufe it is the office and language of laws not to counfel, but to

fufpected, removed, banifhed, or the property was too extenfive to be managed by one perfon. "Officium tuto-"rum curatoribus conftitutis finem accipit. L. 19. ff. De "Auct. Tut. Curator pupillo non datur fi tutor eorum af-"fuerit. L. 11. ff. De Tutor. et Curat. Interdum pupilli "curatores accipiunt, ut puta, fi legitimus tutor non fit "idoneus. Inft. § 5. De Curat." The other cafes are under the title, In quibus cafibus, Code. It is incorrect, therefore, to reprefent the two offices as fubfifting at the fame time, with powers contradiftinguifhed and compatible with each other; nor could they have ever been united, unlefs it were poffible that the fame perfon could be under the age of puberty, and above it at the fame time.

 com-

command; and the knot perhaps may be better unravelled by attending to the dates of the conſtitutions, and admitting the principle, that prior laws are repealed by thoſe which are enacted later[u]. This rule muſt neceſſarily be underſtood to apply to many parts of that collection; and where a former conſtitution is inſerted, which is evidently repealed in the whole, or in part, by another ſubſequent law, the compilers muſt be taken to have given it no further validity than is conſiſtent with ſuch total, or partial, abrogation; valeat qua valeat. In one inſtance this principle is expreſsly allowed by the legiſlator himſelf. A conſtitution of Anaſtaſius, which forms the ſixth law under the title concerning natural children, was completely repealed by a conſtitution of Juſtin, which compoſes the law next following. They are both thus inſerted into the Code, but that the firſt did not thereby revive, and acquire an equal authority with the latter, but continued as

[u] Αι μεταγενεστεραι διαταξεις ισχυροτεραι των προ αυτων εισι.

MODESTINUS.

an abrogated and obſolete law, was expreſsly declared long afterwards in the eighty-ninth novel [w]; which aſſigns a reaſon why they were both ſuffered to remain notwithſtanding, which was, that many families founded their legitimacy upon the effects of that law whilſt it continued in force.

It ſhould ſeem then, that, by the elder laws [x], as in the caſe of ſons, no other conſent was neceſſary to the marriage of daughters, than that of the father, and that only whilſt the child was under his power; and it was expreſsly declared, that the conſent of relations was in no caſe neceſſary. But, under ſubſequent conſtitutions [y], beſides the regular paternal authority, a girl, under twenty-five years of age, who was eman-

[w] Cap. 7.

[x] Paulus, L. 2. ff. De Rit. Nupt. in the time of Alexander Severus, about A. D. 222.—L. 8. C. De Nupt. of Gordian, about A. D. 238.

[y] Of Valentinian, Valens, and Gratian, A. D: 371. L. 18. C. eod. and L. 1. C. Theod. de Nupt. Of Honorius and Theodoſius, about A. D. 408. L. 20. C. eod.

emancipated, could not marry without her father's consent, even if she was in a state of widowhood; unless, indeed, in that situation she had obtained the jus liberorum; till that age, likewise, if the father was dead, the consent of the mother[z], and of the nearest relations, was requisite. In case neither parent was in existence, the advice of those relations seems to have been called in; and if they were unable to decide upon the claims and merits of the rival competitors for the fair hand of a minor, who was too modest to declare her own partialities,

[z] During the father's life the mother had no power of dissenting; in these lines, therefore,

> At tu ne pugna cum tali conjuge, virgo;
> Non æquum est pugnare, pater cui tradidit ipse,
> Ipse pater cum matre, quibus parere necesse est.
> Virginitas non tota tua est, ex parte parentum est,
> Tertia pars matri data, pars tertia patri,
> Tertia sola tua est————————

the poet Catullus must be supposed to refer to a natural, not a legal, authority, agreeably to the opinion of Modestinus. L. 42. ff. De R. N. Semper in conjunctionibus non solum quid liceat considerandum est, sed et quid honestum sit.

tialities, the choice was referred to the magistrate [a].

Whilst the office of perpetual tutor was in use, his consent was, of course, necessary at every age; that of the ordinary tutor was required to the validity of the espousals of his ward, who was necessarily under the years of puberty [b]; but the female, as well as the male pupil, was always free from any authority of her curator, upon this head [c].

It follows therefore that the consent of neither father nor mother was necessary to the marriage of their illegitimate sons, because they were not under the paternal power, which was the only ground of that restriction. But though daughters were totally independent of their natural fathers, yet by analogy to the laws relating to legi-

[a] Si inter honestos competitores matrimonii oriatur forte certamen, &c. si puella cultu verecundiæ propriam noluerit voluntatem depromere, &c.

[b] L. 1. C. eod.

[c] L. 20. ff. De R. N. L. 8. C. De Nupt.

timate