De Jure Personarum;

OR,

A TREATISE

ON THE

ROMAN LAW OF PERSONS:

INTENDED FOR

STUDENTS PREPARING FOR EXAMINATION;

BY

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PREFACE.

IN undertaking to compile a work on the Roman Law of Persons, I have been fully sensible of the difficulties involved in the task, and the extreme care required in its accomplishment. I am also fully aware that some excellent books already exist in English on the Roman Law generally, which in their way leave nothing to be desired; and that therefore I may be met at the outset with the possible objection that there is no need for my little treatise. But the works to which I allude are for the most part simply commentaries on the Institutes of Justinian, or the earlier Code of Gaius, which necessarily adhere to the arrangement of the original text, and are not adapted as easy manuals for students preparing for examination. For instance in consequence of the triple division followed by Gaius and Justinian, of Persons, Things, and Actions, the student continually finds himself under the necessity of referring to one or other of the second, third, or fourth books, to complete what has been said in the first book concerning the capacity or disability of persons. This naturally

breaks the thread of his reading, and he experiences considerable difficulty in condensing his information. Take for instance the case of a *filiusfamilias*. The first book of the Institutes shows that he is subject to the power of his father, who can appoint a tutor for him by testament if still under the age of puberty, and can transfer him by adoption to another family; the second explainsthat the father possessed the right of making a *pupillary substitution*, of enjoying and disposing of his son's acquisitions, except in certain cases, and that the son could not be a witness of the testament of his father, nor exercise the right of making a testament himself before the age of puberty, and was the *heres necessarius* of his father; the third rules that a son under power can enter into an obligation with others; while in the fourth we read that *noxal actions* were abolished by Justinian with respect to *filiifamilias*, and that a father could demand the production of a child subject to his power, by means of an exhibitory interdict. Thus, it is not until the student has mastered the four entire books of Justinian or Gaius that he can form any notion of the Law of Persons; and if an editor of either of these works attempted to remedy this defect, by summarising the law on each particular subject when the first allusion was made to it in the text, he would find himself recapitulating in almost every subsequent page what he had already explained in a previous one. The fact is that the Law of Persons is so intimately connected with the Law of Things and the Law of Actions, that it is most difficult, if not impossible, to keep them strictly apart. It has therefore occurred to me that a separate treatise on each of these subjects, complete and perfect in itself, would materially assist the student in the prosecution of his studies, although the general subdivisional

arrangement followed by Gaius and after him by Justinian might still be retained for facility of reference. Another defect to be noticed, and which is common to the Commentaries of Gaius and the Institutes of Justinian is, that neither of these works deal with any other than physical persons, although it is notorious that the *Fiscus, piæ causæ,* and other corporate bodies enjoyed important rights and privileges which should certainly not be omitted in a treatise which professes to deal with the Law of Persons as a whole. The study of the Roman law is daily increasing, and it is with the object of facilitating that study, that I have compiled, and now offer to the student, the following pages, which I trust will not altogether fail in attaining the object that I have had in view. I need hardly say that I do not profess to have made any discoveries or to have written an entirely original book; for after the lapse of so many centuries, and when the researches of men like Heineccius, Hugo, Mackeldey, and Savigny, have been made known, it would indeed be strange if a modern writer could throw any additional light on a subject which has been so thoroughly explored as the Roman law. All I claim to have done is to have carefully studied the works of the old civilians; to have compared their views with those of the modern Continental Jurists, and to have honestly examined for myself the original writings of the Roman jurisconsults, and from all these sources to have compiled an unpretentious volume which might assist the student in the better understanding of the *Jus Personarum* of the Romans. It will be seen that an authority is quoted for almost every proposition stated in the text; but I have made these quotations in foot notes, so as not to hamper the student in his reading, and yet to furnish a ready means of

enabling him to test the accuracy of what is advanced in the body of the work should he have the leisure and inclination to do so.

The principal works I have consulted are mentioned in a separate list, but it is from the works of Heineccius, Savigny, Puchta, Ortolan, and Demangeat, among foreign jurist and of Wood, Colquhoun, Tomkins and Poste, our own writers, that I have derived the greatest assistance. My grateful acknowledgments are also due to Mr. Robert Campbell, the learned editor of Austin's Jurisprudence, for seeing to the correction of the last pages of proofs and the completion of the Index, and for many valuable suggestions during the progress of the work through the press.

I will only add in conclusion, that I have spared no pains or research to secure accuracy, and although a critical eye may detect defects of style, I believe but few, if any, misinterpretations or mis-statements will be found in the actual texts. Indeed as the materials for this work were collected while I was myself preparing for the Honors Examination of Trinity Term 1872, extreme care and accuracy were necessarily forced upon me; and if any errors have crept in it is certainly not through any want of diligence or attention, but simply owing to the more than ordinary difficulty of the subject.

W. H. R.

LINCOLN'S INN,
11*th August*, 1873.

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C. Th.—Code of Theodosius.

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Fr. 7, pr. D. 4, 1.—Fragment 7, principium, Digest, book 4, title I.

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CORRIGENDA.

Page 55, line 13, for "Ortolon" read "Ortolan."

Page 58, line 4, for "as *a status permutatio*" and *a prioris status commutatio*," strike out "a" in each sentence.

Page 72, line 26, for "capitis deminutio" read "capite deminuta."

Page 108, line 13, for "vested the master with" read "gave the master."

Page 112, line 17, for "*Antig Roman*" read "*Antiq. Roman.*"

Page 127, line 22, for "præter" read "prætor."

Page 142, line 2, for "explains" read "defines."

Page 142, line 5, for "freedman" read "freeman."

Page 214, line 23, for "were capable" read "was capable."

Page 220, line 13, for "calls" read "called."

Page 220, note 6, for "Autonius" read "Antonius."

De Jure Personarum;

OR

THE ROMAN LAW OF PERSONS.

CHAPTER I.

DEFINITION OF *Persona*—DISTINCTION BETWEEN *Homo* AND *Persona*—EFFECT OF BIRTH—DISABILITIES ARISING FROM SEX, AGE, PHYSICAL AND MENTAL INFIRMITIES—THE *leges Julia et Papia Poppæa*.

Definition of *persona*.

THE term *persona* in ordinary language denotes a physical being, and is exactly synonymous with *homo*; but in legal language it has a wider signification, and is also applied to those things and corporations which are regarded as the proper subject of rights, such as *collegia*, *municipia*, *piæ causæ* and the *fiscus*, enjoying what Blackstone calls "a kind of legal immortality." Hence the distinction between *physical* and *moral* persons, or between those who have a *real* and those who have only a *fictitious* or *juridical* existence. Again the word refers etymologically to the *rôle* or character which a man holds in society, or in his family circle, for the term *persona* was originally applied to the mask worn by an actor on the stage, and hence Theophilus translates

it by the Greek πρόσωπον, which means literally a mask, face, or visage. Accordingly the word has been used in a sense nearly equivalent to *status e.g.* the *status* of a *pater-familias* or *a filius familias*; and thus Ulpian observes that an inheritance in abeyance (*hereditas jacens*) sustains the status or wears the mask of the deceased, and not that of the heir at law. *Hereditas enim non heredis personam, sed defuncti sustinet, ut multis argumentis Juris Civilis comprobatum est.*[1] The same man might unite in himself several distinct characters (*unus homo plures sustinere potest personas*), such as that of a father, a tutor, or a husband, with respect to each of which his rights and duties would necessarily be wholly distinct. Thus Cicero says: *tres personas unus sustineo summa animi æquitate, meam, adversarii, judicis.*[2] He might be able to act in one character but not in another. Thus a person under the age of twenty might hold an important position in the state, as that of a Consul, and be perfectly qualified to conduct all the business appertaining to his office, but he could not, prior to the reforms introduced by Justinian,[3] in his private capacity, manumit a slave, except by *vindicta*, and then only upon some legitimate ground approved of by a council.[4] On the other hand he could not be prejudiced in the exercise of his rights in one character what he did in another. For instance, by Roman law a person was not permitted to take a benefit under a testament which he attacked as *inofficiosum*; but a tutor to whom nothing had been left under his father's testament was allowed to accept, in the name of his pupil, a legacy given by that testament, and at the same time to attack the testament in his own name as inofficious.[5] Conversely,

[1] Fr. 34, D. 41, 1; see also Fr. 60, *Ibid.*
[2] *De Orat.* 2, 24.
[3] Novel 119, cap. 2.
[4] Fr. 1, s. 2, D. 1, 10; Gaius. *Comment.* 1, 38; 4 I. 1, 6.
[5] Fr. 10, s. 1, D. 5, 2; 4 I. 2, 18.

if a tutor, in the name of his pupil, to whom nothing had been left, unsuccessfully attacked the testament of his pupil's father as inofficious, he was not debarred from accepting anything that might have been left himself in the same testament.[1] So also advantages derived in one character could not be appropriated to rights which the acquirer enjoyed in another.[2]

Distinction between *homo* and *persona*.

But while the Roman law extended the term *persona* to many juridical persons who were not men, it was not every physical being (*homo*) who was recognised as a legal *persona*, that is, a person who had a capacity for civil rights. True, by the law of nature every rational being has a capacity for rights, but the *jus civile* drew a wide distinction between the *natural* and *civil* capacity for rights. To enjoy the former it was sufficient to possess a human form and a human mind. *Homo dicitur, cuicunque contigit in corpore humano mens humana.*[3] But the civil capacity depended on the existence of certain qualifications which were determined partly by the public and partly by the private law. Thus the Roman law while recognising a slave as a natural being, and therefore one who had to be considered in a general classification of persons, regarded him nevertheless as utterly devoid of legal existence. He had no "caput"[4] and as Modestinus observes, he only acquired a civil status on the day of his manumission.[5] Hence Theophilus calls slaves ἀπρόσωποι,[6] and in like manner Theodosius speaks of them as *nec personam habentes.*[7]

Indeed it is in consequence of the distinction observed

[1] Fr. 30, s. 1, D. 5, 2; 5 I. 2, 18.
[2] Fr. 38, D. 4, 4; Const. 2, c. 2, 29.
[3] Vinnii. *Comment. in Insti.* Edited by Heineccius, tit. 3 p. 29; Heineccius. *Recitationes*, tit. 3, s. 75.
[4] Fr. 3, s. 1, D. 4, 5; 4 I. I, 16.
[5] Fr. 4, D. 4, 5.
[6] S. 2, I. 2, 14, *de hered. institut.*
[7] Novel Theod. 17, s. 2.

by Roman jurists between natural and civil persons that some difficulty has been experienced in reconciling those passages in which slaves are spoken of as mere things with others in which they are referred to as persons. Thus in the Institutes we find Justinian classifying them amongst corporeal things,[1] although he had previously included them amongst persons in the well known passage, borrowed from Gaius, *summa divisio de jure personarum hæc est quod omnes homines aut liberi sunt, aut servi.*[2] In short in the view of the Civil law, slaves being devoid of a legal *caput* were mere things, but as natural beings they could not be ignored in a general classification of persons, using the expression *persona* in its general signification of a physical man. Indeed wherever we find the term *persona* applied to a slave it is used in its general sense, as when Gaius says, "a slave in whose person (*in cujus persona*) these three conditions are united,"[3] and again in a passage of Ulpian where he observes that a slave can owe no obligation (*in personam servilem nulla cadit obligatio*).[4] In like manner, as I shall hereafter have occasion to point out, the word *status* is sometimes used in a technical sense as synonymous with *caput*, and very often in its ordinary acceptation meaning simply *condition*, as that of a freeman or slave. At the same time it must be confessed that, in a certain sense, slaves were undoubtedly invested with personal rights, Thus as Paulus observes, a legacy might be left to a slave (*servi inspici*

[1] 1 I. 2, 2: Gaius. *Comment.* 2, 13.

[2] Gaius. *Comment.* 1, 9; 1 I. 1, 3. Austin while contending that a slave is a person, though he be excluded from rights, adds: "If "indeed we consider him from a certain aspect, we may, in a certain "sense, style him a *thing*. But almost every person may be consi- "dered from a similar aspect, and may also be styled a *thing*, with "equal propriety."—Lecture XII. p. 362. Ed. by R. Campbell.

[3] *Comment.* 1, 17.

[4] Fr. 22, pr. D. 50, 17.

personam in testamentis),[1] and although the master would alone acquire the benefit of such a legacy, the bare fact that a slave could appear in a testamentary bequest, is of itself sufficient to show that he was not altogether regarded as an impersonal object or thing: because a legacy, for instance, could not be left to a horse for the benefit of the owner. *Legatum nisi certæ rei fit*, says Paulus in another passage, *et ad certam personam deferatur, nullius est momenti.*[2] Indeed in this respect slaves enjoyed a capacity which under the ancient law was denied to juridical persons, such as *Collegia*, *piæ causæ*, and the like, for it was Justinian who first permitted bequests to be made to such institutions.[3] Again the *actio injuriarum*, by which an attack on the person or reputation of an individual could be redressed, was extended to such as did not enjoy the *status personæ*.[4] *En effet*, remarks the learned Demangeat, *si l'esclave peut figurer dans un acte juridique, par exemple dans une vente ou dans un legs, comme objet, il peut aussi y figurer comme sujet; il peut sans doute être vendu ou légué, mais il peut également jouer la rôle d'acheteur ou de légataire. Sous ce rapport, il n'est pas un chose: le legs fait à un cheval serait nul, et le legs fait à un esclave est valable. Du moment qu'on admet que l'esclave peut être sujet d'un droit ou partie dans un acte, il s'ensuit nécessairement qu'il est une personne, et, du reste, les jurisconsultes Romains n'hésitent pas à lui reconnaître cette qualité.*[5] In fact, according to Austin, the notion that a *person* is a human being invested with rights is not to be found in any classical authority. In his opinion the Romans neither confined the term "to human beings, considered as in-

Austin's opinion that persona denotes homo.

[1] Fr. 82, s. 2 D. 31, 1.
[2] *Sentent.* lib. 3, tit. VI. s. 13.
[3] C. 6. 48.
[4] Fr. 15, s. 34, 35. 44 D. 47, 10.
[5] *Cours Elémentaire de droit Romain*, vol. 1, p. 144.

"vested with rights: nor did they restrict it to human "beings, considered as subject to obligations. The "meaning which they attached to the term, is the familiar "or vulgar meaning. With them '*persona*' denoted "'*homo*' or *any* being which can be styled human."[1] He considers that the modern limitation of the term "*person*" to "*human beings considered as invested with rights*" arose by the authors of the definition assuming that every *status* comprises *rights*, or, at least, comprises capacities to acquire or take rights. "The truth appears "to be," he continues, "that the authors of the definition "considered the term '*status*' as equivalent to the term "'*caput*;' a word denoting conditions of a particular "class: conditions which *do* comprise rights, and comprise "rights so numerous and important, that the conditions or "*status* of which those rights are constituent parts, are "marked and distinguished by a name importing pre-"eminence."[2]

Distinction between "status" and "caput."

As already stated the Roman law only regarded that being as a man *(homo)* who possessed a human form and a human mind. Mere deformity *(ostentum)* had no disqualifying effect, but a *monstrum* or *prodigium* in whom the human form was wanting, was held to be incapable of rights.[3] The capacity for rights originated, strictly speaking, with birth, but in the anxious solicitude of the Roman law, a child *in utero* was assimilated, in respect to legal advantages, to one already born.[4] *Nasciturus pro*

Definition of "homo."

***Monstrum* incapable of rights.**

Capacity for rights originates with birth.

But the interests of the *nasciturus* were protected.

[1] Lect. XII., pp. 360, 361, vol. I. Edited by R. Campbell.

[2] *Ibid.*

[3] Fr. 14. D. 1, 5; Fr. 38. D. 50, 16, *Paul.* Sentent. lib. IV. tit. 9, s. 3; Const. 3, C. 6, 29. Commentators say that a *monstrum* is to be distinguished by the external formation of the head, which is described by Paulus as the principal part of the human body, whence, he says, *cujus imago fit, cognoscimur*. Fr. 44, D. 11, 7. But see Maynz, *Eléments de Droit Romain*, s. 97.

[4] Fr. 2, s. 6, D. 27, 1. An unborn child was in other respects con-

jam nato habetur, quando de ejus commodo agitur.[1] A *curator ventris* was appointed in case a man died leaving his wife in a state of pregnancy, and the portions of three children had to be set apart for the *nasciturus*.[2] Several applications of the above principle are to be found in the Digest,[3] and it is probably upon the same principle that Justinian in his *Institutes* decides that if a mother be free when she conceives, "*deinde ancilla facta pariat, placuit "eum qui nascitur liberum nasci.*"[4] It was necessary, however, for a child to be born alive, and capable of living, before he could be actually invested with rights;[5] and according to Roman Law, capacity for existence was not to be presumed unless the mother's pregnancy had extended to the 182d day, even though the *abortus* was born alive.[6] But if the capacity for existence could be legally presumed, the child was instantly clothed with the rights of a man, even though he lived but for a moment. Some of the ancient jurists were of opinion that the child must have been heard to cry, but Justinian adopted the contrary opinion of the Sabinians and enacted as follows:—*Si vivus perfecte natus est: licet illico postquam in terra cecidit, vel in manibus obstetricis decessit:*

Necessary for a child to have been born alive and capable of living, before he could actually acquire rights.

sidered as a part of the mother (*mulieris portio*). Fr. 1, s. 1, D. 25, 4; and not as a *homo*, Fr. 9, s. 1, D. 35, 2, except that a mother and her accomplices were liable to punishment for causing abortion, unless it was done as the only means of preserving the mother's life. Fr. 4, D. 47, 11; Fr 8, D. 48, 8; Fr. 38, s. 5, D. 48, 19, Fr. 39. *Ibid. Paul.* Sentent. lib. V. tit. 23, s. 14.

[1] Fr. 7. D. 1. 5. "What Paulus means is not that the child has "rights whilst it is in the mother's womb, but that when it is actually "born its legal life may be dated back to the earliest period of its "physical existence"—Tomkins' *Gaius*, p. 164.

[2] Fr. 3, Fr. 4, D. 5, 4.

[3] Fr. 3 D. 48, 19; Fr. 18 D. 1, 5; Fr. 3 D. 5, 4; Const. 1, 2, c. 6, 29.

[4] Pr. I. 1, 4.

[5] Fr. 129 D. 50, 16.

[6] Fr. 3, s. 12, D. 38, 16.

nihilominus testamentum rumpi, hoc tantummodo requirendo, si vivus ad orbem totus processit, ad nullum declinans monstrum, vel prodigium.[1]

Effect of birth.

If a child was born in lawful wedlock, and not before the 182d day, his legal existence was reckoned from the date of his conception, and he followed the condition of his father;[2] but if he was illegitimate, that is born of an unlawful intercourse, he followed the condition of his mother, and his existence was reckoned from his birth;[3] unless indeed the mother had lost her liberty subsequent to the date of conception, in which case, as we have seen above, the child's status was considered to be that of the mother at the date of conception, because as Justinian says, *non debet calamitas matris ei nocere, qui in ventre est:* the misfortune of the mother ought not to prejudice her unborn infant.[4]

Sex.

In many respects the position of women under Roman Law was inferior to that of men, although as a general rule both sexes were held entitled to equal rights. *In multis juris nostri articulis,* says Papinian, *deterior est conditio feminarum, quam masculorum.*[5] It was in consequence of their intellectual weakness, or want of sufficient firmness of character, *propter levitatem animi,* as Gaius expresses it, that the ancient Roman law, with no wish to encroach upon their liberty, but rather to guard them against imposition, placed women in a sort of perpetual tutelage.[6] Thus the *Senatus-consultum*

[1] Const. 3, c. 6, 29.

[2] Gaius 1, s. 89; *Ulpian* Fragm. 5, s. 10; Fr. 12, Fr. 19, D. 1, 5.

[3] *Ibid*; Fr. 24, D. 1, 5. The jurist Neratius also clearly expresses himself to the same effect. *Ejus, qui justum patrem non est,* he says, *prima origo a matre eoque die, quo ex ea editus est, numerari debet.*—Fr. 9 D. 50, 1.

[4] Pr. I. 1, 4.

[5] Fr. 9 D. 1, 5.

[6] *Gaius.* Comment. 1, 144.

Vellejanum (46 A.D) did not permit them to be bound as sureties. The words of this famous law are given by Ulpian as follows:—"On the question of the consuls "Marcus Silanus and Velleius Tutor, how the liabilities "of women who undertake to be responsible for the "debts of others should be dealt with by the tribunals, it "was resolved that guaranties of women, and loans to "others for whom women assume responsibility, though "formerly held to be valid, shall not henceforth be valid to "support any actions or suits against female guarantors, "as manly functions and liabilities *(virilibus officiis et ejus "generis obligationibus)* are not fairly chargeable on "women, and the Senate deem it incumbent on the "judicature to see that their will in this matter is en-"forced."[1] Again the Prætorian law did not allow women to be prejudiced by errors of law *(propter sexus infirmitatem)*, although the general rule was *juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere.*[2] And under the *lex Julia de adulteriis*, although a woman was liable to the same punishment as a man for incest prohibited *jure Gentium*, she was excused from punishment for an adulterous intercourse which was only deemed to be incest by the operation of the Civil law.[3] Moreover a woman could not be confined in the ordinary prisons. If her crime was of such a serious nature that her detention became necessary, she was either to be confined

[1] Fr. 2, s. 1 D. 26, 1.

[2] Fr. 9; Fr. 8 D. 22, 6. In the case of men of full age ignorance of the civil law did not prejudice them when they sought to avoid being damnified (Fr. 8 *Ibid;* Fr. 5, s. 1, D. 19, 1; Fr. 36 D. 45, 1); but it did not entitle them to recover gain, that is to obtain something to which they were not previously entitled. Fr. 7, Fr. 9, s. 5, D. 22, 6. In the case of women, minors, soldiers, and wholly uneducated persons (*rustici*), the plea of ignorance could be urged, not only to avoid damage (*in damnis*), but to recover profit or gain (*in lucris*). Fr. 1, 7, 8, 9, pr. s. I. D. 22, 6; Fr. 1, s. 5, D. 2, 13; Fr. 2, 7, D. 49, 14.

[3] Fr. 38, s. 2, D. 48, 5.

in a monastery, or to be made over for custody to any person who would undertake to be responsible for her future good behaviour.[1] It was also enacted by the *lex Julia* that although the *dos* of the wife belonged to the husband, it was necessary for him to obtain the wife's consent before he could alienate immoveables which formed part of her dowery; nor could he even with the wife's consent mortgage immoveables, because it was thought that a woman would be more readily persuaded to consent to mortgage than to sell her property.[2] This law only applied to immoveables in Italy, but Justinian extended the prohibition to immoveables in the provinces, and further enacted that neither alienation nor mortgage should be made even with the wife's consent, lest the weakness of the female sex should be abused to the detriment of their fortunes.[3] Another protection afforded to women was, that although they could receive money due to them and grant valid discharges, they were not permitted to feign receipt and release their debtors by fictitious acknowledgments *(per acceptilationem,)* without their guardians' authority.[4] The disabilities under which they suffered were the following :—They were incompetent to fill any public offices, to act as judges, or to practice as advocates ;[5] they were neither permitted by the old law to arrogate nor to adopt,[6] but by an imperial constitu-

Disabilities of

[1] Novel 134, cap. 9. Livy referring to the women who were concerned in the Bacchanalian orgies says that those who were condemned were made over to their relatives, or to those in whose *manus* or power they were, in order that they might carry out the sentence in private; and if no proper person was forthcoming to act as *supplicii exactor* the punishment was carried out in public. Lib. 39, cap. 18.

[2] *Gaius.* Comment. 2, 62, 63; *Paul* Sentent, lib. 2, s. 21.

[3] Pr. I. 2, 8.

[4] *Gaius.* Comment. 2, 85. As to the meaning of *acceptilatio* see *Ibid*, 3, 169.

[5] Fr. 1, s. 5, D. 3, 1; Fr. 1, s. 1, 2 D. 16, 1; Fr. 2 D. 50, 17.

[6] *Gaius.* Comment. 1, 104.

tion of the year 291 A.D., published in the reign of Diocletian, they were permitted by a *quasi* form of adoption to establish the same legal relation as existed between a mother and her natural children ;[1] nor could they be anciently arrogated, because as Aulus Gellius informs us, they were not capable of appearing in the *Comitia Curiata*,[2] but when the *lex Curiata* was superseded by imperial rescript, this incapacity naturally ceased to exist, and thus we find it stated in the Digest that women could be arrogated *ex rescripto Principis* ;[3] they could not alienate a *res mancipi* except with the authority of their guardian,[4] but as the tutelage of women after attaining the age of puberty had become obsolete before Justinian's time, this incapacity had also ceased to exist ; they could not be instituted heir under the provisions of the *lex Voconia* by anyone who was registered in the census as owning 100,000 asses ;[5] they were not permitted to execute a testament except by the cumbrous process of *co-emptio*, or under the authority of their tutors ;[6] nor to institute a criminal

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[1] Const. 5, C. 8, 48 ; 10 I. 1, 11. The woman would consequently not acquire any *potestas* over the adopted children.

[2] Lib. 5, 19.

[3] Fr. 21 D. 1, 7. This fragment is attributed to Gaius, but he could hardly have been the author of it because he distinctly asserts in his Commentaries that " women cannot adopt by either form of adoption." 1, 104. See 1 I. 1, 11.

[4] *Gaius* Comment. 1, 80.

[5] *Ibid* 2, 274 ; *Cicero, In Verr*, I. 42.

[6] Fr. 20, s. 6, D. 28, 1 ; *Gaius*. Comment. 2, 112. No one could execute a Roman testament who did not enjoy the *testamenti factio ;* and no one could enjoy this right who had not the *commercium* and was not *sui juris.—Gaius*. Comment. 1, 114. The term *testamenti factio*, however, is used in three distinct senses : 1. To denote a person who was competent to execute a will, in which sense it was said to be *activa*. 2. To indicate fitness to be the legal object of a testator's bounty, in which sense it was said to be *passiva*. Thus Justinian says : *Testamenti autem factionem non solem is habere videtur qui testamentum facere potest, sed etiam qui ex alieno testamento vel ipsi capere potest vel alii acquirere, licet non possit facere testamen-*

prosecution, unless to avenge the death of a parent or a child, or that of their patrons and their children;[1] nor to act as guardians, unless as the jurist Neratius adds, the tutelage of their children was specially entrusted to them by a rescript of the Emperor.[2] A constitution of the Emperors Valentinian, Theodosius and Arcadius (390 A.D.) permitted a mother to act as guardian of her children in the absence of a testamentary or legal

tum. "Not only is a man who can make a testament said to have "*testamenti factio*, but also any person who under the testament of "another can take for himself, or acquire for another, although he "cannot himself make a testament."—4 I. 2, 19. 3. To signify the capacity to take part in the execution of a will as a witness. *Testes autem adhiberi possunt*, says Justinian, *is cum quibus testamenti factio est.* "Those persons can be witnesses with whom there is *testamenti factio*."—6 I. 2, 10. A person might have the *testamenti factio* in one character, though not in another. Thus *furiosi*, who were generally incompetent to make a valid testament for themselves, were still competent to acquire by testament, either for themselves or others.—4 I. 2, 19. Women, however, could neither take part in the execution of a testament as witnesses (6 I. 2, 10), nor could they make wills if in the power of their father, or in the *manus* of their husbands. So long as testaments were made *calatis comitiis, i.e.*, in the *comitia curiata* summoned *(calata)* twice a year for the despatch of private business, women were excluded from exercising the power for the same reason that they could not be arrogated, namely, because they could not appear in the *comitia (quoniam cum feminis nulla comitiorum communio est*, Aul. Gell. 5, 19). And even after the introduction of the testament *per æs et libram*, women had the right of making a testament only when they had made a *co-emptio*, and had again been transferred and manumitted. But the necessity of making a *co-emptio* was abolished by a *senatus-consultum* passed in the reign of the Emperor Hadrian (*Gaius*, Comment. 1, 115 *a*), which permitted women to make a testament without concluding a *co-emptio*, if they were above twelve years of age, and acted under the authority of their guardians. —*Ibid*, 2, 112. In this respect women were in a better condition than men, for a male of less than fourteen years of age could not make a will even with the sanction of his tutor.—*Ibid*, 113.

[1] Fr[1] 1 D. 48, 2.

[2] Fr. 18 D. 26, I.

guardian, or in case the appointed guardian was exempted on the ground of privilege or had been removed for mis-conduct, provided she was of full age and entered into an engagement not to remarry.[1] Lastly with respect to inheritances, "the rules of title by descent," says Gaius, "are not the same in respect of the successions "which women leave and in respect of the successions "which they take. For the inheritances of females "legally revert to us by the law of agnation just as "those of males; but our inheritances do not belong to "women who are not within the degrees of consanguinity. "Thus a sister is legal heir to a brother or sister; but a maternal aunt, and the daughter of a brother, cannot be "our legal heir."[2] The object of this distinction was no doubt, as Justinian asserts, to keep inheritances in the possession of males, but the obvious injustice of almost entirely excluding females as strangers, more especially as this exclusion was not supported by the law of the Twelve Tables, induced the Prætor to admit them to the possession of goods when there were no *agnati*, nor any nearer *cognatus*.[3] But Justinian went still further, and returning to the law of the Twelve Tables declared by a constitution of the year 532 A.D. that all *legitimæ personæ*, that is, descendants from males, whether themselves male or female, should be equally called to the rights of succession *ab intestato*, according to the proximity of their degree, and that females should not be excluded on the ground that none but sisters had the right of consanguinity.[4]

Hermaphrodites were those whose sex was doubtful;[5] **Hermaphrodites.**

[1] Coust. 2, C. 5, 35; Novel 118, ch. 5.
[2] Comment. 3, 14.
[3] 3 I. 3, 2; *Gaius.* Comment. 3, 14, 23, 29.
[4] Const. 14 C. 6, 58; 3 I. 3, 2.
[5] *Cui forma duplex, nec fœmina dici,*
Nec puer ut possit, neutrumque et utrumque videtur,
Nec duo sunt.—Ovid. Metamorph. 3, 7.

and according to Ulpian they were to be considered as belonging to that sex which predominated in them.[1] So Paulus after stating that persons who were condemned for spoliation *(repetendarum damnatus)* could neither make a testament nor take part in the making of one, continues: *Hermaphroditus, an ad testamentum adhiberi possit, qualitas sexus incalescentis ostendit.*[2]

Age.

Amongst the other qualities upon which certain special rights depend, or which exercise an influence upon rights according to the principles of the Roman law, that of Age deserves to be more particularly noticed. Persons are either *majores* or *minores* XXV. *annis*. Full age, or *perfecta ætas*, was fixed apparently for the first time, at twenty-five years by the *lex plætoria*, a law which was passed before the time of Plautus, and which, according to Cicero, allowed a criminal accusation *(a judicium publicum rei privatæ)* against an individual who took an unjust advantage of the inexperience of a minor under that age.[3] The *Tabula Heracleensis*[4] excluded a man who had been convicted under the *lex Plætoria* from all municipal offices, and the Prætorian law provided another means of protection by allowing a *restitutio in integrum* in all cases in which a minor had been defrauded.[5] In the early stage of Roman law distinctions as to age were confined to two phenomena of physical nature, the faculty of speech, and the power of generation. "The former,"

[1] Fr. 10 D. 1, 5.

[2] Fr. 15 s. D. 22, 5. See also Ulpian's opinion; Fr. 6, s. 2, D. 28, 2.

[3] *De Natura Deorum*, III. 30.

[4] So called from the fact of a fragment having been discovered partly at Heraclea, near the Gulph of *Tarentum*, in 1732, and partly in the same locality in 1735. Ortolan, *Histoire de la législation Romain et généralisation du droit*, s. 312.

[5] Paulus includes this extraordinary remedy among those which *magis imperii sunt, quam jurisdictionis*, and which, therefore, *magistratus municipalis facere non potest.*—s. 26, D. 50, 1.

to quote the lucid explanation of Ortolan, "because the "acts of the Quiritarian law were accomplished by means "of established formulas and symbolic terms, which the "parties had themselves to pronounce, and therefore "anyone who was unable to speak was naturally incapable "of such acts, and no one could perform them for him. "The latter, because it is the essential and sole physical "condition of marriage." [1] These distinctions were substituted by a more intellectual one based upon moral and not upon corporeal development. The first period was that of *infancy*, which originally only comprehended those, as Ulpian declares, *qui fari non possunt*.[2] In this period which extended to the age of seven, the *infans* could not of course utter the sacramental words requisite for the validity of certain acts, such as mancipation or stipulation, and no one else could utter them in his stead. The next period was sub-divided into two parts, in the first of which the minor was said to be *infanti proximus*, that is he had the faculty of speech and could utter the sacramental words, but he had little or no *intellectus*, and the *auctoritas* of a tutor was requisite to complete the *persona* necessary for the accomplishment of the acts of civil law: in the second he was nearer puberty than infancy, and was called *pubertati proximus*. In this period the child who had entered on his eighth year, was considered to have acquired a certain degree of intelligence *(aliquem intellectum habet)* but not the *animi judicium*.[3] This deficiency was supplied by a tutor, but both the tutor and the pupil were obliged to act together. The *pubertati proximus* was liable to criminal punishment,[4] and he

Infancy.

Infanti proximus.

Pubertati proximus.

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[1] *Généralisation du droit*, s. 86.

[2] 1, s. 1, D. 26, 6. In a constitution of Theodosius and Valentinian an *infans* is described as one under the age of seven years.—Const. 18, C. 6, 30.

[3] *Gaius*. Comment, III. s. 109.

[4] Const. 7, C. 9, 47.; *Gaius*, Comment. III., 208. By the French

might be made a slave for ingratitude towards his patron.[1]

Puberty. The third stage was that of puberty, which in the case of males was fixed by Justinian at fourteen years, and in the case of females at twelve years.[2] Prior to this age a person was said to be *impubes*, but on reaching puberty he was henceforth styled *pubes*, and was considered to possess both intelligence and judgment.

An *impubes* above the age of seven could bind others without the intervention of a tutor, but not himself, for the general rule was that he could make his condition better but not worse without the authorisation of his tutor.[3] Pupils were freed from tutelage when they reached the age of puberty, and were competent to contract *justæ nuptiæ*. Before Justinian's time persons under the age of twenty-five were merely excused from acting as tutors or curators, but by a constitution of that Emperor they were prohibited from aspiring to these offices.[4]

legi-tima In the fourth period the persons entered on what was termed *ætas legitima*, which was fixed, as I have shown above, by the *lex plætoria* at twenty-five years. But majority might also be granted by the state *(venia Ætatis)*, provided in the case of males, they had attained the age of twenty, and in that of females, they had passed their eighteenth year.[5]

Senectus Old age, which carried with it exemption from public offices, began at the completion of the seventieth year.[6]

Criminal Code (Art. 66) persons under the age of sixteen are held to be *sans discernement*, and therefore not criminally responsible.

[1] Theoph. Paraph.

[2] Pr. I. 1, 22.

[3] Pr. I. 1. 21; Fr. 28. D. 2. 14, *Gaius*, Comment. 3, 107-108.

[4] 13 I. 1, 25.

[5] Const. 2 C. 2, 45.

[6] Fr. 2, pr. D. 27, 1; Fr. 3, D. 50, 6; Const. 10, C. 10, 31; 13 I. 1, 25.

Incapacity was also created by physical and mental defects. Amongst those who laboured under the former *(vitium)* [1] were included *spadones* [2] (impotent persons), *castrati*, whose impotence was produced by mechanical means, and who could neither contract marriage[3] nor adopt children,[4] though they could make a will,[5] *surdi* (deaf), *muti* (dumb), and *surdi et muti* (deaf mutes). Persons who suffered under some incurable disease [6] *(qui perpetuo morbo laborant)* [7] were equally incapacitated. Distinctions were similarly made with regard to mental incapacity. Thus the *furiosi* were those who were raging mad and had entirely lost their intellectual faculties ; [8] *mente capti* were those in whom mental de-

[1] This word is defined by Modestinus as *perpetuum corporis impedimentum.*—Fr. 100, s. 2, D. 50, 16.

[2] This was the generic term for all eunuchs but it was particularly applied to persons who were naturally impotent. Fr. 128, D. 50, 16. Such persons, although incapable of procreating, were competent to adopt; *Gaius* Comment. 1, 103; *Gaii. Inst.* lib. 1, tit. v. s. 3; 9 I. 1, 11. They could execute a will on attaining the age of 18—*Paul* Sentent. lib. III. tit. IV. *a.* s. 2; institute an heir Fr. 6, pr. D. 28, 2; and contract marriage. Fr. 39, s. 1, D. 23, 3.

[3] Fr. 39, s. 1, D. 23, 3.

[4] 9 I. 1, 11. But see *Novel. Leon.* 27.

[5] Const 5, C. 6, 22. Under the old law, however, a *Castratus* was not able to institute an heir. Fr. 6, s. 1, D. 28, 2.

[6] *Morbus* is defined by Modestinus as *temporalem corporis imbecillitatem.*—Fr. 101, s. 2, D. 50, 16. But *morbus sonticus* was a sickness. rendering a person incapable of attending to business.—Fr. 113, D. 50, 16. A person so afflicted was excused from attendance at a court of Justice by the law of the Twelve Tables (Fr. 2, s. 3, D. 2, 11.), and a judgment pronounced against him was null and void. Fr. 60, D. 42, 1.

[7] 4, I. 1, 23.

[8] *Furorem esse rati sunt,* says Cicero in speaking of the *Decemviri, mentis ad omnia cæcitatem. Quod, cum majus esse videatur quam insania, tamen ejus modi est ut furor in sapientem cadere possit, non possit insania.—Tusc Quæst.* 3, 5. The *furiosi* were not responsible for torts unless committed by them during lucid intervals. Fr. 12,

they were wanting and who were consequently in a perpetual state of imbecility, or very nearly so ;[1] *dementes*, those who suffered from an unnatural depression of mind or from feebleness of intellect ; *simplices et stupidi*, those who were merely silly or stupid ; and *prodigi*, or prodigals, who, when declared to be so by a judicial decree, were regarded as no better than *furiosi* in all matters concerning the administration of their estate.[2] The *furiosus* during his lucid intervals was competent to contract just as any other sane person, and did not require the intervention of a curator. Justinian (350 A.D) settled the law upon this point to remove certain doubts which had existed amongst the ancient jurists. *Sed per intervalla quæ perfectissima sunt, nihil curatorem agere, sed ipsum posse furiosum, dum sapit, et hereditatem adire, et omnia alia facere quæ sanis hominibus competunt.*[3] The *prodigus* could make his condition better but not worse, and by being placed under interdict he was reduced to the condition of a pupil who had passed the age of infancy.[4]

The *mente capti*, *dementes*, and *simplices* were not under any general interdict, and their capacity to bind themselves depended upon whether they were capable of understanding the consequences of their own acts. Demangeat does not hesitate to express his opinion that the Roman law with respect to the persons last mentioned was very defective.

D. 48, 8 ; Fr. 9, s. 2, D. 48, 9. They forfeited none of their former rights or dignities, Fr. 20, D. 1, 5 ; and were still able to make acquisitions through their curators or slaves. Fr. 63, D. 29, 2 ; Fr. 70, s. 4, D. 46, 1.

[1] Demangeat, *Cours Elémentaire de Droit Romain*,—vol. I. p. 244, (1870 ed.). Ortolan. *Généralisation du Droit*, s. 94 ; Mackeldey, *Compendium of Modern Civil Law*, s. 127.

[2] Fr. D. 27, 10 ; 3 J. 1, 23.

[3] 6. C. 5. 70.

[4] Fr. 6, D. 45, 1 ; Demangeat, *Cours Elémentaire de droit Romain*, vol. I, p. 386.

"Je préfère," he candidly declares, "de beaucoup le "système du droit français, aux termes duquel, la justice "ayant une fois reconnu qu'une personne est dans un "état habituel de démence, d'imbécillité ou de fureur, "les actes que fera maintenant cette personne se trouvent "frappés d'une présomption de nullité."[1]

In the matter of testaments insane (*furiosi*) and dumb (*muti*) persons, posthumons children, infants, sons in power, slaves belonging to others, and prodigals interdicted from the management of their own affairs were neither competent to make such instruments[2] nor to take part in their execution as witnesses.[3] But they were still said to have the *testamenti factio*, because, as Pomponius says in a passage afterwards incorporated by Justinian in his Institutes,[4] *licet enim testamentum facere non possunt, attamen ex testamento vel sibi vel aliis adquirere possunt.*[5] An exception, however, was made in favour of a soldier, who though deaf and dumb was competent to make a will, provided it was made *ante causariam missionem*, that is before his discharge for an accidental reason.[6] Justinian maintained this exception to the general rule of law in his Institutes.[7] A *Cœcus*, or blind man, could make a testament by observing the forms introduced by the Emperor Justin *viz.*, by securing the presence of a *tabularius* (or notary), or of some other person in addition to the seven witnesses ordinarily required,

[1] *Ibid.*

[2] Fr. 16, D. 28, 1; 4 I. 2, 19; 1, 2. I, 2, 12. A madman (*furiosus*) could make a testament during a lucid interval (1 J. 2. 12). and so could persons who had lost the faculty of hearing or speaking by reason of ill health or other accident, 3 J. 2, 12; Const. 10, C. 6, 22

[3] 6 I. 2, 10.

[4] *Ibid.*

[5] Fr. 16, D. 28, 1.

[6] Fr. 4, D. 29, 1.

[7] 2 I. 2, 11.

and getting him either to write a testament at his dictation, or to read aloud to him the one already prepared.[1] A testament made during captivity was invalid, and continued so even after the captive obtained his freedom.[2]

Orbi et cœlibes.

Under the *leges Julia et Papia Poppœa* certain disabilities were attached to persons who had no children *(orbi)*, or who had either abstained from marriage altogether after attaining the age of twenty-five[3] *(cœlibes)*, or had neglected to contract a second marriage on the annulment of the first marriage by death or divorce. The above laws while not actually withdrawing the *testamenti factio* from such persons seriously affected their right to receive testamentary gifts *(jus capiendi ex testamento)*. Thus the *cœlebs* by the Julian law was prohibited from receiving inheritances and legacies (although he was able to acquire *fideicommissa*) unless he took advantage of the period of a hundred days allowed by that law from the death of the testator to contract marriage;[4] while the *orbi* by the Papian law lost the half of an inheritance and of legacies, although previous to the *senatus-consultum Pegasianum* they could acquire the whole *per fideicommissa*. Under that law, however, they were prohibited from taking *fideicommissa* as well as inheritances.[5] It appears from a passage of Terentius Clemens that the caducary laws did not apply if the *orbus* happened to be instituted heir by one who was not solvent: *Legi enim locum non*

[1] 4 I. 2, 12; Const. 8, C. 5, 22.

[2] 5 J. 2, 12.

[3] Celibacy was not imputed as a fault to one under this age.—*Ulp.* Frag. 16, s. 1; Demangeat, *Cours Elémentaire de droit Romain*, vol. I, p. 631, note (6).

[4] *Ulpian.* Frag. tit. 16, s. 1.

[5] *Gaius.* Comment. 11, s. 286.

esse in ea hereditate quæ solvendo non est.[1] These laws were partly abrogated by Caracalla, and the penalties for celibacy were annulled by a constitution (339 A.D.) of the Emperors Constantine, Constantius and Constans.[2] At a later period they were completely and textually abrogated by Justinian.[3]

[1] Fr. 72, D. 28, 5.
[2] Const. 1, c. 8, 58.
[3] Ortolan. *Histoire de la Législation Romaine*, s. 377.

CHAPTER II.

Domicile—Class and Profession—Religion, and Relationship.

Domicile.

CONTINUING the subject of those special qualities which in Roman law affected private rights I will first allude to the effect of Domicile. Before the constitutions of Caracalla and Justinian had removed all distinctions as to soil and enabled Modestinus to use the proud boast *Roma communis nostra patria est*;[4] the question of Domicile was important in order to determine by whom the duties connected with public offices were to be discharged, and who were to be liable to the burdens and obligations of each separate municipality. The qualification of a *civis* or *municeps* was determined by birth, manumission, allection, or adoption; while that of an *incola* by domicile or residence. *Cives quidem origo*, says a constitution of

[4] Fr. 33, D. 1.

the Emperors Diocletian and Maximian, *manumissio, allectio vel adoptio; incolas vero (sicut et Divus Hadrianus Edicto suo manifestissime declaravit) domicilium facit.*[1] The same constitution gives the following excellent test of what constitutes a legal domicile. *Ubi quis larem, rerumque, ac fortunarum suarum summam constituit, unde (rursus) non sit discessurus, si nihil avocet: unde cum profectus est, peregrinari videtur; quod si rediit, peregrinari jam destitit.*[2] Mackeldey explains the term *domicilium* as signifying "that place in which a person "has taken up his permanent residence,"[3] by which he means that the intention of mere transitory residence must not exist, as in that of students at an educational establishment, which was required to continue for ten years before it could constitute a domicile.[4] But Ortolan does not think that this definition is sufficiently accurate, because the premises on which the law founds the supposition that a man is in a certain place, are liable to vary, not only in different systems of legislation, but also in the same legislation, according to the different rights to which it is applied. These premises may be, for instance, either the origin of birth, or the principal establishment, or a certain length of residence, or the convention of the parties, or the payment of taxes, or even simple declarations made beforehand. "The "domicile" he says "is not *the place*, it is *at the place*, "as our Civil Code plainly says—art. 102." He would accordingly define *domicilium* as "the seat, the dwelling

[1] Const. 7, C. 10, 39; Fr. 1, D. 50, 1.

[2] Const. 7, c. 10, 39. See also Fr. 203. D. 50. 16.

[3] Compendium of Modern Civil Law, s. 136.

[4] Fr. 5, s. 5, D. 47, 10. So Lord Loughborough in *Bempdé* v. *Johnson*, 3 Ves. J. 201, observes that "Domicile is a place of residence that cannot be referred to an occasional and temporary purpose."

"which a person is always supposed to have in the eye "of the law for the exercise and application of certain "rights."[1]

Domicile, either voluntary or compulsory.

Domicile was said to be voluntary *(Domicilium voluntarium)* when it depended upon a man's own will and pleasure; but when a person was compelled by legal necessity to remain in a certain locality, it was considered to be of a *compulsory* character and was styled *domicilium necessarium*. Thus a *relegatus*, according to Paulus, had a *necessarium domicilium* at the place to which he was relegated.[2] A *miles*, or soldier, at the place where he served, *si nihil*, as Hermogenianus adds, *in patria possideat*.[3] *Senators* and other *public officers* where they were obliged to carry on their duties, the domicile of origin being, in their case, set aside with respect to personal burdens so long as they retained their dignity or office: *Origini eximuntur*, says Paulus, *licet municipalem retineant dignitatem*.[4] Wives, according to a rescript of the Emperors Antoninus and Verus, followed the domicile of their husbands and were not liable to the municipal obligations of the domicile of origin.[5] But this was only in the case of a lawful wife, for if the woman was not lawfully married, according to a rescript of the *Divi Fratres* she continued subject to the obligations imposed by the domicile of origin.[6] The death of the husband did not deprive the wife of his domicile *(vidua mulier amissi mariti domicilium retinet)*,[7] and if she claimed her dower she was obliged to do so

[1] *Généralisation du droit Romain*, s. 80, note 2.
[2] Fr. 22, s. 3, D. 50, 1.
[3] Fr. 23, *Ibid.*
[4] Fr. 22, s. 5, *Ibid.*
[5] Fr. 38, s. 3, D. 50, 1; Const. 1, C. 10, 62.
[6] Fr. 37, s. 2, *Ibid.*
[7] Fr. 22, s. 1, *Ibid.*

where her husband had his domicile and not where the deed of dower was executed.[1] A *filius familias*, that is a son who was under the power of his father, retained his father's domicile so long as he lived in the same abode; but if he established a separate domicile, he was governed by it. This is clearly declared by Ulpian who says, *non utique ibi, ubi pater habuit, sed ubicumque ipse domicilium constituit.*[2] Papinian gave it as his opinion that the *jus originis* with respect to the capacity of filling public offices, and the obligations of discharging public duties, was not affected by adoption, but that the person adopted became liable to additional burdens through his adoptive father.[3] If, however, he was subsequently emancipated by his adoptive father, he not only ceased to be related to the latter as a son but he also lost his position as a citizen which he had acquired in the particular state by the act of adoption.[4] *Libertini*, says Ulpian, follow the origin or domicile of their patrons, as do also their children.[5] And if a slave belonged to several masters who had not the same common *origo*, on being manumitted he followed the origin of each of them *(omnium patronorum originem sequitur)*, that is, he acquired a plural citizenship.

To constitute a *voluntary* domicile both the *fact* of residence and a present *intention* of maintaining such residence permanently, were required to be combined. Thus, as Papinian says, *sola domus possessio, quæ in aliena*

What consti

[1] Fr. 65, D. 5, 1.

[2] Fr. 4, D. 50, 1. As regards the *forum originis*, however, Ulpian says, "*Filius civitatem, ex qua pater ejus naturalem originem ducit, non domicilium sequitur.*"—Fr. 6, s. 1, *Ibid.*

[3] Fr. 15, D. 50, 1. See also Fr. 17, s. 9, *Ibid.*

[4] Fr. 16, *Ibid.*

[5] Fr. 6, s. 3, *Ibid.*

[6] Fr. 7, 22 pr. 27 pr. 37 s. 1, *Ibid*; Fr. 3, s. 8, D. 50, 4.

civitate comparatur, domicilium non facit.[1] The same test was to be applied if a person had two places of residence in each of which he alternately dwelt. In such a case, according to Celsus, the domicile was to be decided with reference to intention (*ubi domicilium habeat, existimatione animi esse accipiendum*), because it was considered almost impossible for a person not to show some preference for one of the two places.[2] It was believed to be equally impossible for a person to be without a domicile, unless indeed he had abandoned his original domicile and had gone in search of a new one; during the interval between his abandonment of the former and his electing another, he might be said to be *sine domicilio*.[3] So also in effecting a change of domicile one of the above elements without the other was insufficient. A domicile, says Paulus, is transferred *re et facto, non nuda contestatione: sicut in his exigitur, qui negant se posse ad munera, ut incolas, vocari.*[4] Nor could a man extinguish citizenship, with its consequences, arising from his domicile of origin at his own will and pleasure: *Origine propria neminem posse voluntate sua eximi, manifestum est.*[5] Thus in a constitution of the Emperor Alexander speaking of a person who was a Byblian by origin, but who had become a resident (*incola*) amongst the Beryti, it is held that he would be liable to bear the municipal obligations of both places.[6]

Change of Domicile, how effected

Absence—

Absence from domicile was also considered to be voluntary or compulsory, and it was further

[1] Fr. 17, s. 13, D. 50, 1. See also Const. 4, C. 10. 39.
[2] Fr. 27, s. 2, *Ibid*; Fr. 5, Fr. 6, s. 2, *Ibid.*
[3] *Ibid.*
[4] Fr. 20, *Ibid.*
[5] Const. 4, C. 10, 38; Fr. 6, D. 50, 1.
[6] Const. 1, *Ibid.*

divided into *praiseworthy, blameless,* and *dishonourable.*[1] A person was considered *absent* in law although really present at his residence, if he was unable to prosecute his rights. Thus, according to Labeo, the Prætorian edict which allowed a *restitutio in integrum* to absentees applied to persons incarcerated in the public prisons and also to *furiosi* and *infantes.*[2] Ordinarily, however, a person was regarded as absent who was not at his usual place of residence: *qui non est eo loci, in quo loco petitur—non enim,* continues Ulpian, *trans mare absentem desideramus: et si forte extra continentia urbis sit, abest: cæteram usque ad continentia non abesse videbitur, si non latitet.*[3] The Prætorian edict refers to those who are absent *ob metum* or *ob reipublicæ causam.*[4] The *metus* was required to be a just fear of death or bodily torture: *sed non sufficit,* says Ulpian, *quolibet terrore abductum timuisse,* and the sufficiency of the fear was a question for the decision of the judge (*hujus rei disquisitio judicis est*).[5] Again with respect to those *qui reipublicæ causa, sine dolo malo abfuissent,* Callistratus explains that persons who take advantage of their mission to stay away longer than is necessary for the sake of personal gain, are not entitled to the privilege of a *restitutio in integrum.*[6] Indeed those only were entitled to be considered as absent on State affairs (*ob reipublicæ causam*), who, as Ulpian elsewhere says,

Metus—what constituted.

Absence on state affairs

[1] *Mackeldey,* Comp. of Roman Law, s. 137; Fr. I. s. I. D. 4, 6.

[2] Fr. 9, 10, 22, s. 2, D. 4, 6. See also Fr. 209, D. 50, 16; Fr. 124, s. 1, D. 50, 17.

[3] Fr. 199, D. 50, 16. A person who was detained by robbers was considered to be absent, but not if he was captured by the enemy. S. 1, *Ibid*; Fr. 9, D. 4, 6. But see Fr. 14, 15 D. 4, 6.

[4] Fr. 1, s. 1, D. 4, 6.

[5] Fr. 3, D. *Ibid.*

[6] Fr. 4, D. *Ibid.* See also Ulpian, Fr. 5, D. *Ibid.*

non sui commodi causa, sed coacti absunt.[1] By a special decree of Antoninus Pius, soldiers actually serving as such at Rome were included in this favoured class but generally those who were employed in a public capacity at Rome, magistrates for instance, were not entitled to the same privilege.[2] Absence *ob necessitatem* was considered in the case of the following persons:

I. *Qui in vinculis fuisset.* In this class were included those who were detained in public prisons, under military discipline or by order of the magistrates, or who had been captured by robbers, or pirates, or were in fetters.[3]

II. *Qui in servitute fuerit.* Those *bona fide* in servitude or detained.[4] A person was reckoned to be in servitude *quamdiu non est ejusmodi lis cœpta.*[5]

III. *Qui in hostium potestate fuit.* Persons captured by or born among the enemy provided they were not deserters.[6]

Lastly, if absence although not owing to any of the preceding grounds could still be referred to a *justa causa*, it was not allowed to prejudice a person's rights, and a *restitutio in integrum* might be obtained under the *clausula generalis* of the Prætorian Edict. This clause, as Ulpian explains, was intended to meet those cases which although well worthy of the Prætor's equitable interference could not be specifically enumerated.[7] Thus persons employed as envoys for the municipality, although not strictly absent *reipublicæ causa*; those absent

[1] Fr. 36, D. *Ibid.*
[2] Fr. 5, s. 1; Fr. 6, D. 4, 6; Fr. 35, s. 4, *Ibid.*
[3] Fr. 9 and 10, *Ibid.*
[4] Fr. 11, *Ibid.*
[5] Fr. 12, *Ibid.*
[6] Fr. 14, Fr. 15, s. 1. *Ibid.* But see Fr. 199, s. 1, D. 50. 16.
[7] Fr. 26, s. 9, *Ibid.*

studiorum causa, and those detained as *fidejussores*,[1] or as sureties for others, were held to be absent for a just and reasonable cause.[2]

As regards prescription the parties were regarded as *present* when they were both domiciled in the same province, and *absent* if they lived in different provinces.[3] In the former case the period of prescription required to confer the ownership of immoveables was ten years, and in the latter, twenty years.[4]

Class and profession.

Class and *profession* also exercised no unimportant influence over private rights. Some professions were more favoured than others, and among the foremost was the military order. The *milites* were accorded numerous privileges especially in the matter of executing testaments. Thus the privilege of making wills independent of any formality, first conferred upon soldiers as a temporary concession by Julius Cæsar, was subsequently continued in their favour by Titus and Domitianus, largely extended by Nerva, and permanently confirmed by Trajan.[5] Justinian, however, added the proviso that this privilege could only be claimed by soldiers while engaged on actual service. At other times and while living at their own homes, they were not permitted to claim it.[6] They could disinherit their sons by simply

[1] *Fidejussor* was a person who stipulated to become a co-debtor with the real debtor for his debt. *Fidejussores* were held to be liable without limitation of time, and, whatever might be their number, each was bound for the whole, and thus the creditor was at liberty to sue any one he pleased for the whole amount of the debt. But by a rescript of Hadrian the creditor was compelled to claim their shares from each and all of those who were solvent at the time.—*Gaius*, Comment. III. 121.

[2] Fr. 28, *Ibid.*

[3] Const. 12, C. 7, 33; 1 Const. 7, 31.

[4] Novel. 119, c. 7—;Const. 7, c. 7. 35; pr. I. 2. 6.

[5] Fr. 1, D. 29, 1.

[6] Pr. I. 2, 11.

passing them over in silence, whereas the general law required that sons who were intended to be disinherited should be specifically named by the testator.[1] They could institute as heirs both *Latini and Peregrini*, or make bequests to them, contrary to the principles of the civil law.[2] Deaf and dumb persons as we have seen did not possess the *testamenti factio*, but an exception was made in favour of soldiers who were in this state.[3] And the most remarkable privilege of all was that soldiers might die partly testate and partly intestate,[4] which was diametrically opposed to the fundamental maxim of the law of inheritance, *Nemo paganus partim testatus partim intestatus decedere potest.*[5] In opposition or contradistinction to *milites* all other persons were called *pagani* or *privati.*[6] Among the latter, however, the liberal professions (*liberalia studia*) which included rhetoricians, grammarians and geometricians, were treated with especial favour.[7] The earliest elementary teachers were known as *Ludimagistri*, who were however inferior to the *Grammatici*. The latter occupied themselves with the interpretation of the poets and the higher branches of literature. They were not held in much repute before the time of Crassus Mallestes, who excited the Roman

[1] 6 I. 2, 13; *Gaius*, Comment. 2, 123, 127. Sons could not be disinherited *inter ceteros*, but other persons of both sexes could be disinherited either by name or *inter ceteros.*—*Ibid*, s. 128.

[2] *Gaius*, Comment. 2, 110.

[3] Fr. 4, D. 29, 1; 2 I. 2, 11.

[4] Fr. 6, D. 29, 1; 5 I. 2, 14.

[5] 5 J. 2. 14; Demangeat, *Cours Elémentaire de droit Romain*, vol. I. 604.

[6] Fr. 3. D. 29, 1; Const. 19, C. 2, 3; Const. 1, C. 9, 23. Soldiers who did not conquer were called *pagani* by way of reproach. Thus Antoninus addressing his prætorian cohorts who had lately suffered a defeat, said: *Vos, nisi vincitis, pagani.* Tacit. Hist. 3. 24, and Brotier's note thereto.

[7] 1 D. 50, 13.

youth to this study by his lectures. Public stipends were subsequently given to grammarians, and an annual ration of corn was distributed to them, which was from time to time diminished and again restored.[1] Rhehoricians and philosophers met with singular reverses of fortune, but under the later emperors they began to rise in favour, and public salaries, in some instances of very large amount, were assigned to them. The above persons enjoyed among other privileges [2] an exemption from tutorships and curatorships, if they practised their profession at Rome, or *in propria patria*.[3] Medical men whose profession was in early times, principally, if not wholly practised by slaves, were first made free of the city by Julius Cæsar,[4] and were subsequently confirmed in their privileges by Augustus, Hadrian and later emperors. They were also exempted from tutorships and curatorships, subject to the same proviso of practising at Rome or *in patria sua*, and not exceeding the number authorised by Antoninus Pius.[5] In small cities, by the rescript of that emperor, the numbers were fixed as follows:—five physicians, three rhetoricians, and the same number of grammarians. The largest number allowed in any provincial city were ten physicians, five grammarians and five rhetoricians.[6]

[1] *Colquhoun's* Summary of the Roman Civil Law, s. 795.

[2] In a constitution of the year 321 the Emperor Constantine thus confirms and enumerates these privileges. *Medicos, et maxime archiatros, vel exarchiatris, Grammaticos, et professores alios literarum, et doctores legum, una cum uxoribus et filiis, necnon et rebus, quas in civitatibus suis possident, ab omni functione, et ab omnibus muneribus vel civilibus vel publicis immunes esse præcipimus: et neque in provinciis hospites recipere, nec ullo fungi munere, nec ad judicium deduci, nec eximi, vel exhiberi, vel injuriam pati: ut, si quis eos vexaverit, pœna arbitrio judicis plectatur.*—Const. 6, C. 10, 52. See also Const. 11, *Ibid.*

[3] Fr. 6, s. 1, 2, 11, D. 27, 1; 15 I. 1, 25.

[4] Seut. Jul. 42.

[5] 15 I. 1, 25; Fr. 6, s. 1, D. 27, 1.

[6] Fr. 6, s. 2, D. 27, 1.

Lawyers Clerici.

Lawyers (*doctores legum*) practising at Rome were similarly exempted,[1] and so were *clerici* by a constitution of Justinian both at Rome *et in omnia terra ubicumque Christianorum nomen colitur*.[2] But *poetæ* by a constitution of the Emperor Philip,[3] and *calculatores* by a constitution of the Emperors Diocletian and Maximian,[4] in accordance with a decree of Antoninus Pius, were not invested with special immunities. Nor were *Hydraulists* (*hydraulæ*).[5] *Athletes* who, according to Ulpian, had been crowned as victors in the sacred contests, were entitled to be exempted from the office of tutors,[6] but it appears from a constitution of the Emperors Diocletian and Maximian that in order to be able to claim this privilege they must have gained not less than three crowns in the sacred contests.[7]

Poetæ and calculatores not exempted.

Athletes exempted under special circumstances

Religion.

Under the Christian Emperors *infideles*, or those who did not profess the christian religion, as well as apostates and *heretics* (*heretici*) were treated with marked severity, and were subject to many disabilities in comparison with the more favoured *orthodox* christians (*orthodoxi, catholici*). Among the *heretici* Justinian included the followers of Nestorius, Eutyches, and Acephalus;[8] while the *orthodoxi* were those who accepted the doctrines of

[1] Fr. 6, s. 12, D. 27, 1, Const. 6, C. 10, 52. See note (3) *ante* p. 31.

[2] Const. 52, C. 1, 3. In the matter of prescription also this class was especially favoured, for while with respect to private immoveable property a title might be acquired by an adverse holder according to circumstances after ten, twenty, or thirty years possession, in the case of ecclesiastical property the legal period was extended by Justinian to forty years. Novel 131, ch. 6.

[3] Const. 3, C. 10, 52.

[4] Const. 4, C. *Ibid.*

[5] Const. 4, *C.* 10, 47.

[6] 6, s. 13, D. 27, 1.

[7] Const. 1, C. 10, 53.

[8] Novell 131, ch. 14. These sects are also mentioned in a decree

the four Œcumenical Councils.[1] Jews and apostates were reckoned as non-Christians. Jews were not allowed to intermarry with Christians;[2] they could not acquire Christian slaves, nor convert such to their own religion, under penalty of death, and the slaves themselves were entitled to their liberty.[3] A Jew who dared to convert a Christian to his own religion also suffered the penalty of death.[4] As regards *Pagans* Constantine directed all their places of worship to be closed, and prohibited them from performing any sacrifices connected with their religion, any infringement of this decree being punishable with decapitation and confiscation of all property.[5] Sectarian heretics were likewise subjected to severe laws. Thus a constitution of the Emperors Theodosius and Valentinian of the year 428 not only deprived certain sects therein named of the rights of either assembling or remaining in any place in Roman territory, but also deprived them of all civil rights.[6] An earlier constitution of the year 407, published by Honorius and Theodosius, was specially directed against the Manichæans and Donatists, who appear to have been treated with even greater severity. The practice of their religion was pronounced to be a public crime, they were to be subjected to decapitation when seized, their property was liable to confiscation, except that left to their children who had renounced their errors; and they might be accused even after death.[7] In short, as declared by a constitution of

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of Gregory, together with sixty-five other sects, and it is added that this even was not a complete list. *Sunt et aliæ hæreses sine auctore et sine nominibus.* D. 24, 3, 39.

[1] *Ibid* ch. I.

[2] Const. 6, C. 1, 9.

[3] Const. 1, C. 1, 10.

[4] Const. 18, C. 1, 9.

[5] Const. 1, C. 1, 11.

[6] Const. 5, C. 1, 5.
Const. 4, and 15, *Ibid.*

the year 326, *Hereticos non solum ab his privilegiis alienos esse volumus, sed etiam diversis muneribus constringi et subjici.*[5]

Pontifices.

In pagan Rome certain privileges were attached to the principal sacerdotal offices. Thus the *Pontifices*[6] could not be cited before a civil or criminal tribunal, or compelled to give an account of any matter whatever to the Senate; they held their dignity for life; they wore a robe bordered with purple (*toga prætexta*), and dwelt in public buildings on the *sacra via*, or in Numa's house;[7] they had the supreme superintendence and judicial cognisance of all matters connected with religion, and they had the power of making new laws and regulations (*decreta pontificum*) in case the existing laws or customs were found to be defective.[8]

Pontifex Maximus.

The chief priesthood, or office of Pontifex Maximus, was vested from the time of Numa in the kings; and after the expulsion of Tarquin the offices of *Rex Sacrorum* and *Rex Sacrificulus* were instituted to perform the sacred rites which had hitherto been performed by the kings themselves.

The Pontifex Maximus had the regulation of the calendar, and the fixing of the *dies fasti, nefasti,* and *intercisi;* the selection of the Vestal Virgins and the superintendence of their conduct; he could compel a magistrate to resign

[5] Const. 1, *Ibid.*

[6] Various derivations are given of this word. Varo derives it from *pons* because the *pons sublicius* was said to have been originally built by a pontiff, and was on several occasions restored by successors in that office (*De Ling Lat.* IV. p. 24); but according to Livy common tradition assigned the building of this bridge to a period long posterior to the institution of pontiffs (lib. 1, 33). Dr. Schmitz thinks it more probable that the word is formed from *pons* and *facere*, and signifies the priests who offered sacrifices upon the bridge. Smith's *Antiq.* tit. *Pontifex.*

[7] Carr's *Manual of Roman Antiquities*, p. 25.

[8] Aul. Gell. II. 28; X. 15.

if he had been elected contrary to religious usages, and he was charged with the interpretation of the *juris actionum*.[1] He might hold any other civil, military, or priestly office, provided it did not interfere with his duties as pontifex; and Livy and other writers mention instances of a chief pontiff holding the office of consul.[2] The pontificate was originally confined to patricians, and continued to be so, even after the Ogulnian law (453) allowed four out of the eight pontiffs to be elected from the plebians, down to the year 254 B.C., when Tib. Coruncanius, a plebian, was invested with the dignity.[3] On the other hand, a pontiff was subject to certain disabilities. Before the time of Licinius Crassus (131 B.C.) he could not leave Italy;[4] he was not allowed to marry a second wife, a law which, as Suetonius informs us, Cæsar was the first to violate;[5] the healthy exercise of horse-riding was denied to him, and the very sight of a dead body unfitted him for his office.

Feciales.

The *Feciales*, of whom Numa instituted a college of twenty, possessed the privilege of declaring war and concluding treaties of peace, and the *jus feciale* was established by that body. As a token of their inviolability they crowned themselves with sacred herbs (*sagminæ*) whence they were called *sagminarii*.

Augurs.

The *Augurs* were consulted on every important occasion, and all things were conducted by auspices during war and peace, at home and abroad.[6]

Auguriis certe sacerdotioque Augurum tantus honos accessit, says Livy in an earlier passage to the one from

[1] Vattel. *Droit de Gens*; Smith's and Carr's *Roman Antiquities*; Livy 1, 20; Diony. ii., 73, &c.

[2] Livy 28, 38; Cic. *de Harusp. Resp.* 6.

[3] Livy *Epit.* 18; *Hist.* 10, 6.

[4] Liv. *Epit.* 59; *Val. Max.* VIII. 7, 6.

[5] Cæs. 21.

[6] Livy. VI. 41.

which I have just quoted, *ut nihil belli domique postea, nisi auspicato, gereretur: concilia populi, exercitus vocati, summa rerum, ubi aves non admisissent, dirimerentur.*[1] Indeed, as Montesquieu remarks with as much truth as pleasantry, the appetite of a fowl, or the entrails of a beast, were capable of deciding the destinies of an empire![2] The election of magistrates and other public officers was regulated by auspices, and the office of Augur was originally confined to the patrician order,[3] but plebians were subsequently permitted to hold it.

In the famous speech of Appius Claudius Crassus against the admission of plebians to the consulship, at that time restricted to the patricians, he thus alludes to the importance of auguries in a Roman point of view. "So "peculiar to us are the auspices, that not only do the "people elect in no other manner, save by auspices, "the patrician magistrates whom they do elect, but even we ourselves, without the suffrages of the "people, appoint the *interrex* by auspices, and in our "private station we hold those auspices, which they do "not hold even in office. What else then does he do, "than abolish auspices out of the state, who, by creating "plebian consuls, takes them away from the patricians "who alone can hold them? They may now mock at "religion. For what else is it, if the chickens do not "feed? if they come out too slowly from the coop? if a "bird chaunt an unfavourable note?" He then adds:— "These are trifling: but by not despising these trifling "matters, our ancestors have raised this state to the "highest eminence."[4] These omens were, however, very often either entirely disregarded or conveniently ex-

[1] *Ibid*, 1. 17.
[2] *Politique des Romains dans la Religion.*
[3] Livy VI. 41.
[4] Livy. VI. 41.

plained away when they did not suit the views of the senate, or of a military commander. Thus Valerius Maximus relates a story of Claudius Pulcher, who, enraged that the chickens would not feed when he was about to fight a naval engagement, ordered them to be flung into the sea, exclaiming—*Quia esse nolunt, bibant.*[1] And another story is told of Scipio Africanus who, when landing in Africa and in springing to the shore chanced to fall, seized the ground, exclaiming, "Oh, land of Africa, I hold thee."

Flamines.

The *Flamines*, or priests instituted for the service of particular deities—such as *Flamen Dialis* for Jupiter, *Martialis* for Mars, and *Quirinalis* for the deified Romulus,—also possessed special privileges. For instance, while holding the office of *Flamen Dialis* a person was not subject to *Patria Potestas*,[2] and the same privilege was enjoyed by the *Vestal Virgins*.[3] These were the only offices in ancient times which had the effect of dissolving the *patria potestas*, but Justinian extended the same privilege to the *summum patriciatus* (a dignity conferred on the emperor's privy councillors), to bishoprics, consulships, and other high offices. The *Vestal Virgins* had also the uncontrolled disposal of their property, the right of making a testament, of giving evidence without the

Vestal Virgins.

[2] Lib. 1, cap. 4, 3.

[3] *Gaius.* Comment. 1, 130.

[4] *Ibid.* A vestal virgin was required to be above six and under ten years of age, perfect in all her limbs, in the full enjoyment of her senses, the daughter (*patrima et matrima*) of parents who had been married by the rite of *confarreatio* and who had never been in servitude, whose home was in Italy, and who followed no dishonourable occupation. Aul. Gell. *Noct. Attic.* 1, 12. The period of service lasted for thirty years, after which they might throw off the emblems of office, unconsecrate themselves, return to the world and even contract marriage. Aul. Gell. IV. 7; Plutarch. *Numa.*

[1] Const. 66, C. 10, 31. Novel 83, ch. 3.

sanction of an oath, of freeing a criminal from punishment if they met him accidentally; prætors and consuls made way for them and lowered the *fasces* if they met them in the street; they were honoured with a particular seat in the theatre and at gladiatorial shows, and in later times testaments and the most important deeds, such as treaties and other State documents were committed to their care.[1]

Flaminica Dialis.

The *Flaminica Dialis* was the wife of the priest of Jupiter, and was also invested with certain privileges. Thus a Senatus-consultum passed on the authority of Maximus and Tubero, enacted that she was only in *manus* with reference to the *Sacra,* but beyond this she was to be regarded just as if she had not come into *manus.*[2] She could not be divorced, and her death compelled the *dialis,* her husband, to resign his office.[3]

Relationship.

Relationship in the Roman system exercised an influence over private rights with reference to marriage, succession, and guardianship.

Distinction between cognatio and agnatio.

The ancient Romans drew a distinction between *cognatio naturalis,* or natural relationship, and *agnatio,* or civil relationship, producing civil effects and conferring the rights of family.[4] The former term signified the tie existing between persons who were descended the one from the other, in which case they were said to be related in a *direct line (linea recta)*;[5] or it comprehended all those who were descended from a common ancestor, and who were said to be related in the *collateral line (linea*

[1] Aul. Gell. 1, 12, 10, 15; Senec. Controvers. VI. 8; Sueton. Octav 44; Cicero. *Pro Murena* 35; Sueton. *Jul.* 1, 83; Tacitus. *Annal* 1, 8; App. B. C. V. 73; Dion Cass. 48, 37, 46.

[2] Gaius. *Comment,* ,1 I36.

[3] Smith's Dict. Gr. and Roman Antiq; Aul. Gell. X. 15; Varro de L. L. VII. 44.

[4] Fr. 10, s. 2, s. 6, D. 38, 10.

[5] Fr. 10, s. 9. *Ibid.*

transversa, obliqua, ex transverso, à latere).[1] The *respectus parentelæ* referred to the relationship existing between two persons one of whom was immediately descended from the common ancestor, while the other was descended in a more distant degree. In reckoning the degrees of relationship the Romans acted upon the rule *tot sunt gradus quot sunt generationes*, that is, they computed a degree for every generation, and accordingly father and son were said to be related in the first degree, grandfather and grandson in the second, uncle and nephew in the third, and so forth.[2] In the collateral line they determined the nearness of relationship by computing the whole number of generations in both the ascending and descending lines. Thus, as Gaius says, *ex transverso* a brother and sister are related in the second degree, and an uncle and nephew in the third.[3] The Code Napoléon has adopted this method of computing degrees of relationship, (Arts. 737-738), but the Canon law has deviated from it with respect to the collateral line, and holds collateral relatives akin to each other in the same degree in which each is related to their common ancestor: *Quoto gradu remotior distat a communi stipite, eo gradu distant inter se.* In other words, it merely reckons the ascending and not the descending lines—thus a brother and sister by this system are related to each other in the first degree, and cousins in the second degree.[4] Natural relationship may again be either *legiti-*

[1] Fr. 1, Fr. 9, Fr. 10, s. 10, *Ibid;* Const. 9, s. 1, C. 5, 27; Novel. 118, ch. 2, 3.

[2] Fr. 1, s. 3, 7; Fr. 10, s. 12, et seq, D. 38, 10, Eck's *Principia Juris Civilis*, vol. II. tit. X. 11, p. 365.

[3] Fr. 1, s. 4, 5, *Ibid.* Eck's *Principia Juris Civilis, Ibid.* s. 12.

[4] Pothier *Traité du contrat de marriage*, 124, et seq; Mackeldey, *Compendium of Modern Civil Law*, s. 130, note (c), Kaufmann's ed. Eck's *Principia Juris Civilis*, vol. II. tit. X. 13, p. 365. Bockelmann

mate or *illegitimate* according as it is founded on a lawful marriage or on simple cohabitation. To effect a lawful marriage, as we shall see hereafter when we come to consider that subject, the Roman law imposed the following conditions, namely :—1. That the contracting parties should have the *connubium*. 2. That they should not stand within the prohibited degrees of relationship. 3. That they should have attained the age of puberty, fourteen years in the case of males and twelve in the case of females. 4. That, if under the power of any one, they should have obtained that person's consent. Consequently slaves could not contract a lawful marriage, and the term *contubernium* was applied to the union of persons belonging to that class; but the law would not permit them in forming such a union to violate natural ties, and *qui si contra hoc fecerint, crimen* stupri *committunt*.[1]

Liberi legitimi.

Liberi legitimi were those who were begotten in lawful marriage, or who were subsequently legitimated in the three recognised modes.[2]

Liberi naturales.

Liberi naturales were those who were begotten in what may be termed licit concubinage, and with regard to whom paternity was assumed for certain purposes.[3]

Tractatus de Differentiis Juris Civilis, Canonici et Hodierni. cap. 34, s. 8.

[1] Const. 4, c. 5, 4.

[2] Const. 1, 3, 4, 5, 11, et seq. C. 5, 27; Novel 89, ch. 11; 13 J. 1, 10.

[3] Novel 89, ch. 12. I mean by licit concubinage a permanent cohabitation with a free woman to whose marriage with the man there was no legal obstacle, *in schemate concubinæ, ubi omnio indebitatus est et concubinæ in domo affectus, et filiorum ibidem proles.* Novel 89, 12, s. 4. Huber *Prælectionum Juris Civilis*, vol. 1, p. 271. The word *naturalis*, however, is at times applied to a son born in lawful marriage in opposition to an *adopted* son.—2, 11, J. 3, 1; Ulp. *Frag.* 8, s. 1, 28 s. 3; Fr. 1, D. 1, 7; and on the other hand the children of slaves were also called *liberi naturales.*—Fr. 88, s. 12, D, 31, 2.

This last class was opposed to the *vulgo concepti et spurii*, who, as explained by Modestinus, were those who were not able to prove their paternity—that is, had no recognised father—or who were the offspring of a prohibited intercourse, and who were said to be simply παρα τὴν σπορὰν, that is begotten promiscuously, or at haphazard.[1] These persons were admitted to the inheritance of their mother by the *Senatus-consultum Orphitianum*, but Justinian so far altered the law in this respect as to exclude such children if the mother was *illustris*, or of high rank, and had one or more children born in lawful marriage.[2]

concepti.

Stuprum was the general expression used to designate an immoral or illicit intercourse, and the distinctive forms were *incestus*, the issue of which were designated *ex damnato coitu procreati*, and *adulterium*, or adultery.

Struprum.

The issue of such unions were not only excluded from all rights of inheritance *ex testamento* or *ab intestato*, but they were not even deemed worthy of the slighest provision for their maintenance.[3]

The *liberi naturales* while having a recognised father were not under his *potestas*, although by means of *legitimation* the father might acquire this power; but the *vulgo quæsiti et spurii* never could fall under *patria potestas* for the simple reason that in the eye of the law they were regarded as *sine patre*, having no father.[4]

Liberi naturales vulgo qui not under potestas.

[1] Fr. 23, D. 1, 5; Fr. 2, D. 38, 8 12; J. 1, 10; Gaius. Comment. 64.

[2] Const. 5, c 6, 57.

[3] Novell 74, ch. 6; Novell 89, ch. 5, 1. Huber. *Prælectionum Juris Civilis*, I. p. 271, 272. The man who was guilty of any of these offences was punishable with *deportatio* and the woman was subject to the penalties of the *Lex Julia*,—Fr. 5, D. 48, 18.

[4] *Ibid.* To establish paternity the Roman law required that the child should be born in lawful marriage and not earlier than six months (or 182 days) from the day of the marriage. Hence Paulus says: *Pater vero is est, quem nuptiæ demonstrant.* Fr 5, D. 2, 4.

They were consequently *sui juris* from the moment of birth.

Agnatio.

Agnatio, as we have above remarked, was a kind of civil relationship producing civil rights and conferring family privileges. "Between *agnati* and *cognati* there is," says Paulus, "the same connexion as between a genus and its species: the natural agnate is necessarily a cognate, but the cognate is not always an agnate."[1] The foundation of *agnatio* was *patria potestas*, of *cognatio* a lawful marriage between the common ancestor and ancestress.[2]

Natural agnation.

According to Ulpian natural agnation had three constituent elements. In the first place agnates were required to be *cognati a patre*—that is, related on the father's side. Next, it was necessary that they should be *descendentes per virilem sexum*, that is, descendants in the *male* line; and lastly, they were required to be *ejusdem familiæ*, that is, belonging to the same family.[3]

Civil agnation

But agnation not only included those who were thus connected by legal relationship (*legitima cognatio*), that is, who were descended from a common ancestor exclusively through males, but it also embraced all those who were introduced into the family through the fiction of adoption, whether male or female, and the *male* descendants of such persons.[4] It was in fact a relationship based on the peculiar constitution of the Roman *familia*, the distinctive character of which was *patria potestas*.

"All persons," remarks Sir Henry Sumner Maine in his very interesting chapter on *Primitive Society and Ancient Law*, "are agnatically connected together who

[1] Fr. 10, s. 4, D. 38, 10.

[2] Maine's *Ancient Law*, ch. v. pp. 147, 149.

[3] Ulp. XI., 4. Fr. 1, D. 38, 8; 4 J. 3, 5; Gaius. *Comment.* 1, 156 3, 10.

[4] Fr. 1, s. 4, D. 38, 8.

"are under the same paternal power, or who have been "under it, or who might have been under it, if their "lineal ancestor had lived long enough to exercise his "empire."[1]

It was for this reason that descendants of females were excluded from the agnatic line, for when a woman married, whether or not she passed into the *manus* of her husband was immaterial, her children fell under the *patria potestas* of her husband, not of her father.[2] Hence it was said by Ulpian that a woman was *caput et finis* of her family.[3] At the same time the wife who came into *manus* acquired agnatic rights in her husband's family.[4]

of females excluded.

"It is obvious," continues Sir Henry Maine, "that the "organisation of primitive societies would have been con- "founded, if men had called themselves relatives of their "mother's relatives. The inference would have been "that a person might be subject to two distinct *Patriæ* "*Potestates*, but distinct *Patriæ Potestates* implied distinct "jurisdictions, so that anybody amenable to two of them "at the same time would have lived under two different "dispensations. As long as the family was an imperium "in imperio, a community within the commonwealth, "governed by its own institutions of which the parent "was the source, the limitation of relationship to the "Agnates was a necessary security against a conflict of "laws in the domestic forum."[5]

Gentiles.

Inferior in the order of intestate succession to the *agnati* but superior to the *cognati* were the *Gentiles*, or those who

[1] *Ancient Law*, p. 149. Maynz. *Eléments de Droit Romain*, vol. 1, s. 102, p. 213. "*Tamen omnes*," says Ulpian, "*qui sub unius* "*potestate fuerunt, recte ejusdem familiæ appellabantur, qui ex* "*eadem domo et gente prodîti sunt.*" Fr. 195, s. 2, D. 50, 16.

[2] 3 J. 1, 10.

[3] Fr. 195, s. 5, D. 50, 16.

[4] Maynz. *Eléments de Droit Romain*, Tom. I. s. 102, *page* 305 note (3).

[5] *Ancient Law*, ch. V. p. 149, 150.

could trace back their origin through all possible degrees of relationship to one common ancestor, and who consequently bore the *nomen*, or name of the common parent of the *gens*.

Scævola's definition as preserved by Cicero, is perhaps the most perfect, and is as follows:—

Gentiles sunt, qui inter se eodem nomine sunt. Non est satis. Qui ab ingenuis oriendi sunt. Ne id quidem satis est. Quorum majorum nemo servitutem servivit. Abest etiam nunc. Qui capite non sunt dimuniti. Hoc fortasse satis est. "*Gentiles* are those who bear a common name—this is "inadequate; who are descended from *ingenni*, or free-"born persons—this is still insufficient; none of whose "ancestors were slaves—something still is wanting; who "have never suffered a loss of status. This perhaps is a "complete definition."[1]

According to Festus, "*Gentilis* is one who is of the "same stock (*genus*), and one who is called by the same "name (*simili nomine*), as Cincius says, those are my "gentiles who are called by my name."[2]

In the early period of Roman history the patricians were alone able to boast that that they had a *gens*, or house,[3] but when the restrictions against the intermarriage of patricians with plebians were removed, we find *gentes* of the latter as well, and sometimes both patricians and plebians belonged to the same *gens*.

"In primitive times," says Ortolan, "*gentilitas* would "be the *agnatio* of patricians, the *gens* being the patrician "family."[4] But the term also included all those who had adopted the name and *sacra* of the representative of each *gens*. Thus clients and enfranchised were numbered in the

[1] Top. VI. 29.
[2] Smith's Dict. of Antiq. tit. *Gens*.
[3] Livy. X. 8.
[4] *Généralisation du Droit*, s. 64, XVIII.

civil *gens* of their patrician patrons, and consequently their descendants, though having *gentiles*, were not themselves *gentiles* to others.[1] If the client or enfranchised died without heirs the patron succeeded to his property.[2]

In ancient times in the case of intestate succession, the *unemancipated* children of the deceased were his heirs, the *emancipated* children being altogether excluded by the civil law, although admitted to the *possessio bonorum* by the Prætor.[3] In default of children under power (*sui heredes*) the succession passed to the nearest agnate,[4] and then to the *gentiles*.[5] The *cognati*, or those who were simply related to the deceased through females, were altogether excluded. So also with respect to tutelage the *agnati* were chosen to the exclusion of the *cognati*. *Nam hereditas*, says Ulpian, *quidem ad adgnatum pertinet, tutela autem ad adgnatum*.[6]

Distinction between agnati and as regards intestate succession.

But Justinian removed all these distinctions and placed the *agnati* and *cognati* on an equal footing, both with respect to succession and tutelage.[7] It is to be observed,

Abolished by Justinian.

[1] *Ibid.* "But it must be observed," says Mr. Long, alluding to Niebuhr's objection to the claim preferred by the Claudii to succeed to the property of a freed man, "though the descendants of freed "men might have no claim as Gentiles, the members of a gens might "as such have claims against them; and in this sense the descendants "of freed men might be Gentiles." Smith's *Dict. of Antiq.*

[2] Gaius. *Comment.* 1, 165; pr. J. 1, 17. As to the relative position of patron and client, see *Niebuhr*, I p. 280. In the law of the Twelve Tables it is laid down that a patron who shall defraud his client shall be accursed. Table VIII. 21. And Virgil includes patrons "who have wrought deceit against a client." (*fraus innexa clienti*) among those wicked mortals undergoing punishment in the infernal regions. Æneid VI. 609.

[3] Gaius. *Comment.* III. 1; 1, 2, 9. J. 3, 1.

[4] Gaius *Comment.* III, 9, 19, 25, 26.

[5] Gaius, *Ibid.* s. 17; pr. J. 3, 2; Ulp. *Frag.*

[6] Fr. 1, D. 26, 4. See also Gaius. *Comment.* 1, 155 and 157.

[7] Novel. 118 ch. 4, and 5. Mothers were now allowed the tutelage

however, that the law of the Twelve Tables called the agnates to succession without distinction of sex.[1]

"It was," to use Justinian's words, "an intermediate "jurisprudence posterior to the law of the Twelve Tables, "but prior to the imperial constitutions, that in a spirit "of subtle ingenuity introduced this distinction, and "entirely excluded females from the succession of *agnati*, "no other method of succession being then known, until "the prætors, correcting by degrees the asperity of the "civil law, or supplying what was deficient, were led by "their feeling of equity to add to their edicts a new order "of succession. The line of *cognati* was admitted accord-"ing to the degress of proximity, and relief was thus afforded to females by the prætor giving them the "possession of goods called *unde cognati*."[2]

Effect of Prætorian edict.

Cognates generally within the sixth degree, or the children of a second cousin within the seventh degree, were alone admitted under the prætorian edict, but agnates were admitted both by the law of the Twelve Tables and by the prætor up to the tenth degree.[3] Indeed it would seem that there was no absolute limit fixed in the case of agnates, for Justinian distinctly says that "when there "are no *sui heredes*, nor any of those who are called with "them, then an *agnatus* who has retained his full rights, "although he be in the *most distant degree* (*etiamsi* "*longissimo gradu sit*), is generally preferred to a *cognatus* "in a nearer degree."[4]

Further distinction between agnatio and cognatio.

There was another important distinction between

of their sons provided they bound themselves not to contract a second marriage.

[1] Table V. 4. Fr. 10, s. 2, D. 38, 10.

[2] 3 J. 3, 2. Sandar's ed. Huber. *Prælectionum Juris Civilis*, vol. I, lib. III. 266.

[3] 5 J. 3, 5. Huber. *Prælectionum Juris Civilis*, vol. 1, p. 266.

[4] 12 J. 3, 6. Huber. *Ibid.* p. 277.

agnatio and *cognatio*. The former depending as it did on *patria potestas* and the existence of family rights was annulled as soon as the agnate suffered any *capitis deminutio*. As will be more fully explained hereafter *capitis deminutio* was of three kinds, and the least, or *minima capitis deminutio*, was entailed when a person's *status* was changed without forfeiture either of the *civitas* or of liberty. Thus children passing into the family of another person by adoption, or women *in manu viri*, ceased to retain their agnatic rights in their original family. And this effect is also attributed by Gaius [1] and Justinian [2] to those who were emancipated, for although, as Ulpian says, the *minima capitis deminutio* took place *salvo statu* [3] this must be understood with reference to public and not of private rights: [4] for it is certain that in whatever way a change of status was effected it necessarily involved a loss of all private rights in the family. Thus it destroyed the bond of agnation as well as all rights of *gentilitas* [5] and of patronage; [6] and a testament became void (*irritum*) by the testator undergoing a *capitis deminutio*, except in the case of soldiers whose testaments were not affected by their change of status.[7] The *capite minutus* accordingly lost his title as a *legitimus heres*, or statutory successor under the law of the Twelve Tables, which as we have seen, called collateral agnates to the succession in default of lineal descendants.[8] But the rigour of the old civil law was controlled by subsequent laws in favour of certain

[1] *Comment.* 1, 163, 164.
[2] 3 J. 1. 16.
[3] Fr. 1, s. 8, D. 38, 17.
[4] Huber. *Prælect. Juris Civilis*, lib. 1, tit. 16, s. 4.
[5] See Cicero's definition of *gentiles*, ante: page 44.
[6] Gaius. *Comment.* 3, 51.
[7] 5 J. 2, 11.
[8] Fr. 1, s. 8, D. 38, 17.

persons. Thus the *S. C. Orphitianum* allowed children, although in the power of another, to succeed their intestate mother in preference to her *consanguinei* and *agnati*,[1] and in like manner the *S. C. Tertullianum* called mothers to the succession of their intestate children.[2] This probably explains why Justinian in reproducing the text of Gaius that "the right of agnation is taken away by every *capitis deminutio*,"[3] supplies the important word *plerumque*, or generally, thus implying that the rule was subject to exception. With regard to the effect of emancipation the fact is that under Justinian's legislation it had altogether lost its primitive character. By the civil law of Rome emancipation could only be accomplished by three mancipations or imaginary sales,[4] which so completely reduced the person mancipated to a servile condition that he was incapacitated from taking as heir or legatee under the will of a person to whom he was mancipated, unless enfranchised at the same time and by the same instrument, thus labouring under the same incapacity as a slave.[5] Hence Paulus argues that "an emancipated son or other person clearly suffers a diminution of his *caput*, because no one can be emancipated unless he is first reduced into an imaginary servile condition."[6] And thus Cicero places on the same footing a *filius familias* mancipated by his father and the citizen who was sold by the people because he refused to become a soldier (*cum miles factus non sit*), or because he refused to have his name recorded in the census register (*cum censeri noluerit*).[7]

[1] Fr. 9, *Ibid.* pr. J. 3, 4.
[2] Fr. 2, s. 15, 18, 19, D. 38, 17, 2 J. 3, 3.
[3] *Comment.* 1, 158, 163.
[4] Gaius. *Comment.* 1, 132.
[5] *Ibid.* 123.
[6] Fr. 3, s. 1, D. 4, 5.
[7] *Pro Cœcina* 34.

But the Emperor Anastasius introduced a new mode of mancipation *ex imperiali rescripto* in which the old forms were dispensed with and the presence of the emancipated person was no longer required;[1] and by a Constitution of the year 498 A.D. he so far altered the old law concerning the loss of agnate rights by emancipation, that he permitted emancipated brothers and sisters, subject to the deduction of a fourth, to succeed in preference to all *agnati* of an inferior degree, even though these *agnati* had undergone no *capitis deminutio*, and of course in preference to all *cognati* of the deceased.[2] Justinian not only still further facilitated the emancipation of children by simplifying the forms of procedure,[3] but he admitted emancipated brothers and sisters, as well as their children, to succeed just as if they were still members of their father's family. This change in the law was introduced by a Constitution published in the year 534 subsequent to the promulgation of the Institutes, in which we accordingly find the Constitution of Anastasius still retained.[4]

With regard to *cognatio*, however, Gaius distinctly declares that the tie could not be destroyed by any *capitis deminutio*, because, he says, civil polity may annul civil rights but not natural ones.[5] But this maxim, specious as it seems at first sight, must be received with certain qualifications, for it is clear that in Roman law a person who suffered the greater (*maxima*) or middle (*media*) *capitis deminutio* experienced a very material loss of cognate rights, for he was excluded from the line of intestate

loss of caput?

[1] Const. 5, C. 8, 49.
[2] Const. 4, C. 5, 30.
[3] Const. 6, C. 8, 49; 6 J. 1, 12.
[4] Const. 15, C. 6, 58; 1 J. 3, 5.
[5] Comment. 1, 158.

succession.[1] On the other hand when Justinian says [2] that the *jus cognationis* is wholly destroyed by the greater and middle *deminutio*, this is true in one sense but not in another: it is true that the loss of citizenship involved the loss of private civil rights, such as those of succession and the like; but it is not true that the tie of cognation was completely effaced for all purposes, because a person who had suffered a loss of *caput* could not upon regaining his rights of citizenship contract a valid marriage with any of his natural relations within the prohibited degrees.

Succession per stirpes.

In the matter of succession *ab intestato* grand-children and great-grand-children were the only persons who inherited *per stirpes*, that is by right of representation, the descendants of each son taking his share and dividing it between them irrespectively of their comparative numbers.[3] In other cases both *agnati* and *cognati* inherited *per capita*, or "by the head," so that in the division of the property of a deceased relation the representatives of those who had previously died were entirely passed over, and only those who were alive and in the same degree of relationship were called to the succession, each person taking an equal share. Thus on the death of a brother his surviving brothers and sisters would divide the estate between them, altogether excluding the children of deceased brothers or sisters.[4] *Agnatorum hereditates*, says Ulpian, *dividuntur in capita*.[5]

Per capita.

Affinity.

Affinity (*adfinitas*) is that relationship resulting from a lawful marriage which exists for instance between one

[1] Fr. 1, s. 4 and 8, D. 38, 17; 2 J. 3, 4.

[2] 6 J. 1, 16. Justinian evidently borrowed this passage from Modestinus. Fr. 4, s. 11, D. 38, 10.

[3] 6 J. 3, 1.

[4] 4 J. 3, 2.

[5] *Frag.* 26, s. 4.

of the married parties and the kindred of the other. Thus Modestinus defines *affines* as the kindred (*cognati*) of the husband and wife.[1] But marriage did not create any affinity between the relations of one of the married parties and those of the other, for Papinian says *inter privignos contrahi nuptiæ possunt, etsi fratrem communem ex novo parentium matrimonio susceptum habeant.*[2] Strictly speaking there are no grades of affinity,[3] but the Roman law employed particular terms to express the various degrees of relationship resulting from marriage. Thus *socer* was a father-in-law and *socrus* a mother-in-law; *nurus*, a daughter-in-law, and *gener* a son-in-law; *prosocrus* the wife's grandmother, and *socrus magna* the husband's grandmother. *Privignus* was the name for a son born of a previous marriage, and with respect to him the step-father was called *vitricus* and the step-mother *noverca*. The husband's brother (called in Greek δαηρ)[4] was *levir*, and his sister (Gr. γαλως) *glos* to the wife.[5] Between those persons, continues Modestinus, who by reason of affinity are in the place of parents and children (*quod affinitatis causa parentium liberorumque loco habentur*) marriage is prohibited.[6] Emancipation or adoption into another family did not break the ties of affinity, but a *capitis deminutio* which entailed the forfeiture of the rights of liberty or of citizenship, had this effect. Nor did adoption into another family create affinity between the members of that family and the adopted.[7]

[1] Fr. 4, s. 3, D. 38, 10.

[2] Fr. 34, s. 2, D. 23, 2. See also, Fr. 10, s. 13, D. 38, 10. The Canon law follows a different rule.

[3] Fr. 4, s. 5, D. 38, 10.

[4] Homer makes Helen address Hector:

Δαερ ε'μοῖο, Κυνος Κᾶκομήχάνου, ο'χρυοέσσης. Il. 6. v. 342.

[5] Fr. 4, s. 6, D. 38, 10.

[6] Fr. 4, s. 7, *Ibid*; Fr. 15, D. 23, 2.

[7] Fr. 4, s. 10, 11. *Ibid.*

Nor again were step-brothers and step-sisters (*comprivigni*) affined to each other, because as already pointed out, the rule was that the kindred (*consanguinei*) of one of the married parties were not *affines* to the kindred of the other. Moreover, since affinity was formed by marriage, it ceased to exist when the marriage itself was dissolved. This appears to have been the general rule, for Ulpian says we should only regard those persons as our *affines* who are so at the present time. But for sake of decency the law prohibited marriage with a deceased wife's daughter or mother,[2] as well as with the daughter of a divorced wife by a second husband.[3] Constantine also prohibited marriage with a deceased brother's wife or a deceased wife's sister.[4]

[1] Fr. 3, s. 1, D. 3, 1.
[2] Gaius. *Comment.* 1, 63; 6, 7, J. 1, 10.
[3] 9 J. 1, 10.
[4] Const. 5, C. 5, 5.

CHAPTER III.

Civil Capacity for Rights.

IN the preceding chapters I briefly considered certain personal qualities and relations which either exercised an influence upon rights, or upon which certain special rights were said to depend under the Roman system of law. In the present chapter I shall confine myself to the question of *status* as affecting the general civil capacity for rights.

The word *caput*, meaning literally the head, end or extremity of anything, is used in so many different senses by Latin writers that it is not surprising to find a number of conflicting theories started by modern civilians as to the exact force of the expression in Roman law. Thus it is used in the Digest to signify simply a person: *Cum paterfamilias moritur*, says Ulpian, *quotquot capita ei subjecta fuerunt, singulas familias incipiunt habere*;[1] and

Caput.

[1] Fr. 195, s. 2, D. 50, 16, *De Verb. Signif.* It is justly said by

Paulus writes: *servile caput nullum jus habet.*[1] It is also used in this sense by Cæsar (Bell Gall. IV. 15), Livy, Terence, and other writers. Again it is used by Cicero as equivalent to reputation or character, and Modestinus in speaking of capital punishments says :—*Licet capitalis Latine loquentibus omnis causa existimationis videatur.*[2] But in a strictly legal sense it appears to be generally agreed that the term *caput* means in Roman jurisprudence, the condition which a person possesses *jure naturæ* as *status libertatis*, *jure civili* as *status civitatis*, and *jure generis*, as *status familiæ*.[3] The word *status*, however, although frequently used to designate the condition of man from the point of view of the three elements of freedom, citizenship, and family, was not regarded by Roman jurists as exactly synonymous with *caput*. "For the purpose of ascertaining "the meaning which should be assigned to the term *status*," writes Austin, "I have searched the meanings "which were annexed to it by the Roman lawyers, through "the Institutes of Gaius and Justinian, and through the more "voluminous Digest of the latter. And the result at which I "have arrived is this : that *status* and *caput* are not synony- "mous expressions, but that the term *caput* signifies certain "distinctions which are *capital* or principal : which cannot "be acquired and cannot be lost, without a mighty and

Status.

Van Eck of this Title of the Digest, that it should never be out of the student's hand, but should be made the subject of constant study: *hunc Titulam numquam de manibus esse deponendum, sed nocturna diurnaque cura versandum.* Principia Juris Civilis, vol. II. p. 653.

[1] Fr. 3, s. 1, D. 4, 5.

[2] Fr. 103, D. 50, 16. So Heineccius remarks: Sed et *capitalis* pœna Romanis dicebatur, non tantum illa, quæ ultimum inferebat supplicium, sed quæ censu eximebat, adeoque vel libertatem, vel civitatem perimebat. *Antiquitorum Romanorum* Tit. XVI. de cap. dem., page 179.

[3] Huber. *Prælectionum Juris Civilis*, vol. I. p. 51.

"conspicuous change in the legal position of the party."[1] Thus, as Austin points out, a condition or *status* is ascribed to a slave, and yet it is expressly affirmed that he has no *caput* (*nullum caput*).[2] The word *status* is again clearly used in a general and not in a technical sense in the title *De statu hominum*, and by Hermogenianus in the passage *primo de personarum statu*.[3] Savigny has also sharply criticized the scholastic theories which have been constructed by German civilians on the Roman *status*, but on the other hand it must be confessed that it is by no means easy to state precisely the exact difference between the two expressions *status* and *caput*. The fact is, as Ortolon very justly remarks, "the language of the law, "constantly mixed up with acts and objects of ordinary "life, is, by its very nature, indefinite; the same words, "especially when they are ordinary words, appear in "varied acceptations, such as that of *status* in Roman law. "Comprehensive and flexible as it is, he who would "restrain it within limits, and give it the stiffness of a "technical expression, runs the risk of the charge of "pedantry."[4]

The truth of this remark will be readily admitted by any one who has closely applied himself to the study of the Roman law, and in fact it is a Roman jurist himself who warns us that *omnis definitio in jure civili periculosa est*.[5] Thus notwithstanding the use of the word *status* in

[1] Lect. XII. vol I. p. 361. Campbell's ed. Demangeat, however, is of a different opinion: "Je crois," he says, "que de bonne heure *caput* "a été employé comme synonyme de *status*; et nous voyons, en effet, "dans plusieurs textes, *capitis diminutio* significant la même chose que "*status commutatio*." *Cours Elémentaire de Droit Romain*, vol. I. p. 341.

[2] Fr. 3, s. 1, D. 4, 5; 4 J. 1, XVI.

[3] Fr. 2, D. 1, 5.

[4] *Generalisation du Droit*, ch. II. sect. VI. pr. 24, note 2.

[5] Fr. 202, D. 50, 17.

its natural signification of "condition" by various writers in the Digest, we still find Modestinus asserting that a slave only begins to acquire a *status*—by which he clearly means a civil capacity for rights—on the day of his manumission.[1] On the whole then we can venture to say no more than what Maynz has stated in his learned work on the "Elements of the Roman law," that *status* although at times used in the same or very nearly the same sense, is in reality a "less technical" expression than *caput*. "Le mot *status*," he writes, "est employé "à peu près dans le même sens (*i.e.*, as *caput*), quoique, "à la vérité, il paraisse *moins technique*; car il se trouve "très-fréquemment comme synonyme de *conditio* pour "désigner une position quelconque de la vie sociale."[2]

Caput integrum.

Libertas, *civitas* and *familia* were the three constituent elements which went to make up a *caput integrum*, or a complete capacity for rights, in Roman law; and hence it was that a slave, who possessed none of these qualifications, was pronounced to be without a *caput*, or civil existence.

Status Libertatis.

Libertas, or freedom, was the first essential for the acquisition of all those rights which were founded on the *jus naturale* and the *jus gentium*, and hence the primary division of persons by Roman jurists into freemen (*liberi*) and slaves (*servi*).[3] But in order to possess political and civil rights—that is rights to share in the electoral and legislative power (*jus suffragii*) as well as to enjoy the capacity for public offices (*jus honorum*) on the one hand, and those proprietary and family rights, such as *commercium* and *connubium*, which were regulated and enforced by the *jus civile*, on the other hand—the further qualification of citizenship was necessary. He who possessed the

[1] Fr. 4, D. 4, 5.
[2] Vol. I. s. 98, page 212.
[3] Gaius. *Comment.* 1, 9; Fr. 3, D. 1, 5.

latter was entitled to the *status civitatis*, and to this referred the division of freemen into *cives* and *peregrini*. In order, however, to complete the *caput* it was still necessary *familium habere*—*i.e.*, that the person should have a *familia* or family, a condition which was technically known as the *status familiæ*. *Nam civium Romanorum*, says Ulpian, *quidam sunt patresfamiliarum; alii filiifamiliarum: quædam matresfamiliarem; quædam filiæfamiliarum.*[1] This word *familia* affords another instance of the utter impossibility of limiting a particular technical meaning to ordinary words occurring in legal writings. Thus *familia* is employed to mean as Ulpian tells us:—1. All those persons who are united together by ties of blood. 2. Those who are under the power of one man. 3. All agnates, for although, as Ulpian explains, by the death of the common ancestor they may each have acquired family rights for themselves, yet they are rightly esteemed *ejusdem familiæ*, as being descended *ex eadem domo et gente*. 4. The property of a man, in which sense it is used in the Twelve Tables in the passage *adgnatus proximus familiam habeto*. 5. The slaves of one man;[2] provided they were more than two, for two slaves it seems were not sufficient to constitute a *familia*.[3]

Status civitatis.

Status familiæ.

Various meanings of

From what has been said above we see that while *freedom* might exist independently of citizenship or family, no one could exercise the rights of citizenship unless he was in a state of freedom; nor again could the *status familiæ* exist independently of the *status civitatis*. The loss of freedom then involved the loss of citizenship, and in consequence, that of the *status familiæ* also. This brings us to the consideration of a very important subject,

Freedom might exist independently of citizenship

But no one could be a citizen unless he were free.

[1] Fr. 4, D. 1, 6.

[2] Fr. 195, ss. 1, 2, 3, 4 D. 50, 16. Smith's *Dict of Antiq.* tit *familia*.

[3] Fr. 40, s. 3, D. *Ibid*

the loss of civil rights, known in Roman law as the *capitis deminutio*.

Capitis deminutio.

The expression *capitis deminutio* is explained by Gaius as a *status permutatio*,[1] and by Justinian as a *prioris status commutatio*,[2] the change in each instance involving a *loss* of rights, that is a *mutatio in deterius*. Thus Theophilus calls a loss of caput, πάθος καταστασιν ἐλαττοῦν τοῦ πασχοντος.[3] The addition of the word *prioris* in Justinian's definition has laid it open to criticism, for although every change of status implies a change in the former *condition* of the person, yet it was not every change in the condition of a person which caused a *capitis deminutio* according to the principles of the Roman law. Thus as Höpfner justly remarks, "a child on the death of its father acquires "rights it had not before by becoming *sui juris*: but "this is a *prioris status mutatio*," and yet no one will contend that he is *capitis deminutus*. Höpfner therefore prefers the expression "a loss of civil position." But even this definition is not strictly accurate, for *filiifamilias* who passed from one family to another by adoption, suffered no loss of "civil position" because they still continued to be *filiifamilias* as before, and yet the old law considered that this transfer effected a *capitis deminutio*. The same may be said of the children of a person who gave himself in arrogation; but as we shall have to resume this subject when we come to consider the least degree of *capitis deminutio*, there is no need to occupy ourselves with the discussion in the present place.

Of three kinds

Just as three elements were required to constitute the *caput integrum* of a Roman citizen, so the loss of that *caput* was divided into three gradations, according as the

[1] Fr. 1, D. 4, 5. In his Commentaries he describes it as a *prioris capitis permutatio*. 1, 159.

[2] Pr. J. 1, 16.

[3] Huber. Prælectionum Juris Civilis, vol. I. p. 51.

rights of liberty, citizenship or family were affected. Thus Paulus says—"*capitis deminutio* is of three kinds, "greatest (*maxima*), middle (*media*), and least (*minima*); "as there are three things which we have, liberty, citizen- "ship, and family."[1]

Origin of the

According to some writers the probable origin of the term *capitis deminutio*, as implying a loss or change of *status*, is to be traced to the history of the division of the Roman people into classes. Servius Tullius we are told comprehended all those who were too poor to be rated individually in any of the five superior classes into one large century, who were called *capite censi* or *proletarii* from the circumstance that they were rated by the head, and were the most inferior order of citizens.[2] In course of time all those who enjoyed the rights of liberty and citizenship and were recorded in the tables of the censors were said to be *capite censi*, in contradistinction to those who were not entitled to be separately enrolled, such as slaves and *filiifamilias*, who were accordingly styled *capite destitui*. Livy frequently speaks of those who were registered in the census tables as *capita civium*. Thus: *fuerunt* censa civium capita *centum septemdecim millia trecenta novemdecim*. "The number of citizens rated were one hundred "and seventeen thousand three hundred and nineteen."[3] And again, "censa capitum *milia ducenta sexaginta duo, trecenta viginti duo*."[4] Moreover just as citizenship was acquired by getting oneself rated in the census—for instance slaves who were enrolled with the knowledge and consent of their masters at once acquired the status of a citizen[3]—so by removing a person's name off the census,

[1] Fr. 11, D. 4, 5.

[2] Livy. 1, 42; Aul. Gell. 16, cap. 10. They were only called out to service in great emergency, and Marius was the first who formed his army out of them. SALL. *De Bello Jug.* 86, 2.

[3] Livy. 3, 24.

[4] *Ibid.* 10, 47.

or by excluding him from the survey, he was immediately reduced to the position of a tribeless man (*ærarius*), and was consequently deprived of the rights of citizenship. It appears, however, that although the censors had the power to degrade a citizen by removing him from one tribe to another, they could not without the sanction of the people take away the right of suffrage, that is, exclude a citizen from all the thirty-five tribes. Hence it was that by the compromise which was effected between the Censors Tiberius Gracchus and C. Claudius Pulcher, the sons of freedmen, whom the former wished to exclude entirely, were rated in the Æsquiline tribe.[1] Thus then as the term *caput* was at first used with reference to the quinquennial survey, so the term *capitis deminutio* may have originally signified a forfeiture of, or at least a change in, that *status* which a Roman citizen possessed by having his name recorded under a particular "head" or *caput* of the Censor's tablets. For instance, if the offence involved the loss of liberty or citizenship the Censor expunged the offender's name from his tablets, which thus became diminished by a "caput" or head. Hence Paulus speaking of the various kinds of capital punishments observes, that *per has enim pœnas eximitur caput de civitate*.[2] But if the change of status merely involved the loss of family rights, as for instance when a *paterfamilias* gave himself in arrogation, the tablets were simply altered to this extent that the person's name was transferred from one column to another —as from that of *patresfamiliarum*, or independent persons, to that of *filiifamiliarum*, or persons *alieni juris*. To understand this process it is necessary to bear in mind that it was only the heads of families who were separately rated by the Censors, that is among the *censa*

[1] *Ibid.* 45, 15. See also 7, 2. But see Cic, *Pro Cluentio*, 43 Asconius *in Cic. div. in Cæc.* 3.

[2] Fr. 2, D. 48, 1. See further discussion, *post*.

civium capita, while those who were *alieni juris* were entered immediately under the "caput" of the person in whose *potestas*, or power, they were.

The first, or *maxima capitis deminutio*, involved the loss of liberty, and with it, as a necessary consequence, all civil rights, whether connected with the *status civitatis* or the *status familiæ*.[1] The condemned person ceased in fact to have a legal *caput*, and in the eye of the law was nothing more than a mere thing: a *homo* it is true, but devoid of a legal *persona*. This terrible punishment was inflicted upon the following persons:— Maxima

1. *Servi pœnæ*, that is persons who were condemned to a degrading punishment, as for instance to work in the mines (*aut in metallum vel opus metalli*),[2] or to contend with wild beast (*ad bestias*).[3] In such cases the sentence reduced the condemned person to the position of a slave, and as he had no master whose slave he could be considered (a *servus sine domino*), he was called the slave of punishment (*servus pœnæ*). Justinian, however, altered the law in this respect, and enacted that no one was to be reduced to a state of slavery *ex supplicio: Nullam ab initio bene natorum ex supplicio permittimus fieri servum*.[4] A remarkable consequence of which was that the previous marriage of the condemned person was not dissolved, as was the case under the old law.[5]

2. Freedmen for ingratitude towards their patrons, an offence which reduced them to their former condition of slavery.[6]

[1] Fr. 11, D. 4, 5; *Gaius*, Comment. 1, 160.

[2] As to the distinction between these two punishments, which seems to have been simply one of degree, see Fr. 8, s. 6, D. 48, 19. The early Roman law did not permit a citizen to be put to death.

[3] Fr. 17, D. 48, 19; Fr. 8, s. 4 and 12; Fr. 10, s. 1; Fr. 29, *Ibid* 3 J. 1, 12.

[4] Novell. 22, ch. 8.

[5] *Ibid.* Fr. 24, c. 5, 16.

[6] 4 J. 1, 3; Const. 2, c. 6, 7.

3. Freemen above the age of twenty who allowed themselves to be fraudulently sold as slaves in order to share in the proceeds of the sale.[1]

4. Freewomen who cohabited with slaves knowing them to be such and in opposition to the will and warning of their masters, under the provisions of the *senatus-consultum Claudianum*.[2].

5. *Qui censum aut militiam subterfugerant*, or those who refused or neglected to inscribe their names in the census, or to enlist. It was the duty of every Roman citizen to deliver an account of his family and the amount of his property to the Censor, and those who failed to do so were styled *incensi*, and were liable to be sold as slaves.[3] It was equally the duty of every citizen to perform military service when called upon to do so, and those who tried to evade this duty were liable to a similar punishment.[4]

Under the law of the Twelve Tables a freeman who was caught in the actual commission of theft (*furtum manifestum*), after being scourged, was adjudged (*addictus*) to the person from whom he had stolen the thing. But, as we learn from Gaius, the ancients were not agreed as to whether, in consequence of this adjudication, he became a slave, or was simply to be regarded in the place of an *adjudicatus*.[5]

Media capitis deminutio.

The second, or *media capitis deminutio*, involved the loss of citizenship and *familia* although freedom was retained: *Cum vero amittimus civitatem*, says Paulus, *libertatem retinemus, mediam esse capitis deminutionem*.[6] "When we lose citizenship while we retain liberty, there

[1] Fr. 5, s. 1, D. 5; 4 J. 1, 3.
[2] Gaius. *Comment.* 1, 160.
[3] Cicero *Pro Cœcina*, 34; Ulp. Frag. 11, s. 11.
[4] *Ibid.*
[5] *Comment.* 3, 189. Aul. Gell. *Noct. Att.* 20, 1.
[6] Fr. 11, D. 4, 5; 2 J. 1, 16.

"is *media capitis deminutio*." We learn from Cicero that the Roman law did not permit a citizen to be deprived of his status as a *cives* against his will;[1] but what could not be done directly was effected *indirectly* by depriving the condemned person of all the necessaries of life, such as shelter, fire and water, and thus compelling him to seek an asylum out of Roman territory. *Id autem ut esset faciendem*, says Cicero, *non ademptione civitatis, sed tecti, et aquæ et ignis interdictione faciebant.*[2] "But "that this should be done not by taking away their "rights of citizenship, but only their house, and by "interdicting them from fire and water." Accordingly Justinian includes among those who suffered the *media capitis deminutio* such as were forbidden the use of fire and water, which was tantamount to a sentence of banishment.[3] This form of banishment was succeeded, as Ulpian informs us, by the *deportatio in insulam*, a sentence which the *præfectus urbi* had power to inflict, but not the *præses*, or president of provincial towns, and which

[1] *Pro. Dom.* 29. Although Cicero had an obvious interest in thus propounding the law it can hardly be credited that he would have dared to mislead judges so well informed of the laws as the pontiffs, before whom his speech was delivered.

[2] *Ibid.* 30.

[3] 2 J. 1, 16. *Aqua et ignis*, says Festus, *sunt duo elementa quæ humanum vitam maxime continent*; and thus Cicero in his treatise *de Amicitia* speaking of the benefits to be derived from true friendship sums up with this remarkable passage: *Itaque non aqua, non igni, ut aiunt, pluribus locis utimur, quam amicitia.* 4, 22. Indeed most nations of antiquity looked upon these two elements as those whereof all things were made, and hardly any religious rite could be performed without their use. Thus the Roman wife was received at the threshold of her husband's house with fire and water, in token probably of her being taken under his protection and support, Fr. 66, D. 24, 1; and perhaps in like manner, by interdicting a citizen from fire and water, the State intimated that it withdrew from him its support and protection.

immediately involved the loss of citizenship.[1] The *deportatio* did not mean a simple banishment from the country, but prescribed certain limits within or out of which the condemned person was prohibited from either entering or going under penalty of death.[2] Thus Cicero was interdicted by the *lex Clodia* from fire and water within four hundred miles of Rome.[3]

Distinction between a deportatus and a relegatus.

There was a broad distinction, however, which should not be overlooked, between a *deportatus* and a *relegatus*. Both no doubt were banished to a certain place or within certain limits; but while the former (*deportatus*) lost his citizenship, we have Ulpian's authority for saying that the latter (*relegatus*) retained his civil rights and the *testamenti factio*, whether he was relegated only for a time or was sentenced to perpetual banishment.[4] Ovid well expresses the distinction between *relegatio* and *exilium* in the following well-known lines—

Nec vitam, nec opes, nec jus mihi civis ademit,
Nil nisi me patriis jussit abesse focis,
Ipse Relegati non Exsulis utitur in me
Nomine : tuta suo judice causa mea est.[5]

And Justinian also says that the *relegati* still retain their children in their power.[6] But Callistratus in treating of the loss of *existimatio* seems to include the *deportati* among those who suffered *magna capitis deminutio*[7] and were deprived of their freedom: *Consumitur vero*, he

[1] Fr. 2, s. 1 D. 48, 19; Fr. 6, D. 48, 22.
[2] Fr. 4, D. 48, 19.
[3] *Ad. Attic.* III. 4.
[4] Fr. 7, s. 2, 3; Fr. 14, D. 48, 22.
[5] *Trist.* 5, Eleg. v. 11. et seq.
[6] 2 J. 1, 12.
[7] The expression *magna capitis deminutio* is here employed, as well as by Ulpian in another passage, to refer to the first two kinds of *capitis deminutio* taken together, in contradistinction to the third, which is called *minor capitis deminutio*. Fr. 1, s. 8, D. 38, 17; Fr. 1, s. 4, D. 38, 16.

quotiens magna capitis minutio intervenit, id est, cum libertas adimitur: veluti *cum aqua et igni interdicitur, quæ in persona deportatorum venit,* vel *cum plebe jus in opus metalli, vel in metallum datur.*[1] Some endeavour to get over the difficulty of reconciling this passage with those numerous texts in which the *deportatus* is said to lose merely his civil rights while retaining his liberty, by reading *vel* or *vel uti* instead of *veluti,* and thus disconnecting the two sentences. But it is to be observed that this would render the whole passage extremely confused, and make Callistratus draw a distinction between three classes of persons, *i.e.,* between those who had lost their freedom, those who were either simply deported or banished, and those who were sentenced to work in the mines—because the conjunction *vel* joins each of the succeeding sentences. Now the latter class of persons (*i.e. in metallum vel opus metalli*), as we have already shown, are admitted by all jurists alike to suffer the *maxima capitis deminutio,* and consequently to lose all rights of freedom and citizenship. It seems clear, therefore, that if Callistratus had intended the first part of the paragraph to be entirely disconnected from the succeeding sentences,—that is in order to draw a distinction between those who had lost their freedom and those who had simply lost their citizenship by the *aquæ et ignis interdictio,* he would not have used the word *vel* with reference to those who were sentenced to work *in opus metalli vel in metallum.* Another, and perhaps a more plausible explanation, is that given by Cujas and approved of by Huber, that Callistratus uses the word *libertas* as referring to civil, or Quiritarian, and not natural liberty.[2] Thus Cicero asks, *qui potest jure Quiritium liber esse is, qui in numero*

[1] Fr. 5, s. 3, D. 50, 13. See also Boëthius on *Cic Topic.* lib. II.
[2] *Prælectionum Juris Civilis,* 1 tit. XVI. s. 3.

Quiritium non est? "For how can a man be free by the "rights of the Quirites, who is not included in the number "of the Quirites?"[1] In this sense undoubtedly the *deportati* may be said to have lost their liberty, for they were regarded as devoid of all rights except those to which they were entitled by the *jus gentium*. Thus Marcianus says:—Relegatus civitatem amittit, non libertatem, et speciali quidem jure civitatis non fruitur, jure tamen Gentium utitur. Emit enim et vendit, locat, conducit, permutat, fænus exercet, et cætera similia, et postea quæsita pignori dare potest, nisi in fraudem fisci, qui ei mortuo successurus est, ea obliget. Priora enim bona, quæ publicata sunt, alienare potest.[2] And accordingly Justinian adopting the words of Gaius, declares, *sequitur ut, qui ex modo ex numero civium Romanorum tollitur, perinde ac eo mortuo desinant liberi in potestate ejus esse.*[3] "It follows, that the children of a person thus struck out "out from the number of the citizens cease to be under "his power exactly as if he were dead." The *deportatus* was in fact reduced to the position of a *peregrinus*,[4] and for all civil purposes was regarded as dead (*pro mortuo habetur*). But if by favour of the emperor the banishment was subsequently annulled, the *deportatus* was restored to all his previous rights (*restitutus in integrum*) exactly as if he had never been interdicted.[5] *Deportatio* did not, however, dissolve marriage, as appears from two Constitutions in the Digest of the years 230 and 321 A.D. respectively.[6]

It appears moreover from Cicero's speech *Pro Balbo*, that the rights of citizenship might also be lost by

[1] *Pro Cœcina* 33.
[2] Fr. 15, D. 48, 22.
[3] 1 J. 1, 12.
[4] Ulp. *Frag.* X. 3. Gaius. *Comment.* 1, 128.
[5] Const. 1, C. 9, 51.
[6] Const. 1, C. 5, 17.

becoming a citizen in another state. *Duarum civitatum civis esse, nostro jure civili, nemo potest: non esse hujus civitatis, qui se alii civitati dicarit, potest.* "According "to our civil law, no one can be a citizen of two states at "the same time; a man cannot be a citizen of this "state, who has dedicated himself to another state."[1] Cicero here speaks of communities outside the Roman empire, as is evident from the examples he gives in support of his proposition. But it is abundantly clear that one person could possess at the same time citizenship in several cities of the empire, and not only enjoy the rights but be responsible for the burdens pertaining to citizens of both places. Thus adopted children had a double citizenship,[2] and so had a common slave who was manumitted by several masters having rights of citizenship in one or more places.[3] Indeed Cicero himself, speaking in another place of *municipes* from Italy, says: "*Omnibus municipalibus duas esse censeo patrias, unam naturæ, alteram civitatis . . . . habuit alteram loci patriam, alteram juris.*[4]

Capitis deminutio minima.

The third and last form of *capitis deminutio* was called *minima*, or the least. *Minima capitis deminutio est*, says Ulpian, *per quam, et civitate et libertate salva, status dumtaxat hominis mutatur.* "There is least *capitis deminutio* "when both citizenship and liberty are preserved and the "*status* of the person is alone changed."[5] And Paulus gives a similar definition: *Cum et libertas et civitas retinetur, familia tantum mutatur, minimam esse capitis deminutionem, constat.* "When liberty and citizenship are

[1] *Pro Balbo* c. 11; *Pro Cæcina* 33 34. Cicero also mentions that "Roman citizens who went to Latin colonies did not lose their citizenship without voluntary enrolment among the colonists." *Pro Domo* 30. See also Gaius. *Comment.* 1-131.

[2] Fr. 15, s. 3, Fr. 17, s. 9, D. 50, 1.

[3] Fr. 6, s. 3, Fr. 7, 22, 27, D. 50-1; Fr. 3, s. 8, D. 50-4

[4] *De Legibus*, II. 2.

[5] *Frag.* XI. 13.

retained, and the family is only changed, there is the least *capitis deminutio.*"[1] The same language is also employed by Gaius[2] and Justinian.[3] In each instance it will be observed that the resulting change is described as merely affecting the private rights of *familia*. Liberty and citizenship remained unimpaired, and it is worth observing that while the Roman jurists when speaking of the loss of these two rights use the term "*amittatur*," the word "*mutatur*" or "*commutatur*" is applied to the loss of *familia*. Again it is to be observed that Paulus does not speak of the change as one of *status* but simply as one of family. The word *deminutio*, concerning which many conflicting theories have been raised, implied in Roman law a fall, degradation or loss, and as each *familia* was composed of so many *capita* or heads, it followed that whenever a member of that family left it, whether by adrogation, adoption, or emancipation, the *familia* suffered a loss, or in other words, was decreased by a *caput*. In like manner if the change involved the loss of freedom or citizenship, the class of freemen in the one case and the city in the other, lost a *caput*. Taken in this sense *caput* would simply stand for a *person* without reference to civil rights, and this appears to have been considered the correct view by Hotomann, although, as we have seen, Niebuhr was of opinion that the term was originally used with reference to the Censorial survey, as indicating the political status of a Roman citizen. La Grange referring to Hotomann's explanation remarks that it is the one generally accepted (*c'est là explication génêralement admise*).[4] But M. de Fresquet translates *capitis deminutio* by *deminutio de capacité*, and the learned Savigny has also ably contended that the expression was always

[1] Fr. 11, D. 4, 5.
[2] Comment. 1, 162.
[3] 3 I. 1, 16.
[4] *Manuel de Droit Romain*, page 158, note 3.

used in Roman law to signify a degradation *eines Menschen in Beziehung auf seine Rechtsfähigkeit*,[1] or, what La Grange calls, *une déchéance juridique*.[2] Maynz, who never commits himself to generalities, also thinks that the real signification of the expression *capitis deminutio* is *une diminution de capacité*, but that when used with reference to the change of family it means a change of *status* or condition (*un simple changement d'état*).[3] The fact is that when applied to the first two forms of loss of *caput* the word *deminutio* is perfectly intelligible, for in either case the *capite minutus* suffered a degradation in his civil capacity; but when applied to the least *capitis deminutio*, Savigny's theory of degradation of civil position or capacity is found to be altogether incompatible with the opinions of the most celebrated Roman jurists. No doubt every modification of status involved a change in *family*, in *property*, and in the *person*. In the family, because the person who underwent the change passed from one to another; in property, because a distinct co-ownership was centred in each family; and in the person, because in the view of the private civil law there was in each family no other *persona* but that of the chief, and by changing his status he quitted this *persona* to identify himself with another, or to invest himself with a new one.[4] Hence Ulpian observes that the effect of *minima capitis deminutio* was to destroy not only the private rights of family but also those of the person: *Privata hominis et familiæ ejus jura, non civitatis, amittit*.[5] In this sense truly there was a diminition of rights but cer-

[1] *System*. Vol. II. Append. VI. 11, et. seq.

[2] *Manuel de Droit Romain*. page 158, note 3.

[3] *Eléments de Droit Romain*, Tom. 1, s. 98, p. 211.

[4] Ortolon, *Génér. de Droit Romain*, s. 71; *Explicat. Hist. des Instituts*. vol. II. pp. 154, 155.

[5] Fr. 6, D. 4, 5. "Every *capitis deminutio*," says Von Scheurl, "is an entire loss of personality, as regarded by private law." *Beitr*, I. 235.

tainly not of any rights affecting civil or public capacity, that is in the domain of public law. This will become still more evident if we proceed to examine the instances of *minima capitis deminutio*, of which Gaius gives the following :—

Examples of minima capitis deminutio.

(*a*) Those who are given in adoption.

(*b*) Those who conclude a *co-emptio*.

(*c*) Those who are given in *mancipium*, and those who are emancipated.[2]

Arrogation.

Demangeat thinks that the first refers to persons who were *arrogated*, because in the time of Gaius adoption was effected *per mancipationes et intercedentes manumissiones*, and consequently the case of adoption would be more correctly included in the third example of those who are given in *mancipium*.[3] With regard then to persons who were transferred into another family by means of arrogation, the jurist Paulus was of opinion that the children of an arrogated person suffered a *capitis deminutio* as well as their father: *Liberos, qui adrogatum parentem sequuntur, placet minui caput, cum in aliena potestate sint et cum (eo) familiam mutaverint.*[4] "The children who follow an adrogated parent suffer a "deminution of *caput*, as they are dependent and have "changed family." But Savigny following out his fundamental theory that the term *capitis deminutio* only applied to those cases in which persons suffered a loss of *political* or *civil* rights, does not think that the doctrine of Paulus was generally favoured by Roman jurists; because the children of the *adrogatus* were not transferred to the power of the adrogator *per servilem conditionem*, and they retained in the new family their

[1] Noct. Attic. 1 ch. XII. p. 59, note 18.
[2] *Comment.* 1, 162.
[3] *Cours Elémentaire de Droit Romain*, 1 p. 342.
[4] Fr. 3, D. 4, 5. See also 11 J. 1, 12. Gaius. *Comment.* 1, 107.

status as *filiifamilias*. The case of the *adrogatus* himself was of course very different, for by the act of arrogation he was reduced from the condition or status of a *paterfamilias* to that of a *filius familias*, and his position became much inferior: so that in his case there was clearly a *capitis deminutio*. But Savigny's opinion has not been very generally accepted even by German scholars, and among others Vangerow has particularly dissented from it.[2] Savigny supports his theory by referring to the case of the Vestal Virgins, who, as Aulus Gellius records, were freed from parental power *sine emancipatione ac sine capitis minutione*, and were deprived of all rights of succession *ab intestato*. This latter disability arose, in Savigny's opinion, in consequence of the Vestal Virgins ceasing to be members of their natural family; and upon this assumption he proceeds to argue that a mere change of family did not necessarily involve a *capitis deminutio*. To this Demangeat forcibly replies that the fact of the Vestal Virgins being deprived of their rights of succession *ab intestato* does not at all prove that they really ceased to belong to their family, because their incapacity to inherit *ab intestato* was enacted apparently by a special law, as Labeo seems to indicate in the passage quoted by Aulus Gellius: *Virgo Vestalis neque hæres est cuiquam intestato, neque intestatæ quisquam: sed bona ejus in publicum redigi ajunt.* ID QUO JURE FIAT, QUÆRITUR.[3] It is clear at all events that the mere fact of being freed from *patria potestas* did not involve a loss of family rights; thus the supreme dignity of the patriciate and

[1] *Lehrbuch*. vol. 1, s. 34.

[2] Vol. 1, tit. XVI. p. 52.

[3] *Noct. Attic*. 1 ch. XII. I observe that Mr. Sanders, the learned translator of Justinian's Institutes, distinctly affirms that neither the *Flamen Dialis* nor the Vestal Virgins ceased to be members of their father's family, page 123.

the office of consul or bishop, dissolved *patria potestas* without affecting in other respects the *status familiæ*.[1] On the whole it is perhaps safer to accept the doctrine propounded by so profound a jurist as Paulus, that the *adrogatus* as well as the children who were under his *potestas* suffered a *capitis deminutio*, than to be guided by any reasons of our own founded on the supposed effect to be rightly attributed to the loss of *caput*. It should not be forgotten that the doctrine of Paulus is the direct consequence of the theory that in the least form of *capitis deminutio* it is the change of family which alone causes the notion of a "deminution "of head," and this is supported by Ulpian and Gaius in the texts already cited; and it is moreover in direct harmony with the characteristic features of the Roman *familia* viewed in connection with the *jus sacrum*, *jus publicum* and *jus privatum*. Justinian, it should be added, mentions arrogation as still incurring the least *capitis deminutio*.[2]

In manum conventio.

Again Savigny's theory is in direct antagonism with the operation of *in manum conventio*, which both Gaius and Ulpian assert gave rise to the *minima capitis deminutio*.[3] A woman who made a *co-emptio* was not however reduced into a servile condition (*non deducitur in servilem conditionem*),[4] and for this reason, according to Savigny's theory, she could not be said to be *capitis deminutio*, for as a *filia familias* she lost no civil rights by falling under the *manus* of her husband. But the passages in support of the contrary proposition are too clear and numerous to admit of the smallest doubt that a woman who concluded a *co-emptio* really suffered

[1] Const. 66, C. 10, 31; 4 J. 1, 12; Novel. 81, ch. 2.
[2] 3 J. 1, 16.
[3] Gaius. *Comment.* 1, 162; *Ulp.* Frag. XI. 11.
[4] Gaius. *Comment.* 1, 123.

a *capitis deminutio*;[1] and there is no ground whatever for Savigny's assumption, except indeed to overcome an otherwise insurmountable difficulty, that the operation of co-emption to produce *capitis deminutio* was limited to the case of independent women. Neither Gaius nor Ulpian allude to this limitation, and it is too much to accuse three—(I include Paulus)— of the greatest of Roman jurists of such omissions and inaccuracies simply to support a particular theory, even when that theory is advanced by so profound a scholar and jurist as Savigny.

Persons given in mancipium, or emancipated.

Those who are given *in mancipium* and those who are emancipated, are also mentioned by Gaius as persons who suffered the *minima capitis deminutio*. Mancipation in the old Roman law was a cumbrous process by which Quiritarian ownership was acquired either over persons or things, and those persons who were submitted to the mancipium were looked upon as *in loco servi*. In the time of Gaius adoption could only be effected by first releasing the child from the *potestas* of the natural father, which was accomplished by means of *mancipatio*, or a fictitious sale repeated on three several occasions, after which the adopting father claimed the child by means of an equally fictitious process, called *in jure cessio*.[2] Thus in the law of the Twelve Tables it is laid down *si pater filium ter venumduit liber esto*. According to the opinion of most commentators it was in consequence of this fictitious process of sale, which, as above remarked, reduced the mancipated person *in loco servi*, that adoption as well as emancipation were regarded as entailing the consequences

[1] See besides the above passages, *Ibid.* 3, 83, 84; 4, 38. *Quod fit adoptione, et in manum conventione* are the examples given by Ulpian of *minima capitis deminutio*. *Frag.* XI. 13.

[2] Gaius. *Comment.* 1, 134

of a *capitis deminutio*.[1] But as I have already stated,[2] the Emperor Anastasius allowed a son to be emancipated by obtaining an imperial rescript, the registration of which before a magistrate at once deprived the father of his *patria potestas*.[3] And Justinian went even still further and afforded the utmost facility for the emancipation of children, entirely abolishing the old forms.[4] Prior to the Anastasian and Justinian Constitutions emancipation involved the loss of the *jus agnationis*, and as this was the immediate and natural consequence of every *capitis deminutio minima*,[5] Gaius, who wrote in the reign of Marcus Aurelius (169-176 A.D.), or about three centuries previously, rightly mentions emancipation as an instance of the least *deminutio*. But under the legislation

[1] *Ii, qui in causa mancipii sunt servorum loco habentur.* Gaius. *Comment.* 1, 138. See also Heineccius *Jus Civile Institutionum*, s. 228, p. 139. Maynz. *Elements de Droit Romain*, s. 98, Tom. 1, p. 211. But *Thomasius* (*ad Huberi Prælect. Inst.* p. 52, *Le Plat's* ed.), entirely dissents from this view, and expresses his deliberate opinion that *Emancipati* were said to suffer a *capitis deminutio* simply because they experienced a change of *status*, which, as we have already shown, seriously affected the rights of family, property and person. While admitting that emancipation under the new law did not strictly speaking give rise to a *capitis deminutio* he denies that this is to be solely attributed to the abolition of the old form of emancipation by means of imaginary sales, or yet to the rule that every *capitis deminutio* involves a change of *status in deterius*. It is also to be remarked, as Heineccius observes, that if emancipation occasioned a *capitis deminutio* solely in consequence of the fictitious form of sale which had to be gone through before *patria potestas* could be annulled, the effect of which was to reduce the person *in loco servi*, it should strictly speaking have been included in the instances of *maxima capitis deminutio*, and not of *minima capitis deminutio*. *Anti. Rom.* lib. 1, tit. XVI. s. 12.

[2] *Ante*, page 49.

[3] Const. 5, C. 8, 49.

[4] Const. 6, *Ibid.*

[5] Gaius. *Comment.* 1, 158; 3 J. 1, 15.

of the above emperors the bond of agnation was not altogether destroyed by emancipation, for the emancipated person was allowed to succeed *ab intestato* to the property of his natural agnates, and might also execute the office of *tutor legitimus*.[1] Nevertheless Justinian in his Institutes still mentions as an instance of *minima capitis deminutio*, the case of a person *alieni juris* who becomes independent.[2] Of course a slave who was manumitted, although he became *sui juris* did not suffer a *capitis deminutio*, because while a slave he possessed no *caput*.[3] As regards adoption the law was considerably altered by Justinian, and although in the time of Gaius adoption involved a *capitis deminutio*—either in consequence of the form of mancipation which had to be employed, or because it effected in every instance a complete change of family rights[4]—it could no longer be said to produce that effect under the Justinian law, except perhaps in the case of adoption by an ascendant: in any other case the adopted was not removed from his natural family, and continued to be subject to the *patria potestas* of his natural father.[5]

Effect of adoption

There can indeed be no doubt, as Mackeldey observes, that the true object of the *minima capitis deminutio* was to mark the destruction of the *jus agnationis*, the consequence of which was that the *capite deminutus* lost the *jura familiæ* of that family to which he had

T
o
Capite
deminutio

[1] Const. 5, 6, C. 8, 49.

[2] 3 J. 1, 16.

[3] Fr. 3, s. 1; D. 4, 5.

[4] The ancient forms were superseded by Justinian, and he substituted instead the simple execution before a magistrate of a deed setting forth the fact of adoption, in the presence and with the consent of the interested parties. Const. 11. C. 8, 48.

[5] 2 J. 1, 11. Const. 10, C. 8, 48.

previously belonged as an *agnatus*.[1] Paulus,[2] Modestinus,[3] Ulpian,[4] and Gaïus[5] concur in saying that the agnatic bond is broken in *every* case of a *capitis deminutio*, but Justinian for reasons founded on the later Constitutions of Anastasius and himself, to which I have before alluded, uses more qualified language, and says *jus agnationis* plerumque *perimitur*.[6]

Only affected private rights

It is certain, moreover, that the *minima capitis deminutio* only affected *private* rights: *Privata hominis et familiæ ejus jura*, says Ulpian, *non civitatis, amittit*. Thus the bare fact of a man suffering a *minima capitis deminutio* did not affect his public rights, as those of a senator, magistrate, or judge.[8] Nor would it deprive him of the office of a tutor other than that of a *tutor legitimus*, granted by the Law of the Twelve Tables to the nearest agnate; for in the latter case as the agnatic bond would be broken by the *capitis deminutio*, the person would lose the qualification in virtue of which alone the law conferred the *tutela* upon him.[9] But every *capitis deminutio* of the pupil, even the least, put an end to the tutelage.[10] Again the mere loss of dignity, as that of a senator, did not entail a *capitis deminutio*.[11] It appears, however, that a patron

[1] *Compendium of Modern Civil Law*, s. 121. But it did not destroy the right of succession to the mother, which was not derived from the old Civil law, but from later Constitutions. Fr. 1, s. 8, D. 38, 17; *Basil*, lib. 45, tit. 1.

[2] *Quia adgnatis deferuntur, qui desinuant esse, familia mutati.* Fr. 7, D. 4. 5.

[3] *Adgnationis jura perdit.* Fr. 4, s. 10, D. 38, 10.

[4] Reg. XI. 9.

[5] *Jus agnationis perimitur.* Comment. 1, 158.

[6] 3 J. 1, 15.

[7] Fr. 6, D. 4, 5.

[8] Fr. 5, *Ibid.*

[9] Fr. 7. *Ibid*; Fr. 2, D. 26, 4; 4 J. 1, 23.

[10] 4 J. 1, 23.

[11] Fr. 3, D. 1, 9; 5 J. 1, 16.

who suffered a *capitis deminutio* lost his rights of succession to the property of his freedman; and the same consequence ensued if the freedman suffered a *capitis deminutio*. In either case, as Gaius tells us, the children of the freedman would exclude the patron.

Effect of capitis deminutio on debts and obligations.

With regard to debts and obligations the general effect of a *capitis deminutio* was to deprive a person of the right to sue or be sued in all civil actions (*actiones stricti juris*.)[2] But the Prætorian equity, ameliorating in this as in other respects, the severity if not injustice of the ancient civil law, allowed a remedy under certain circumstances. "I will grant an action," says the Prætor in his Edict, "against those who have suffered a *capitis* "*diminutio*, after anyone has dealt or contracted with "them, just as if they had not suffered any change "of status."[3] This Edict only applied to cases of *minima capitis deminutio*, because where a person lost his liberty or the rights of citizenship, the prætor granted an action against the individual who obtained possession of the debtor's property (*dabitur plane actio in eos, ad quos bona pervenerunt eorum*.)[4] The loss of liberty in fact reduced the person to the position of a slave, and no action could be sustained against a person in a servile condition; but according to Julianus an *actio utilis* might be obtained from the prætor against the lord, or master of the slave, and unless the master was prepared to defend the action *in solidum*, the creditor was entitled to all the goods possessed by the slave prior to his loss of freedom.[5] Again, if the *capitis deminutio* entailed the loss of citizenship, an action against the person so circumstanced would

[1] Comment. 3, 51 and 83; Fr. 7, D. 4, 5; Fr. 3, s. 9, D. 26, 4.
[2] *Gaius*. Comment. 3, 84.
[3] Fr. 2, s. 1, D. 4, 5.
[4] Fr. 2, D. 4, 5; Fr. 128, s. 1, D. 50, 17.
[5] Fr. 7, s. 2, D. 4, 5.

have been unfructuous, because his goods were confiscated to the State.[1] Accordingly the benefit of a *restitutio in integrum* only applied to the case of a *minima capitis deminutio*;[2] and in such cases although the legal liability under the civil law (*jus civile*) was extinguished, the prætor enforced natural liability, because, as Gaius somewhat speciouslly contends in a passage which I have already quoted, *civilis ratio naturalia jura corrumpere non potest*. "Those who suffer a degradation of status (*capitę minuuntur*)," says Ulpian, "continue to be "naturally bound (*manent obligati naturaliter*) with re- "spect to obligations incurred prior to such degradation." "And with respect to those incurred since that event," he continues, "the creditor can only blame himself "for entering into such transactions; for this is apparent "from the very words of the Edict."[4] The Prætor in fact only promised to grant an action against those who had suffered a *capitis deminutio* after they had incurred obligations,[5] and Ulpian therefore argues that it was the creditor's own fault if he dealt with a person subsequent to his loss of *status*. "Sometimes indeed," Ulpian adds, however, "an action is granted against an individual for "debts contracted subsequent to his loss of status. Thus "in the case of adrogation, the individual who has been arrogated remains bound as a *filiusfamilias*."[6]

[1] *Ibid.*

[2] Fr. 2, D. 4, 1; Fr. 2, D. 4. 5, "This kind of restitution, however," remarks Dr. Goudsmit, "had nothing in common with other proceedings so called;—because, first, it was granted without any thorough investigation of the particular circumstances of the case; and, secondly, was not subject to short prescription. It was therefore, in reality, an abrogation of the ancient rule of strict law; and already in the Justianian law, there was no thought of its practical use as an extraordinary remedy." *Pand.* s. 116, p. 358.

[3] Fr. 8, D. 4, 5.

[4] Fr. 2, s. 2, *Ibid.*

[5] Fr. 2, s. 1, *Ibid.*

[6] Fr. 2, s. 2, *Ibid.*

But this passage has caused no little difficulty to modern civilians, and Pothier asks in what case an individual who had suffered a *minima capitis deminutio* would be unable to bind himself for subsequent debts ?[1] Cujas suggests the solitary instance of a woman who has passed into the *manus* of her husband, but Pothier remarks that he sees no reason why a wife, in the *manus* of her husband, should be denied the capacity permitted to every *filiafamilas* by the *Senatus-consultum Macedonianum*, of binding her own *peculia*.[2] Demangeat considers that Ulpian merely

[1] *Pandectæ Justin.* tom. III. lib. IV. tit. V. art. II. p 372, note.

[2] Fr. 9, s. 2, D. 14, 6. This *senatus-consultum* was enacted in order to restrain money lenders from lending money to children under the power of their parents, and it refused any action to the creditor, either against the descendants, whether still under power, or become *sui juris* by the death of the parent or by emancipation, or against the parent, whether he still retained them under his power or had emancipated them. "This provision" says Justinian "was "adopted by the Senate, because they thought that persons under "power, when loaded with debts, contracted by borrowing sums to "be wasted in debauchery, often attempted the lives of their "parents." 7 J. 4, 3. Tacitus refers this *senatus-consultum* to the reign of Claudius (*Ann.* XI. 31), but according to Suetonius it was made in that of Vespasian (*Vesp.* 11.). Ulpian says it did not relieve the son's special property (*castrense peculium*) from liability for his debts (Fr. 1, s. 3, D. 14, 6.), nor did it prevent *filiæfamilias* binding their *peculia*. Fr. 9, s. 2, *Ibid.* Justinian also allows that "a *filius-* "*familias* can enter into an obligation with others." 6 J. III. 191. So it is said in a passage of Gaius. inserted in the Digest: "A *filius* "*familias* incurs obligations by the same modes, and may be sued "on the same grounds of action, as an independent person (*pater-* "*familias.*)" Fr. 39, D. 44, 7. The Senatus-consultum Macedonianum, in fact, did not apply to any contract other than a 'pecuniary loan.' Thus Ulpian says: "The law only incapacitates the *filius familias* "for receiving a loan of money that was deemed to be dangerous to "the parent." Fr. 3, s. 3, D. 14, 6. Moreover the law could only be pleaded against a lender who knew or might have known that the

intended to refer to contracts made with a person *in mancipii causa*, against whom of course no action could be maintained by the *jus civile*, while the Prætorian Edict only protected debts contracted *previous* to the change of status.[1] The fact is that Ulpian's exposition of the law in this matter referred to a state of things which had ceased to be in existence at the time of Justinian, for neither adoption nor emancipation were then made *per mancipationes et intercedentes manumissiones*, and it would have avoided confusion if the compilers had entirely expunged the above passage from the Digest.

Actio de dote not affected by capitis deminutio.

Gaius mentions the *actio de dote* as one which was not affected by the change of status, which Noodt thinks is merely cited by way of example, and that *bonæ fidei actiones* would be similarly privileged; but Cujas, on the other hand, is of opinion that the rule stated by Gaius was only applicable to those actions which are specially founded on equity and natural justice. Indeed Gaius expressly says that the benefit of an *actio de dote* is preserved *quia in bonum et æquum concepta est*.[2]

Nor actions founded on fact.

Again actions founded principally on fact were not lost by a *capitis deminutio*. Thus, as Modestinus explains, a legacy payable by the year or month does not lapse by the legatee suffering a *capitis deminutio*, because a legacy is founded rather on fact than in law (*tale legatum in facto potius quam in jure consistit*).[3]

Capite minutus remained answerable for crimes and delicts.

Nor did a person escape the consequences of a delict, or crime, by undergoing a *capitis deminutio*;[4] for, as

borrower was a *filiusfamilias* or a *filiafamilias*. Fr. 19; Fr. 3, s. 2; Fr. 9, s. 2, D. 14, 6. Again the mere knowledge of the father took the case out of the law. Fr. 12, *Ibid.*

[1] *Cours. Elémentaire de Droit Romain.* vol. 1, p. 3

[2] Fr. 8, D. 4, 5.

[3] Fr. 10, *Ibid.*

[4] Fr. 2, s. 3, *Ibid.*

Paulus says, obligations arising out of injuries or delicts follow the person.[1]

Usufructs destroyed

Before Justinian's time a usufruct (*usufructus*) was destroyed by the usufructuary suffering any *capitis deminutio*, but Justinian altered the law and decided that the *maxima* and *media capitis deminutio* would alone entail this consequence.[2] He also settled a moot question as to the devolution of a usufruct acquired by a *filius-familias* or a slave. In the former case he decided that the death or *capitis deminutio* of the son would not terminate the usufruct, but that it would enure for the benefit of the father for his life time, and after his death, it would still continue for the benefit of the son, if the latter survived his father. In the case of a slave the *usufructus* continued after his death for the benefit of the master during his lifetime.[3]

media capitis deminutio.

Testaments invalidated by testator suffering capitis deminutio.

Every *capitis deminutio* had the effect of invalidating testaments executed by a testator before he became *capite minutus*.[4] Such testaments were called *irrita*, that is ineffectual according to the rules of the civil law, but they were not absolutely void. Thus, as Justinian points out, if they were regularly attested by the seals of seven witnesses, the prætor allowed the instituted heir a *bonorum possessio secundum tabulas;* in other words the intentions of the testator were practically carried out by the prætor in the exercise of his equitable jurisdiction, provided that the testator was a Roman citizen, and *sui juris* at the time of his death.[5]

Partnerships also annulled.

Partnerships were also terminated by any of the partners suffering a loss of *caput*, because, says Gaius, according to

[1] Fr. 7, s. 1, *Ibid.*
[2] S. 3, J. 2, 4; Const. 16, c. 3, 33.
[3] *Ibid.*
[4] 4 J. 2, 17; Gaius. *Comment.* 2, 145.
[5] 6 *Ibid*; Gaius. *Ibid.* 146.

principles of the civil the law (*civili ratione*), *capitis deminutio* is said to be equivalent to death (*morti æquiparari dicitur*).[1] But inasmuch as partnership was a contract of the *jus gentium*, and could be formed with a *peregrinus*, it might be again renewed between the same parties although one or more of them had suffered a *capitis deminutio*.[2]

Reputation (existimatio).

Reputation, or the esteem in which a man is held amongst others on account of his personal character, is called *natural*, when it depends on the acknowledgement of his worth by the public generally, and is equivalent to *good name*. Civil reputation, on the other hand, is the mere consequence of the quality or status of citizenship; "it proceeds," says Mackeldey, "solely from "the state, and rests on an acknowledgment made on the "part of the state, it can be taken away or diminished "only by the state and in accordance with the law of the "state, and not by the private judgment of others as to a "man's worthiness or unworthiness."[3] This kind of reputation is called in Roman law *existimatio*; it was the public honour which alone entitled a Roman citizen to the full enjoyment of his public and private rights. It is defined by Callistratus:—*Dignitatis illæsa status, legibus ac moribus comprobatus*.[4] It might be entirely lost (*consumitur*) or only diminished (*minuitur*).

When lost.

It was lost whenever the person suffered the first two kinds of *capitis deminutio*;[5] that is a person who lost either his liberty or citizenship was looked upon as devoid of all honour. But when the *existimatio* was merely *diminished* (*minuitur*), the individual retained his liberty

[1] Comment. 3, 153.
[2] *Ibid.*
[3] *Compendium of Roman Civil Law*, s. 122
[4] Fr. 5. s. 1, D. 50, 13.
[5] Fr. 5, s. 3, *Ibid.*

and was only deprived of certain political and private rights.[1]

The Romans always attached a great importance to the honour of their fellow-citizens being maintained intact, and in order to preserve a high principle of integrity and virtue in the state, they branded those who fell beneath the standard of morality deemed to be worthy of a Roman citizen, or who neglected to perform those duties which were legally required of them, as *infamous* and unworthy of the full privileges of their class. Thus in the law of the Twelve Tables it is written, as we learn from a passage quoted by Aulus Gellius, that "he who has been a witness or has "acted as scale bearer and refuses to give testimony shall "be accounted infamous (*improbus*) and incapable of giving "or receiving testimony (*intestabilis*)."[2] Indeed in ancient times it would seem that the possible loss of public honor was held to be a sufficient guarantee for the due observance of the law without imposing the additional sanction of punishments. Thus we learn from Livy that the Valerian law after forbidding a person who had appealed, to be beaten with rods and beheaded,

[1] Fr. 5, s. 2, D. 50, 13.

[2] *Noct. Attic.* XV. 13. The term *intestabilis* was applied to a person who was prohibited by law from taking any part in those solemn acts in which the presence of witnesses was necessary. Maynz. *Elèments de Droit Romain.* vol. 1, s. 105, p. 225. Thus Ulpian says: *nec testamentum facere poterit, nec ad testamentum adhiberi.* Fr. 18, s. 1, D. 28, 1. And Gaius: *eo pertinet, ne ejus testimonium recipiatur, et eo amplius (ut quidam putant) neve ipsi dicatur testimonium.* Fr. 26, *Ibid.* This was a very terrible punishment because in ancient times all important transactions required the intervention of witnesses, and hence it was that the *intestabilis* was regarded as a person who was at once execrable, wicked and infamous. Thus Horace in one of his Satires employs the threat *Is esto intestabilis et sacer* (lib. ii. 3); and Paulus says *Semper*
, ne sis intestabilis (*Cur.* Act. 1, sc. i.)

added, in case of one acting contrary thereto, that it should only bé deemed a wicked act (*nihil ultra quam improbe factum*).[1] Upon this Livy quaintly remarks—*Id (qui tum pudor hominum erat) visum, credo, vinculum satis validum legis.* "This, I suppose, was judged of sufficient strength to enforce obedience to the law in those days; so powerful was then men's sense of shame." But the Romans at the period of the historian had greatly degenerated from the Romans of ancient times, and Livy accordingly adds: *Nunc vix serio ita minetur quisquam.*[2] "At "present one would scarcely make use of such a threat "seriously."

Infamia and ignominia.

Infamia and *ignominia* originally affected the *jus publicum* as well as the *jus privatum.* Thus Cicero arguing against the finality of the censorial notations, says: *Sic hominibus ignominia notatis, neque ad honorem aditus, neque in curiam reditus esset.*[3] "Thus men branded with "this ignominy would never have had any subsequent "access to honour, or any possibility of return to the *curia*, "or senate."[3] And a constitution of the Emperor Constantine proclaims that the portals of dignity would be absolutely closed to such individuals: *Neque famosis, et notatis, et quos scelus, aut vitæ turpitudo inquinat, et quos infamia ab honestorum cætu segregat, dignitatis portæ patebant.*[4] By another constitution of the Emperors Diocletian and Maximian infamous persons (*infames personæ*) are excluded from all honours to which those whose reputation was inviolate (*integræ dignitatis*) were eligible;[5] but they were nevertheless required to bear their share of those public burdens, on the due mainten-

[1] Livy. lib. X Cap. 9.
[2] *Ibid.*
[3] *Pro Cluentio*, 42.
[4] Const. 2. C. 12, 1. See also Const. 8, C. 10, 31.
[5] C. 10, 57

ance of which the general safety of the state depended. In the Republican period the Censors, as superintendents of morals, were no doubt the usual interpreters of public opinion in determining whether a man had lost his public character for honesty and integrity, and should be removed from his order or rank, thus depriving him, as Montesquieu observes, "of his individual nobility." But under the later emperors it is chiefly with respect to private rights and judicial proceedings that the effects of *infamia* are to be distinguished. Thus *famosi* or *notati* were not permitted to institute criminal proceedings,[1] or the *actio popularis*;[2] to act as procurators or advocates,[3] except for certain persons, such as parents, patrons and their children, their own children, brothers and sisters of the whole as well as of the half-blood, pupils of both sexes, *furiosi* and imbeciles under their guardianship;[4] if they were instituted heirs an action *de inofficioso testamento* was granted to their brothers and sisters, the effect of which was to pronounce the testament inofficious *(inofficiosum)*, and the inheritance then passed according to the rules of succession *ab intestato*.[5] Lastly, as already stated, they were incompetent to give or receive testimony.[6]

Under Empire only affected private rights and judicial proceedings.

There were two species of infamy—*infamia juris* and *infamia facti*.[7] The former was pronounced either by a

Infamy of two kinds.

[1] Fr. 8, D. 48, 2; Const. 15, C. 9, 1.

[2] Fr. 4, D. 47. 23.

[3] Fr. 1, s. 8, D. 3, 1; Fr. 20, s. 5, *Ibid.*

[4] Fr. 1, s. 11, *Ibid*; Fr. 2; Fr. 3. s. 1, 2, *Ibid.* Justinian, however, appears to have removed this disqualification, which does not seem to have been very strictly enforced even under the old law. 11 J. 4. 14.

[5] Fr. 21; Fr. 27, D. 3, 28; 1 J. 2, 18.

[6] Fr. 3, s. 5, D. 22, 5; Fr. 18, s. 1, D. 28, 1.

[7] Warnkœnig. *Commentarii Juris Romani Privati*, Tom. I. lib. 1, Cap. II. p. 192; Pothier *Pandectæ Just.* Tom. III, lib. III. tit. II.

law, a senatus-consultum, or the Prætorian Edict, and those who were thus expressly designated to be devoid of *existimatio* or public honor, were called *infames quos lex notavit.* A further distinction was drawn between *infamia juris immediata* and *mediata.* When the infamy was caused by some act of turpitude itself without judicial condemnation, it was called *immediata*; but when it arose only in consequence of condemnation (*suo nomine*) in certain actions as those of theft, of injuries, *de dolo, fiduciæ, mandati* and *depositi,*[1] it was called *mediata.*

The following cases may be mentioned as instances of *infamia juris immediata*:—

Infamia juris immediata.

Widows who married before the expiration of the prescribed year of mourning;[2] those who were married

[1] Gaius. *Comment.* 4, 182; 2 J. 4, 16. A condemnation in such actions only produced infamy when it was pronounced against the person *suo nomine.* Thus a condemnation against one *alieno nomine i.e.* in the capacity of tutor, procurator, or heir, did not affect his personal reputation, or *Existimatio.* Fr. 6, s. 2, D. 3, 2. See also Fr. 14, *Ibid.*

[2] Fr. 1, Fr. 11, s. 4; Fr. 12, 13 D. 3, 2; Const. 2, C. 5, 9. The father who allowed his widowed daughter to marry before the expiration of her period of mourning was also pronounced infamous, provided he was acquainted with the circumstances of his son-in-law's death. Fr. 8, D. 3, 2. The second husband also incurred infamy if he knew the woman's period of mourning had not expired when he married her, and was his own free agent in the matter. If, however, he was under the *potestas* of another, he was excused, and the latter suffered infamy in his stead for permitting the marriage. Fr. 11, s. 4; Fr. 13, D. 3, 2. The usual period of mourning was one year (Const. 2, C. 5, 9), but the Senate could reduce it under special circumstances. Thus we learn from Livy that after the battle of Cannæ the senate decreed that the mourning should be limited to thirty days, in order that the matrons in the city might take part in the sacred rites of Ceres. (lib. 22 Cap. 56.). But although the Senate might authorise widows to dispense with the garb and other signs of mourning for special purposes before the prescribed period, this would not justify them contracting a second marriage until that

or betrothed to several at the same time;[1] women seized in the act of adultery;[2] tutors or curators who either married their wards themselves before they attained the age of twenty-six, or who gave them in marriage to their sons;[3] soldiers who were dismissed the service *ignominiæ causa*;[4] persons above the age of twenty years or upwards who violated contracts freely entered into and ratified by oath;[5] insolvent debtors who compelled their creditors to resort to a *missio in bona* to obtain possession of their property. Debtors, however, who voluntarily surrendered their goods were not adjudged infamous because such surrender was followed by a public sale,[6] nor were they liable to incarceration.[7]

Persons who carried on certain low or immoral trades were also pronounced infamous. Such as prostitutes;[8] persons who took the part of performers in any public spectacle (*qui in scenam prodiit*), as stage actors or

period had expired, or protect them from the consequences of infamy. The Emperor Gordianus expressly says so in a constitution of the year 240 A.D. (Const. 15, C. 2, 12.) It should also be observed that the Roman year of Romulus was only ten months, and although Numa added two months to the Calendar the period of mourning continued to be ten months till the constitution of the year 381 above quoted increased it to a year. Thus Ovid says:

Romulus anno
Constiuit menses quinque bis esse suo
Per totidem menses a funere conjugis uxor
Sustinet in vidua tristia signa domo. *Fast.* I

[1] Const. 18, C. 9. 9; Fr. 13, s. 1, 4 D. 3, 2.
[2] Fr. 43, s. 12, 13, D. 23, 2.
[3] Fr. 66, D. 23, 2; Const. 7, C. 5, 6.
[4] Fr. 1; Fr. 2, D. 3, 2; Const. 3, C. 12, 36
[5] Const. 41, C. 2, 4.
[6] Const. 11, C. 2, 12.
[7] Const. 8, C. 7, 71.
[8] Fr. 1, s. 6, D. 1,3; Fr. 1, D. 3, 2.

gladiators;[1] males who suffered pollution, or practised pederastry;[2] procurers and procuresses.[3]

Infamia facti.

Infamia facti, according to modern civilians, arose in consequence of an evil course of life (*vitæ turpitudo*), or the practice of some mean profession, which although not giving rise to infamy either by law (*ex lege*) or the Edict of the Prætor (*ex edicta*). was yet regarded by public opinion as unbecoming a Roman citizen.[4] Such persons were equally excluded from all dignities;[5] and if they were instituted heirs the testament could be set aside by their brothers and sisters whose reputation was unsullied by an action *de inofficioso testamento*.[6] But in other respects they do not appear to have laboured under the disqualifications to which thoso *qui infamia notati sunt* were subject.[7] Indeed Maynz attaches no legal importance whatever to *infamia facti*.[8] It is clear, however, that the later Jurists did recognise gradations of infamy, if I may use the expression, and in several imperial

[1] Fr. 1, D. 3, 2; Fr. 2, s. 5, *Ibid.* A Constitution, however, of the Emperors Diocletian and Maximian (278 A.D.) exempted from the consequences of infamy persons who had only appeared on the stage during minority. *Athletes (xystici)*, *thymelici* (musicians), *agitores* (charioteers), *qui aquam equis spargunt* (those who threw cold water on horses to refresh them and make them run better, or as Noodt thinks, who sprinkled the *aqua lustralis* on the horses in the sacred games), as well as all those who took subordinate parts in the sacred games, were held not to fall within the provisions of the Prætorian Edict. Fr. 4, D. 3, 1.

[2] Fr. 1, s. 6, D. 3, 1; Const. 31, C. 9, 9.

[3] Fr, 1; Fr. 4, s. 2, 3, D. 3, 2; Fr. 43, s. 6, 9, D. 23, 2.

[4] Cicero. *De Repub.* IV. 6. Warnkœnig. *Commentarii Juris Romani Privati* 1, cap. II. 195. Mackeldey, s. 123, 2.

[5] Const. 2, C. 12, 1.

[6] Const. 27, C. 3, 28; 1 J. 5, 18.

[7] Warnkœnig. *Comment Juris Rom. Priv.* lib. 1, cap. 2, 47, p. 194.

[8] *Eléments de Droit Romain*, s. 105, p. 226, note (16).

constitutions which are embodied in Justinian's Code, the terms *infamia, turpitudo* and *levis notæ macula* are severally employed.[1]

Levis nota.

The latter term (*levis nota*) was applied to freedmen and the children of those who gained their living on the stage (*qui artem ludicram faciebant*). Such persons were prohibited by the *lex Julia* and *lex Papia Poppæa* from contracting a lawful marriage with senators or their children, nor could they be instituted heirs in preference to their brothers and sisters, who were entitled to bring an action to set aside the testament by which they were prejudiced.[2]

Effects of infamia of a permanent character.

The effects of *infamia* were permanent and could only be removed by the person obtaining an express dispensation, or a *restitutio in integrum*, from the senate or the emperor.[3] But this was only when the *infamia* was the result of a judicial sentence *(turpe judicium)*. Thus Cicero says: *Turpi judicio damnati in perpetuum omni honore privantur.* "Persons condemned by a sentence "involving infamy are deprived for ever of all honour."[4] The *nota censoria*, however, that is condemnations pronounced by the Censors simply upon their own conviction of a man's unworthiness, only endured during the term of their office.[5] It was open to their successors to restore the condemned person to his original rank, and Cicero cites the remarkable instance of Caius Geta, who had been expelled the senate by the Censors L. Metellus

[1] Const. 27, C. 3, 28; Const. 2, C. 12, 1.

[2] Fr. 44, D. 23, 2; Const. 27, C. 3, 28; Const. 7, C. 5, 5. The prohibition against the intermarriage of the above persons with senators, or children of senators, was suppressed by Justinian, who himself married an actress. Const. 23, s. 1, C. 5, 4; Novel 117, cap. 6.

[3] Fr. I. s. 9, 10, D. 3, 1; Const. 3, C. 9, 43; Const. 7, C. 9, 51; Const. 5, Th. C. 9, 38.

[4] *Pro Cluentio*, 42.

[5] *Niebuhr* II. p. 396.

and Cn. Domitius, and was afterwards himself elected Censor; so that, as Cicero forcibly observes, "he whose "morals had met with this reproof from the Censors, was "afterwards appointed to judge of the morals of the "whole Roman people, and of those very men who had "thus punished him."[1] One of the Censors might also disagree with the opinion of his colleague, and a law passed in the consulship of Clodius (695 A.D.) accordingly enacted that no one could be degraded who had not been first openly accused and condemned by their joint sentence. Cicero, still smarting under the disgrace of his banishment which had been passed at the instigation of Clodius, speaks of this law as the device of a man immersed in unheard of and impious debaucheries, to abolish "that old preceptress of modesty and chastity, "the severity of the Censor."[2] But Cicero's oratory was not always consistent, and he himself in his speech for Cluentius shows the necessity there was for some check being placed on the whimsical and even corrupt exercise of power on the part of those who were intrusted with the superintendence of Roman morals (*cura morum*).

Query, if infamia occasioned a capitis deminutio.

It is doubtful whether *infamia* ever gave rise to a *capitis deminutio*. It certainly did not do so in the time of Justinian as appears from a fragment of Modestinus inserted in the Digest,[3] but Tertullian, the great Father of the Church, who was also a profound lawyer, speaks of it as involving a loss of caput,[4] and in view of the consequences attached to the graver forms of this forfeiture of public honour, we may well believe that in republican times there was but little if any difference

[1] *Pro Cluentio*, 42.

[2] *In Pis.* 4.

[3] Fr. 103, D. 50, 16.

[4] *De Spect.* 22. See also Cicero *Pro Quinctio*, where he speaks of a suit involving *existimatio* as a *causa capitis*.

between *infamia* and *capitis deminutio*. Under the Empire, however, as I have previously observed, *infamia* ceased for the most part to have any political effects.

Natural death

The *persona* of a person, regarded simply as a creation of civil law, does not become extinct by the natural death of the individual, but is immediately perpetuated in those who succeed to his rights and privileges. Thus according to a legal fiction the state or the king never dies. But of course all those rights which are limited to the duration of a person's own life, perish with his material death. Thus in Roman law a usufruct perished on the death of the usufructuary if the *jus fruendi* was limited for his life (*quamdiu vivat*).[1] But prædial servitudes being attached to immoveable property were not held to perish with the natural or civil death of the person in actual enjoyment: they continued so long as the dominant tenement (*res dominans*) remained in existence.[2]

Extreme length of life.

The extreme length of human life is reckoned by Gaius at a hundred years, and this was accordingly fixed as the period of duration for usufructs which belonged to a city or corporation: *quia neque morbe, nec facile capitis deminutione periturus est.*[3] In Germany the natural term of human life is presumed to extend to seventy years, reckoned from the date of birth, no doubt with reference to the passage in the Psalms of David in which the Psalmist declares—"the days of our lives are three score "years and ten."[4]

Priority of death; how determined.

According to Roman law the following rules were to

[1] Fr. 3, s. 3, D. 7, 4; Const. 16, C. 3, 33; 3 J. 2, 4; Gaius. *Comment.* 2, 33.

[2] Fr. 3, D. 8, 6; Fr. 20, s. 2, D. 8, 2.

[3] Fr. 16, D. 7, 1; see also Const. 23, C. 1, 2, fixing the prescription against churches and charitable institutions at a hundred years, as the longest duration of human life.

[4] Psal. Davd. 90, 10.

be observed in determining questions regarding priority of death in the absence of any direct evidence:

1. If two or more persons perished together in a common accident, such as a fire or shipwreck, they were to be presumed to have died at the same moment.[1]

This was the general rule, but regard was had to age in certain cases. Thus, according to Tryphonius,

2. If a father and child below the age of puberty *(impubes)* were killed by the same accident, the child was presumed to have died first.[2]

3. But if the child had attained the age of puberty, the presumption was altered in consideration no doubt of the greater vitality of a full grown youth, and the father was then presumed to have perished before the child. Thus where a father and son perished together in war (a fact which shows that the son had attained puberty), the Emperor Hadrian in the absence of direct evidence as to priority of death, decided that the father died first, and this decision is approved of by Tryphonius.[3]

To this last rule there were also exceptions. Thus

a. In the case of a freedman and his son meeting their death by the same accident, the rights of the patron could not be defeated under the ordinary presumption of the son outliving the father, but express proof was required that the father really died first.[4]

b. In the case of a testamentary *fidei commissum*, under the condition *si sine liberis decesserit* to the heir, if both father and son perished together by shipwreck, or some other accident, that presumption was to be drawn which would maintain the due performance of

[1] Fr. 16, 17, 18, D. 34, 5; Fr. 34, D. 36, 1; Fr. 26, D. 39, 6.
[2] Fr. 9, s. 4, D. 34, 5; Fr. 23, *Ibid.*
[3] Fr. 9, s. 1, 4, *Ibid*; Fr. 22, *Ibid.*
[4] Fr. 9, s. 2, D. 34, 5.

the trust: in other words the son was not to be presumed to have outlived the father.[1]

4. In case of a *donatio mortis causa* or a *donatio inter virum et uxorem*, the donor in case of doubt was presumed to have died first, and the gift was thus enforced.[2]

Neither life nor death to be presumed.

Mackeldey, whose doctine has been disputed, however, by Dr. Rosshirt, states another general rule that *neither the life nor the death of a man is to be presumed.* "The "fact," he says, "that a man has lived must therefore be "proved; but if this be once established, he is held to "be living until evidence of his death is brought for-"ward."[3] Although there are no express rules to be found on this subject in Roman law, it would seem from one of Justinian's Novels concerning the re-marriage of widows, that some evidence of death was always necessary.[4] It may not be uninteresting to quote the following provisions of the Indian Evidence Act of 1872 based on the principles of English law, as to the burden of proof where the question at issue is whether a man is alive or dead :—

"107. When the question is whether a man is alive "or dead, and it is *shown that he was alive within* "*thirty years*, the burden of proving that he is dead "is on the person who *affirms* it."

"108. When the question is whether a man is alive "or dead, and it is proved that he has *not been heard* "*of for seven* years by those who would naturally have "heard of him if he had been alive, the burden of "proving that he *is alive* is on the person who affirms "it."

[1] Fr. 17, s. 7, D. 36, 1.
[2] Fr. 32, s. 14, D. 24, 1; Fr. 26, D. 39, 6; Fr. 8, 9, s. 3, D. 34, 5.
[3] *Compendium of Modern Civil Law*, s. 140.
[4] Novell. 117, Ch. 11.

CHAPTER IV.

Freemen and Slaves.

General division of persons.

BOTH Gaius and Justinian adopt the general division of persons into Freemen and Slaves.[1] In one view this division is open to objection, because in Roman law a slave had no legal existence: he had no caput (*nullum caput*)[2] and could not, therefore, be rightly regarded as a legal *persona*. Hence it is that he is included amongst corporeal things.[3] But it is evident that both Gaius and Justinian employ the word *person* in the title *de jure personarum*, in its natural and not in its technical sense of one who has a capacity for rights.[4] In the secondary division of persons into those *sui juris* and *alieni juris*, we have another instance of the employment of the term in its general signification; and since it was impossible to exclude

[1] *Gaius*. Comment. 1, 9; Pr. J. 1, 3.
[2] 4 J. 1, 16.
[3] Heineccius *Recitat. Elem. Ju. Civ.* s. 78.
[4] 1, J. 2, 2.

slaves from this second classification, it was necessary to devise a primary division which would at once embrace both classes of physical persons. Besides, as I have already shown, a slave could receive a legacy[1] and acquire property,[2] although it may be the master could demand the benefit of such acquisitions for himself; but a father in the same manner, in the more ancient period of Roman law, was entitled to all his son's acquisitions,[3] and yet no one would deny that a *filiusfamilias* was a *persona*. Again slaves might create a valid obligation by securing the intervention of a *fide jussor*,[4] and by the *lex Petronia*, passed in all probability in the reign of Augustus, a slave could not be made to contend with wild beasts or be sold for that purpose by way of punishment, except by the sentence of a competent tribunal pronounced on the complaint of his master.[5] Indeed under the emperors we find that the *peculium*, or self-acquired property of slaves, was as a matter of fact enjoyed by themselves, and they frequently purchased their freedom with it.[6] So that practically, if not legally, a slave at the time when Gaius wrote, and to a still greater degree under Justinian, was not only the object but even the subject of rights; and thus the broad and general division of persons into freemen and slaves, although strictly open to the technical objection I have mentioned, is sufficiently intelligible.[7]

Definition of liberty.

Liberty and freedom, says Justinian, adopting the language of the Jurist Florentinus,[8] is the natural power

[1] Fr. 82, s. 2.
[2] Pr. J. 2, 9; *Gaius*. Comment. 2, 86.
[3] Fr. 1, *Ibid*; *Gaius*. Comment. 2, 87; Const. 6, C. 6, 61.
[4] *Gaius*. Comment. 3, 119; 1 J. 3, 20.
[5] Fr. 11, s. 1, 2, D. 48, 8; Fr. 42, D. 18, 1; Aul. Gell. *Noct. Attic.* 5, 14. See also *Gaius*. Comment. 1, 53.
[6] Tacit. Ann. XIV 42; Fr. 53, D. 14, 1.
[7] See Demangeat *Cours Elémentaire de Droit Roman*, vol. I. p. 144.
[8] Fr. 4, D. 1, 5.

Of slavery.

of doing what we each please, unless prevented by force or by law.[1] Slavery, on the other hand, is described as an institution of the law of nations, by which one man is made the property of another, contrary to natural right. According to the favourite paradox of the Stoics, "the "wise man is alone free, and every fool is a slave" (μονος ὁ σοφος ἐλεύθερος, πας ἄφρων δοῦλος); and Aristotle broadly asserts that nature destined command and empire for those endued with powers *and a disposition for that purpose,* and that she gave to the other division of mankind a strength of body joined to an infirmity of judgment to qualify such for a state of subjection. But whatever practical truth there may be in this remark, for it has been observed that great mental ability is not usually combined with superior physical strength,[2] and in the battle of life it is generally found that the cleverest men rise to power, at least in civilized countries; it is nevertheless obvious, as Sir Patrick Colquhoun forcibly points out, that the mere possession of qualities fitting a man for a particular sphere or condition of life do not necessarily imply the condition itself.[3]

Slavery

The introduction of slavery is ascribed to the *jus gentium,* because, as Ulpian observes, by the law of nature (*jus naturale*) all men are free, and it is only by the civil polity of nations that one man is compelled to owe obedience to another. The law of nature treats all men alike, but the *jus gentium* divides them into three classes, according as they happen to be *liberi* (free), *servi* (slaves), or *libertini* (freedmen).[4]

[1] 1 J. 1, 3.

[2] In a letter from the famous Dr. Molyneux to Locke, dated December 20, 1692, he says one cannot "but deplore the great "losses the intellectual world, in all ages, has suffered by the "strongest and soundest minds possessing the most infirm and sickly "bodies."

[3] *Summary of Roman Civil Law*, vol. 1. s. 412.

[4] Fr. 4, D. 1, 1; Fr. 4, s. 1, D. 1, 5; Fr. 32, D. 50, 17.

Florentinus derives the term *servi* from the circumstance that generals were accustomed to direct their captives in war to be sold, and thus to preserve their lives (*servare*) instead of putting them to death.[1] They were also called *mancipia* because they were taken from the enemy by the strong hand (*manu*).[2] Thus both terms equally refer to the notion that war was the origin of slavery; and it appears that the practice of reducing

Derivation of the term servi

[1] Fr. 4, s. 2, D. 1, 3; 3 J. 1, 3. The ancients generally recognised the right of victors to put their captives to death, a memorable instance of which is related by Livy who mentions that of the Tarquinians who were made prisoners, only three hundred and fifty-eight were sent to Rome by the Consul, the rest being put to the sword. And even those who were sent to Rome were subsequently beaten with rods and beheaded in the middle of the Forum. lib. VII. c. 19. See also Cicero's 2nd speech against Verres, s. 30. As a rule, however, the Romans acted very mercifully towards prisoners captured in a war arising out of quarrels concerning honour and sovereignty. Thus Cicero remarks: "As we are bound to be merciful to those whom we "have actually conquered; so should those also be received into favour, "who have laid down their arms, and thrown themselves wholly on "the general's mercy, and that even though the breach be made in "their city walls. Our good forefathers," he continues, "were most "strictly just as to this particular; the custom of those times making "him the patron of a conquered city or people, who first received "them into the faith and allegiance of the people of Rome." *De Off.* lib. 1, XI. But a different course of treatment was necessarily adopted against persistent enemies, such as the *Cimbri* and *Celtibri*, for in such cases, as Cicero says, it was not merely a question of "whether "of the two should remain a conqueror, but whether should remain "a people at all." *Ibid.* XII. Montesquieu altogether denies the right to kill an enemy, unless his existence be incompatible with the personal safety of the victor; if it be so, he says, his death is justifiable; if it be not, he has no right to destroy the captive, and, consequently, as little to reduce him to slavery, but merely so far to assure himself of his person as to prevent his doing him harm. *Esprit des Lois*, 15, 2. The Roman soldier was taught *aut vincere aut mori*. *Cie.* De. Off. lib. III. 32; and thus we find those who had behaved badly taunted as *pagani*, see *ante*, page 30.

[2] *Ibid.*

captives to a servile condition was very generally followed amongst all the nations with whom the ancient Romans had any intercourse. But by war is to be understood a contest in which two hostile nations are engaged, and thus freemen who were captured by pirates or brigands were not regarded as slaves, even during the period of their unlawful detention, nor did they stand in any need of the *jus postliminii*.[1] Those persons, however, who were deprived of their liberty by a hostile State, such as that of the Germans or Parthians, ceased to be recognised as Roman citizens so long as they remained in the power of the enemy; for, as already explained, liberty was an essential element in the *caput* of a *cives*, and the loss of it entailed the greater *capitis deminutio*. But captives did not actually forfeit all their pre-existing rights, which were merely held to be in abeyance and instantly revived as soon as liberty was regained.[2] This right of a captive to be restored to his former *status* was called *jus postliminii*, but since persons captured by pirates or brigands suffered no change of *status*, they needed no restoration to rights, which according to the law of nations they had never ceased to possess.[3]

Slavery early adopted by the Romans.

Whether or not slavery originated with the Romans, it is, at all events, certain that it was an institution which they early adopted, for we find mention of slaves in the Twelve Tables: *Si servus furtum faxit noxiamve nocuit*, a passage which is thus interpreted by Ulpian:[4] "If a slave "has committed a theft or any other injury . . . . the

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[1] Fr. 21, s. 1; Fr. 24; Fr. 27, D. 49, 15. It was not, however, necessary for actual hostilities to have commenced at the time of capture: it was sufficient if the person was seized by an enemy with whom the Romans had neither friendship, rights of hospitality, nor treaties of alliance (*neque amicitiam, neque hospitium, neque fœdus amicitiæ*, as Pomponius says). Fr. 5, s. 2, *Ibid.*

[2] 5 J. 1, 12; *Gaius*. Comment. 1, 129.

[3] Fr. 24, 27 D. 49, 15.

[4] Fr. 2, s. 1, D. 9, 4. See also Festus on the word *Noxia*.

"direct action does not lie against the master, but the "*actio noxalis* does." And accordingly Marcianus says that men become slaves either by the law of nations or by the civil law.[1] As instances of the former he mentions prisoners captured in war, and the children of a female slave. Indeed to such an extent was slave traffic carried at Rome that a man's wealth was computed according to the number of his slaves,[2] and some families were said to possess as many as 20,000.[3] Hereditary slaves, called *vernæ*, were those who were born and reared on the property of the master of their mother, and were reckoned as members of his household. As slaves could not contract a legal marriage, the children followed the condition of the mother at the time of birth, subject to certain exceptions which we shall hereafter consider.[4]

Hereditary slaves.

By the civil law slavery was produced under various circumstances. Justinian, following Marcianus,[5] only gives a solitary instance, namely, that of a free person, above the age of twenty, who allowed himself to be sold in order to share the price given for him.[6] The general theory of the Roman law was that a freeman could not barter his liberty. Thus Callistratus says that a freeman cannot be made a slave or a freedman by private compact.[1] And Paulus treating of things which are not the subject of commerce remarks, that a promise to give a consecrated place when it shall prove profane, or a freeman when he shall become a slave, is not admitted by law, because in their existing condition they are not liable to any such obligation; only those things, he adds, are subject to

Slavery jure civili.

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[1] Fr. 5, s. 1, D. 1, 3.
[2] Juv. 3, 141.
[3] *Athen.* 6, 272.
[4] Ulp. *Fragm.* V. s. 8, 10; *Gaius.* Comment. 1, 82, see *post.* p.
[5] Fr. 5, s. 1, D. 1, 3.
[6] 4 J. 1, 3.

obligations, which in their own nature may be performed at the present time, and it is not agreeable to civil or natural law to anticipate the fall or misfortune of a freeman.[1] But in order to check fraudulent persons from taking advantage of the law and permitting themselves to be sold as slaves with the view of sharing the price, and immediately afterwards reclaiming their liberty, it was enacted (in all probability by the *Senatus-consultum Claudianum*, A.D. 52,) that such persons, if they had attained the age of twenty at any time up to the division of the proceeds, should lose all the rights of freemen and be reduced to the condition of actual slaves;[2] provided, however, that the purchaser on his part had acted in good faith and had paid the purchase-money. For if the purchaser was fully aware of the real condition of the pretended slave, he could not prevent the person who had been sold to him from asserting his freedom: the whole transaction being tainted with fraud, and both parties being *in pari delicto*, the law refused to recognise the sale, as one made in opposition to a fundamental rule that liberty was not a subject of commerce.[3] Supposing, however, that the first purchaser had transferred his rights to a second purchaser, who honestly believed that the person sold to him was in reality a slave, in this case, says Paulus, the *proclamatio ad libertatem* cannot be claimed by him who willingly permitted himself to be disposed of under a false character.[4]

Examples of slavery jure civili.

Among other instances of slavery arising *jure civili* were the following, most of which have already been alluded to under *maxima capitis deminutio*:—

1. According to the provisions of the *Senatus-consultum Claudianum*, a free woman who cohabited with

[1] Fr. 37, D. 40, 12.
[2] Fr. 83, s. 5, D. 45, 1.
[3] Fr. 1, D. 40, 13.
[4] Fr. 33, D. 40, 12.

the slave of another, knowing him to be such and in opposition to the express and thrice repeated warning (*denuntio*) of his master, or even without a warning if the slave were owned by a municipium, might, by the sentence of a magistrate, be pronounced to be the property of the owner of the slave; and her children, although born before she had been adjudged a slave, were held to be born in a servile condition.[2] Justinian abolished this law deeming it unworthy of the age.[3] The same *senatus-consultum* contained two other provisions which had ceased to be law before Gaius wrote his Commentaries. By the first it was enacted that when a freeman had children by a woman whom he believed to be free, but who turned out to be a slave, those of the male sex should be free, but the female children should follow the condition of the mother. Vespasian restored the rule of the *jus gentium* and decided that the children of a slave woman, without distinction of sex, should be born slaves.[4] In the second place it was provided that a free woman who cohabited with the slave, having obtained the consent of his master, might by agreement stipulate to retain her freedom while her children should be born slaves. But Hadrian, influenced by the want of equity in such an agreement, decided, in accordance with the principles of the *jus gentium*, that where the mother retained her freedom her children were equally free.[5]

2. A Roman citizen who refused or neglected to do military duty when required, forfeited his liberty and could be sold as a slave.[6]

[1] Fr. 33, D. 40, 12.

[2] Gaius. *Comment.* 1, 86, 91, 160; C. 7, 24; Paul. *Sentent*, 2, 21, s. 17.

[3] 1 J. 3, 12.

[4] Gaius. *Comment.* 1, 85.

[5] Gaius. *Comment.* 1, 84.

[6] Cic. *Pro Cæcina.* 34; Fr. 4, s. 10, D 49, 16.

3. So also if he failed to enroll his name on the tables of the Censor he was reduced to the condition of a slave.[1]

4. Persons condemned to work in the mines (*in metallum* or *in opus metalli*), or to contend with wild beasts, became the slaves of punishment (*servi pœnæ*). But Justinian repealed the old law and decided that no one was to be reduced to slavery by way of punishment.[2]

5. According to the law of the Twelve Tables, as we learn from Aulus Gellius, a debtor who made default was made over by the Prætor to his creditor, and if after a certain period of grace he was still unable to discharge his debt, he was entirely at the mercy of his creditor, who could either sell him or put him to death.[3]

6. By a Constitution of the Emperor Claudius a freedman who was guilty of ingratitude towards his patron was liable, on the complaint of the latter, to be reduced to his former condition.[4] But this law had apparently been forgotten, or was purposely ignored, in the succeeding reign of Nero (A.D. 56); for we learn from Tacitus[5] that in consequence of the insolence of the enfranchised slaves towards their patrons it was proposed in the senate to pass a law empowering patrons to reclaim their rights over such as made an improper use of their liberty. Nero, however, rejected the proposal and decided that each case between a patron and his freedman should be determined upon its own merits, without derogating from the rights of the body of freedmen at large. But under the later emperors

[1] Cic. *Pro Cæcina*. 34.
[2] Novel. 22 chap. 8.
[3] *Noct. Attic.* 20, 1.
[4] *Sueton.* s. 25.
[5] *Annal.* 13, 26-27.

the *revocatio in servitutem* was revived, and in a Constitution of Constantine of the year 319 A.D. it is declared that children who were born to a freedman after the *revocatio* were likewise slaves.[1] This law continued unaltered down to the reign of Justinian.[2] But it was not every trivial act of disobedience which the law recognised as ingratitude. Thus Papinian says :—*Liberta ingrata non est, quod arte sua contra patronæ voluntatem utitur.*[3] The *libertus* owed his patron the duties of *obsequia et reverentia,* and failure in the discharge of these duties rendered him *ingratus.*[4] The same result followed if he refused to administer the property of his patron or to undertake the *tutela* (or guardianship) of his patron's children.[5] It appears however from a constitution of Antoninus of the year 215 A.D. that one who manumitted a slave *ex causa fideicommissi* was not entitled to accuse the slave thus manumitted of ingratitude : because, says the emperor, that is an extraordinary remedy afforded to him who of his own accord manumits his slave gratuitously, and is not extended to a person who simply discharges an obligation (imposed upon him by another).[6] A patron might, however, secure additional rights (such as *dona, munera,* and *operæ*) by special agreement ratified by the oath of the slave after he had gained his liberty.[7] The *operæ* might be either *Officiales* or *Fabriles.* The former consisted in the duties of respect and affection, and ordinarily terminated, in the absence of any

[1] Const. 2, C. 6, 7.

[2] 1 J. 1, 16.

[3] Fr. 11, D. 37, 15.

[4] Fr. 1, s. 1 ; Fr. 9, D. 37, 15 ; Const. 1, C. 8, 50. See also Heineccius, *Jus Civile Insti.* lib. 1, tit. III. s. 83.

[5] Fr. 19. D. 37, 14.

[6] Const. 1, C. 6, 7.

[7] Fr. 7, pr. s. 1, 3, D. 38, 1 ; Gaius, *Comment.* IV. 162.

agreement to the contrary, with the death of the *patronus*. The latter were of the nature of money and money's worth, and passed to the heirs of the patron. By a rescript of the Emperor Hadrian no *operæ* could be imposed by a person who simply manumitted a slave *ex causa fideicommissi*.[1] But, according to Marcianus, if a deceased person bequeathed his slave to his son, and at the same time requested the son to manumit the slave, reserving to himself the full rights of the *jus patroni*: in that case the manumittor could impose what *operæ* he thought fit,[2] provided, as Paulus says, they were of an honest character, not dangerous to life, and suitable to the age and capacity of the slave.[3] Moreover, under the provisions of the *lex Julia et Papia Poppœa*, freedmen who had begotten two children and had them under their power, or had one child five years old, except those who practised the *ars ludicra*, or who hired themselves out to fight with beasts, were released from all obligation as to gifts or *operæ*.[4]

No distinction in the legal condition of slaves.

The Roman law recognised no distinction in the legal condition of slaves, for they were all alike devoid of civil capacity;[5] but *ratione officii* some were reckoned superior to and enjoyed greater privileges than others. Thus the *servi publici* enjoyed a superior position to domestic slaves (*servi privati*). The former class included those who were captured in war (called *dedititii*), and those who had been publicly sold for contravening the provisions of the *lex Ælia Sentia* and had been subsequently emancipated by their owners.[6] They were usually employed by the

[1] Fr. 7, s. 4, *Ibid.*
[2] Fr. 29, s. 1, D. 38, 2.
[3] Fr. 16; Fr. 17, D. 38, 1.
[4] Fr. 37, D. 38, 1.
[5] Fr. 5. D. 1, 5; 5 J. 1, 3.
[6] Gaius. *Comment.* 1, 27.

magistrates[1] and acted as lictors, gaolers, and in the departments of justice, religion, and public buildings. The Censors allotted them places for their habitation,[2] and appear to have had a general control over them, for Livy represents the Censors Caius Claudius and Tiberius Sempronius, when they were decreed to stand their trial for high treason, mounting the temple of liberty, sealing the books of the public accounts, closing the registers, and dismissing the public slaves.[3] But what particularly distinguished the *servus publicus* from the domestic slave was that the former, as Ulpian informs us, had a testamentary power over half of his property.[4]

Servi privati.

The following are classes of *servi privati* mentioned by Ulpian[5]:—*Servi ordinarii*, or superior household slaves; *vulgares*, those who filled menial offices, as cooks,[6] barbers, bakers, porters, &c.; *mediastini*, who were mostly rustic slaves, but the term was also applied in cities to *atriarii*, *socarii*, and the like, and Ulpian says a master was not responsible for anything entrusted to such persons;[7] *qualisqualis*, a general term not applied apparently to any particular class of slaves. Gaius[8] and Justinian[9] also

[1] Aul. Gell. *Noct. Attic.* 13, 13.
[2] *Tab. Herac.*
[3] Lib. 43, 16.
[4] *Frag.* 20, s. 16.
[5] Fr. 15, s. 44, D. 47, 10.
[6] The office of cook began to rise in importance as the Romans became familiar with the rich viands of Eastern tables. Thus Livy alluding to the Asiatic luxuries imported into Rome by the soldiery of Cn. Manlius Vulso, observes: "Their meats also began to be prepared with greater care and cost; while the cook, whom the ancients considered as the meanest of their slaves, both in estimation and use, became highly valuable, and what was formerly considered as a servile office began to be considered an art." Lib. 39, 6.
[7] Fr. 1, s. 5, D. 4, 9; Fr. 6, D. 7, 7.
[8] Fr. 4, D. 33, 8.
[9] 17 J. 2, 20.

mention the *servus vicarius*, who was the attendant or slave of the *servus ordinarius*, and formed part of his *peculium*.[1] "If ordinary slaves," says Justinian, "are "bequeathed together with vicarial, although the ordinary "slaves die, yet the vicarial slaves will pass by virtue of "the gift."[2]

Adscriptitii. The Emperor Alexander also draws a distinction between ordinary slaves and *adscriptitii*,[3] or those who were employed in agriculture. In a constitution of the Emperor Anastasius referring to this class, it is said that their *peculium* belonged to their masters (*eorum peculia dominis competunt*),[4] so that in this respect it would seem they did not differ from ordinary slaves. But they were *not bound to the person*, as Sir T. Smith says, but to the *manor* or *place*. Their masters could not transport them from one place to another, and when the land which they cultivated was sold they passed with it into the hands of the purchaser.[5] Their children also passed with the land, and if it happened that the father and mother were attached to different plots of land, Justinian decided that the children should be allotted between them, equally if possible, but where the number of children rendered such a division impracticable, the owner of the soil to which the mother was attached obtained the largest proportion; thus if there were three children, two belonged to the mother's master and the third to the owner of the father's land: if there were five, three belonged to the former, and the remaining two to the latter.[6] If the mother were *adscriptitiæ conditionis* the child always followed her condition although the father

[1] Fr. 25, D. 33, 8.
[2] 17 J. 2, 20.
[3] Const. 1, C. 8, 52.
[4] Const. 18, C. 11, 47.
[5] Const. 23, C. *Ibid.*
[6] Novel. 162, ch. 3.

might be a freeman;[1] but in the case of children who were born *ex patre adscriptitio et matre libera*, Justinian enacted that they were free and could acquire property for themselves, although they were not able to quit the estate on which they were born. They were called *coloni* and were assimilated in all respects to persons of that class.[2] By a constitution of the Emperor Valentinian III. (454 A.D.) a freeman might become an *adscriptitius* by contracting a union with a woman who was *adscriptitiæ conditionis*, and voluntarily announcing his intention *gestis municipalibus*.[3] Under the later legislation of Justinian *adscriptitii* could enter holy orders even without the consent of their masters, but they were not freed from thēir connexion with the land until they attained the dignity of a bishop.[4] An ordinary slave could also become a *clericus*, and if he did so with the consent of his master he immediately acquired his freedom; but if he was ordained without the knowledge of his master, the latter could reclaim the benefit of his services within the space of one year.[5] *Adscriptitii* might receive moderate chastisement from their masters.[6]

Condition of slaves.

The lot of the Roman slave was one of the most pitiable character, and was far worse than that of the villein in English law, who "*knew not in the evening what he was* "*to do in the morning, but was bound to do whatever he* "*was commanded.*" The life and property of the Roman slave was completely at the disposal of his master, and nothing but the will of the *dominus* could originally put an end to the period of his servitude; but under the empire freedom might be obtained by the uninterrupted enjoy-

[1] Const. 21, C. 11, 47.
[2] Novel. 162, ch. 2.
[3] Novel. *Valent.* tit. 30, 1, s. 5, 6.
[4] Novel. 123, ch. 4, 17.
[5] Novel. 123, ch. 17.
[6] Const. 24, C. 11, 47.

ment of liberty for a period of twenty or thirty years.[1] The status of the children, however, could not be challenged except within five years of the slave father's death, whether on behalf of a private person, or the *fiscus*.[2] Whatever the *servus* acquired was for the benefit of his owner,[3] and since he had nothing to call his own, he could not directly purchase his liberty.[4] But he might do so by procuring another freeman to become the nominal purchaser, on condition of emancipating him as soon as the purchase-money was paid up. A rescript of the *Divi Fratres* ordained that a slave *in eam conditionem redigitur, ut libertatem adipiscatur*.[5] So also with respect to the person of the slave the old law vested the master with the power of life and death,[6] but a Constitution of the Emperor Pius Antoninus made it criminal homicide to kill one's own slave, and by another Constitution the same emperor commanded that on proof of intolerable cruelty a master should be compelled to sell his slaves. Thus in Gaius's time masters were not permitted to indulge in excessive or causeless harshness towards their slaves;[7] and Constantine (A.D. 312) only allowed moderate corporal punishment, an enactment which Justinian retained in his Code.[8] We have also seen that similar changes were made in the law regulating the acquisition of property.[9]

[1] C. 7, 39; Novel. Valent, 8.
[2] Fr. 1, Pr. D. 40, 15.
[3] Gaius. *Comment.* 1, 52; 1 J. 1, 8.
[4] Fr. 4, s. 1, D. 40, 1.
[5] Fr. 4, pr. *Ibid.*
[6] Gaius. *Comment.* 1, 52; 1 J. 1, 8.
[7] *Ibid*, s. 53; 1 J. 1, 8. A *lex Cornelia* passed by Sylla (B.C. 82) allowed a prosecution against a master who put his slave to death (Fr. 23, s. 9, D. 9, 2), and the *lex Petronia* prohibited the exposure of slaves to contests with wild beasts. Fr. 11, s. 2, D. 48, 8.
[8] C. 9, 14.
[9] *Ante*, page 95. See *post*, ch. 5.

Coloni or

The condition of the *coloni* is not inaptly characterised by Blair "as one of imperfect or abridged freedom, "rather than of mitigated servitude."[1] It is beyond the just limits of the present work to go into a full history of this class of semi-freemen, but I may here remark that agriculture during the latter days of the republic, and more particularly under the empire, was carried on by bands of slaves transported to and maintained upon the land. In ancient times, however, the occupation was one which was not deemed unworthy of men of the highest rank, and as persons of the senatorial class were debarred from engaging in all lucrative employments, they turned their attention to the cultivation of land.[2] The classical reader will here recall the story related by Livy of the famous Roman general Cincinnatus receiving the message of the senate which called him to the dictatorship, while engaged in ploughing a small farm of four acres, at the other side of the Tiber, called the Quintian meadows.[3] Servius Tullius allotted seven acres to each citizen, and this was generally the proportion which was subsequently assigned in the distribution of conquered territory.[4] Plebians were all bound to be husbandmen, and if they renounced this calling and adopted a retail trade or handicraft, they renounced their order likewise; and it became the censor's duty to expunge their names.[5] But with the increase of opulence and the acquisition of large estates by single proprietors, it became the custom to let out farms for cultivation to the poorer classes of freemen, who paid the proprietors a

[1] *State of Slavery among the Romans*, p. 100.

[2] Cic. *Cat. Maj.* 16, 55-56; *Plat. Cat. Maj.*

[3] Lib. III. cap. 26.

[4] Lib. 5, 30; *Nieb.* II. p. 161. Six acres per man are mentioned by Livy as having been allotted to the colonists who were sent to Potentia in Picenum, and Pisaurum in the Gallic territory. Lib. 39, c. 44.

[5] *Nieb.* II. p. 398.

certain fixed rent. Conquered barbarians were also employed to cultivate land, as appears from a constitution of Honorius of the year 409 A.D.,[1] discovered by M. Peyron amongst the fragments of the Theodosian Code. Poverty and distress reduced others to change their position as freemen for that of agricultural labourers under wealthy proprietors.[2] If a freeman occupied the position of a *colonus* for a period of thirty years and paid rent in that capacity to the owner of the land, he forfeited his rights as a citizen and became inalienably connected with the soil, and was bound to provide for its cultivation and to pay his legitimate rent or dues. This rule was professedly established by Anastasius as much in the interests of the agriculturist as of the proprietor of the land,[3] and it was confirmed by a subsequent constitution of Justinian.[4]

Coloni inseparably attached to the lands they cultivated.

It would appear from a question submitted to and decided by the jurist Scævola, that in his time *coloni* were not inseparably attached to the lands which they cultivated; because in deciding that a certain legatee of an estate was entitled to have the *coloni* attached thereto, the jurist seems to rest his decision solely on the wording of the will and codicil.[5] But whatever may have been their original position, it seems unquestionable that in the time of Marcianus and Ulpian, the *coloni* could not be separated from the soil, and that they passed with it to every successive owner. Thus the former jurist gives it as his opinion that a legacy of the *coloni* simply without the estate itself is of no avail.[6]

[1] Fr. 3, C. Th. 5, 4.
[2] Salvian, *De gubernatione Dei.* ch. 8.
[3] Const. 18, C. 11, 47.
[4] Const. 23, s. 1, *Ibid.*
[5] Fr. 20, D. 33, 7.
[6] Fr. 112, D. 30, 1.

In some respects *coloni* were assimilated to freemen and in others to slaves. Thus they could contract marriage,[1] and acquire property for themselves, but it appears from a constitution of the Emperors Arcadius and Honorius that they could neither sell nor dispose of their own peculium without the knowledge of their masters, or rather of the owners of the land which they cultivated.[2] Nor could they institute a civil action against their masters, or any criminal proceeding unless for a personal injury to themselves or their children.[3] If they absconded they could be compelled to return by order of the president of the province.[4] They could occupy no military post however subordinate,[5] and although prior to Jūstinian they might by prescription change their position as *coloni*, by a constitution of that emperor it was enacted that no length of time would have this effect.[6] The position once assumed extended to their entire posterity.

Condition of coloni.

Latium was composed of an association of thirty cities (*τρίακοντα πόλεις. Dionysius*, iii. 34) with Alba as capital, and the inhabitants being the nearest neighbours of the Romans, and aspiring to equal privileges with them, a spirit of hostility was continually maintained by the two peoples against each other, which frequently led to war. But the complete conquest of Latium during the consulship of Lucius Furius Camillus and Caius Mænius destroyed for ever the ancient association and established the supremacy of Rome.[7] Those Latin cities which had

Jus

[1] Novel. *Valent.* III. tit. 30, 1 s. 2, 3.
[2] Const. 2, C. 11, 49.
[3] Const. 2, C. 11, 49.
[4] Const. 6, C. 11, 47.
[5] Const. 19, C. 11, 47.
[6] Const. 23, *Ibid.*
[7] Livy. lib. VIII. cap. 13. It was in this last sanguinary contest that the consul Decius Mus devoted himself to the Dii Manes for the Quirites in the engagement which took place between the Romans and Latin confederates not far from Mount Vesuvius. *Ibid*, 9.

not taken part in the war were continued in their rights of citizenship, but the others were treated with marked severity, and the right of lawful marriage and of holding landed property was limited for each citizen to his own particular town.[1]

Latini veteres

The condition of the *Latini veteres* was an intermediate one between that of the Roman citizen and the *peregrinus*, or foreigner. They generally possessed the rights of *commercium*, and thus Livy mentions that the ambassadors from the confederate states complained amongst other things, that in order to gain complete Roman citizenship many of the Latins *liberos suos quibusquibus Romanis* MANCIPIO *dabant*.[2] Whether they equally possessed the *testamenti factio* is a disputed point, although Heineccius distinctly asserts that they did not, unless the right was specially conceded.[3] In s. 87, cap. ii. of the Appendix to the learned author's *Antig. Roman.* the same opinion is again expressed, and Ulpian's authority is cited.[4] But the text of Ulpian clearly refers to the *Latini Juniani*, who were expressly excluded by the *lex Junia*, and this is proved by reference to s. 23 of the first book of the Commentaries of Gaius, which had not been discovered when Heineccius wrote his works. So that, as Ortolan remarks, "we are authorised to conclude from this express "exception made by the Junian law with regard to the *Latini Juniani* that this law met the case with the *Latini* "*veteres*."[5] It is clear at all events that the Latins were early accustomed to execute wills,[6] and having the *Commercium* there is no reason to suppose that they were

[1] *Ibid*, cap. 14.

[2] Lib. 41. Cap. 9. This was in order to evade the law which permitted Latins who left a child at home to become Roman citizens.

[3] *Jus Civile Insti.* s. 119, lib. I. tit. 5.

[4] Frag. 20, 14.

[5] *Hist. de la legis. Rom.* s. 187, note.

[6] Livy, lib. I. 3, 34.

denied the privilege of the *factio testamenti*. With regard to the right of *connubium*—that is of intermarriage with Roman citizens—it appears that although there are many recorded instances of the marriage of Romans with Latins, it was not one which was generally enjoyed by the latter. The sister of the brave Horatius, it is true, was betrothed to one of the Curiatii, an Alban,[1] and Tarquin the Proud, in order to gain over the Latins, gave his daughter in marriage to Octavius Mamilius of Tusculum, "the most eminent "of the Latin name," says Livy, "being descended, "if we believe tradition, from Ulysses and the goddess "Circe."[2] So also Pacuvius Calavius, chief magistrate of Capua, was married to a daughter of Appius Claudius, and his own daughter was married to a Roman.[3] Strabo moreover distinctly asserts that the right of intermarriage subsisted between Rome and Alba.[4] Again, there is the account given by Diodorous that the armies of C. Marius and Q. Pompædius, when standing in array against each other, were sad at heart, because intermarriage having been legally sanctioned, many were linked together by the ties of friendship and affinity.[5] But perhaps these were only special instances where the *jus connubii* had been conceded as a particular mark of favor; for Livy records that the Campanians, who had formerly afforded valuable aid to the Romans and had received the right of suffrage and the freedom of the state,[6] subse-

Doubtful whether the Latinus ever enjoyed the connubium.

[1] Livy. lib. 1, 26.
[2] *Ibid.* 49.
[3] Lib. 23, 2.
[4] V. p. 231, *b*. βασιλευόμενοι ἑκάτεροι χωρὶς ἐτ
ἧττον ἐπιγαμία τε ἦν καὶ ἱερὰ κοινα τὰ ἐν Ἄλβᾳ καὶ ἄ
δίκαια πολιτικά.
[5] *Exc. de Sententiis.* 37, 10, p. 130, ed. Dindorf.
[6] Lib. 8, 14.

quently petitioned "that they might be allowed to take "in marriage women who were citizens of Rome, and "that any who had, heretofore, married such, might "retain them; and, likewise, that children born of such "marriages, before that day, might be legitimate, and "entitled to inherit; both of which requests were "granted."[1] Ulpian moreover expressly says: *Connubium habent cives Romani cum civibus Romanis: cum Latinis autem et peregrinis ita, si concessum sit.*[2] And this statement is also borne out by a passage in Gaius in which he states that "our princes often *concede* to certain veterans "the *connubium* with those *Latinæ* or *peregrinæ* whom "they have married immediately after their dismissal from "the public service."[3]

Query, whether Latins enjoyed patria potestas over their children

We have no means of ascertaining the rules observed by the ancient Latins with respect to *patria potestas*, the position of females, and other matters connected with family rights. Justinian in fact says with regard to the *potestas* of a father, that it is "peculiar to "the citizens of Rome, for no other people have a "power over children, such as we have over ours."[4] But Gaius mentions that the Galatians claimed a similar institution,[5] and it will be remembered that the Apostle Paul in his epistle to this people, writes as follows:— "Now I say, that the heir, as long as he is a child, "differeth nothing from a servant, though he be lord of all; but is under tutors and governors until the time appointed of the father."[6] Heineccius however, refers to

[1] Lib. 38, cap. 36.
[2] Frag. 5, 4.
[3] *Comment.* 1, 57.
[4] 2 J. 1, 9.
[5] *Comment.* 1, 55. Cæsar also mentions that among the Gauls, "husbands and fathers have power of life and death over wives and "children." *Bello. Gall.* 6, 19.
[6] Ch. IV. v. 1, 2.

a controversy which arose in Ardea concerning the marriage of a maiden of a plebian family, to show that Latin women were more consulted in family matters and had greater power than Roman matrons.[1] It appears from the account of that controversy given by Livy that there were two aspirants to the hand of the young lady, who was highly distinguished for beauty, one of whom was a plebian and favoured by her guardians, while the other was a young nobleman who was naturally favoured by the mother, anxious that her daughter should have the most splendid match possible. The dispute was finally brought before a court of justice, and the magistrate decided in accordance with the wishes of the mother.[2] But I do not think we can safely conclude from this that the magistrate was simply guided by the mother's choice—or that by the law of the country the mother had the privilege of selecting a husband for her daughter. Indeed the very circumstance that the girl was under other guardians would seem to point to a different conclusion, and to imply that in all probability the mother was subject to the same incapacity as a *materfamilias* by the ancient civil law of Rome. It must also be noted that the decision of the magistrate so far from being acquiesced in was pronounced by the people of Ardea to be unjust, and led to a civil war which was only quelled by the timely intervention of the Romans. "The Roman general," says Livy, "quieted the disturbed state of affairs at Ardea, beheading the principal authors of that commotion, and confiscating their effects to the public treasury of the Ardeans; the Ardeans considered the *injustice* of the decision (*injuriam judicii*) completely repaired by such kindness on the part of the Roman people."[3] In the next paragraph the decision is styled *infamous*.

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[1] *Antiq. Roman.* Append. lib. 1, Cap. 11, s. 87.
[2] Lib. IV. Cap. 9.
[3] *Ibid.* Cap. 10.

Latins resident at Rome could vote in the tribes.

The Latins alone had the right to vote in a tribe, assigned to them by lot, if they happened to be at Rome during the *comitia*,[1] which Niebuhr calls "an honorary right without "any reality."[2] Some writers however think that this was not a general right to which all Latins were alike entitled, but that it was restricted to those on whom the *jus civitatis cum suffragio* had been conferred.[3] Another right which they enjoyed was that of becoming Roman citizens by taking up their residence in the capital, provided that they had left a descendant (*stirpem ex sese*) behind them in their native city, a law which, as we have seen, led to frequent abuse, and formed the subject of an express embassy to Rome.[4] A Latin who held a magistracy in his own state acquired thereby the rights of Roman citizenship,[5] and according to the Salpensa Table, the same privilege was extended by Domitian even to their parents, wives, children and grandchildren born in a lawful Latin marriage. Roman citizenship might also be gained under the provisions of the *lex Ælia* and *lex Servilia* by a Latin for himself and his entire family, by successfully carrying a prosecution through to conviction against a magistrate or citizen on a charge of corruption.[6]

Latin magistrates acquired Roman citizenship.

Lex Servilia.

Municipia.

By degrees, however, the old Latin cities were formed into separate *municipia* and received the full freedom of Rome. The first town that was thus distinguished was Cæres, as a reward for having preserved for the Romans, during the war with the Gauls, their valuables and treasures consecrated to religious worship, except that it did

[1] Livy. XXV. 3; Appian, *de bell civ.* 1, 23
[2] *Hist.* vol. III. p. 530; vol. II. p. 74.
[3] Puchta *Op. Cit.* t. I. s. 62, note *h*.
[4] Lib. XLI. Cap. 8.
[5] Gaius. *Comment.* 1, 96; App. *de bell. civil.* II. 26.
[6] Cic. *Pro Balbo.* 24.

not obtain the *jus suffragii.*[1] In other cases the title of *municipium* carried with it privileges more or less extensive, but in every instance superior to those enjoyed by any other class of towns. Such cities enjoyed all their own laws together with the private and, in many instances, even the public rights of Roman citizens, and their soil was subject to Quiritarian ownership.[2]

Coloni.

From the earliest period the Romans adopted the policy of settling colonies in conquered lands by transplanting a certain number of its citizens and dividing the lands amongst them. These colonists preserved their right of voting in the *comitia,* but owing to their distance from Rome this right was seldom exercised. They also continued to enjoy the *connubium, commercium, factio testamenti,* and all the other rights of private citizenship. After the complete conquest of Latium the Romans still continued to establish colonies on the model of the old Latin towns. The first which was so established was that of Cales, and it was composed of Qurities, pale-burghers, and equal allies, numbering in all two thousand five hundred men.[3] At the period of the second Punic war (543 A.U.C.) these colonies were thirty in number,[4] eighteen of which came forward to the assistance of Rome while the remaining twelve plainly declared that they had not whence to furnish either men or money.[5] The former received the thanks both of the senate and the people, and according to Cicero, were entitled to receive inheritances from the Roman citizens;[6] but with regard to the other twelve colonies it was decreed that their

[1] Aul. Gell. XVI. s. 13.
[2] *Ibid*; Varro *De lingua Latina,* lib. V. s. 179; Fr. 1, s. 1, D. 50, 1.
[3] Livy. lib. 8, 16; Niebuhr. *Hist.* vol. III. p. 173.
[4] *Ibid.* lib. 27, 9,
[5] *Ibid.* and s. 10.
[6] *Pro Cæcina,* 35.

names should never be mentioned, and the consuls were forbidden to hold any intercourse with their ambassadors.[1] Nor was this all the punishment reserved for them, for as soon as the Punic war was successfully concluded, the Romans commanded them to furnish double the greatest number of foot soldiers which they had ever provided; that an annual tax after the rate of one *as* for every thousand, should be collected from them; and that they should lose the right which they had hitherto enjoyed in common with the other Latin colonies, of presenting their own census.[2]

Condition of Latini colonarii.

The general condition of the *Latini colonarii* resembled that of the *Latini veteres* except that they did not enjoy the *connubium*. Thus by the operation of the *lex Mensia* it appears that the child born to a Roman citizen by a *Latina colonaria* followed the condition of the mother. The text of Gaius referring to this law has unfortunately come down to us in a mutilated condition, but the reading suggested by Gœschen is generally accepted, and is to this effect: "That where the *connubium* "does not exist, the child born to a Roman citizen by a "*Latina colonaria*, or *Juniana* would follow the condition "of his mother."[3] The Latins enjoyed the *commercium*, as is proved by the passage of Cicero already referred to, in which he mentions that the Latin colonies could receive inheritances from Roman citizens, and also from a fragment of Ulpian where it is stated—*Mancipatio locum habet inter cives Romanos et Latinos colonarios, etc.*[4] It is unnecessary to enter into any discussion as to whether or no Cicero refers to the colonies enumerated by Livy as having

[1] Livy. lib. 27, 10.

[2] Livy. lib. 29, 15, 37.

[3] Gaius. *Comment.* 1, 79; Niebuhr, *Hist.* vol. II. p. 80, 81. "The "lex Mensia" says Ulpian "makes children, one of whose parents is an alien, follow the inferior condition of that parent." Frag. 5, s. 8.

[4] *Fragm.* XIX. 4.

co-operated with the Romans in the second Punic war, but it is at all events certain that Ariminum is mentioned by both writers, and this seems to support Savigny's opinion on the affirmative side of this question.[1] The *jus civitatis*, however, was rarely conferred upon these colonies, for it appears that up to the seventh century of the Roman era (or 95 B.C.) the greater part had not received it. But it was found that many of the Latins had contrived to get their names recorded on the Censor's tables and by this means had acquired the right of citizenship. In order to check this abuse the *lex Licinia Mucia* (91 B.C.) was enacted, the object of which was to institute a rigid inquiry into the titles of Roman citizenship. But this law gave great offence to the Latin colonies, and the failure of the tribune M. Livius Drusus to obtain for them the Roman franchise, led to a terrible war known in history as the Social or Marsic War, which at one time threatened the extinction of Roman supremacy. The Latin *socii* who took part in this revolt were the Marsians, Pelignians, Marrucians, Vestinians, Picentines, Samnites, Apulians, and Lucanians; but from the prominent part taken by the Marsians the war is sometimes called the Marsic war. The Romans seeing the danger to which they were exposed realised the necessity of making some concessions, and accordingly on the proposal of Julius Cæsar a law was passed granting the rights of Roman citizenship to all the Latin colonies and to such of the

Lex Licinia

[1] *Verm. Schriften*, t. I. p. 20, 26. According to the old editions Cicero speaks of Arimium as one of the *twelve* colonies which had the right of accepting inheritances from Roman citizens, but Savigny thinks Cicero intended to refer to the eighteen colonies mentioned by Livy as having assisted the Romans in the second Punic war, and he accordingly reads "eighteen" for "twelve," and Orellius approves of this correction. But of course it is possible that Cicero may have alluded to twelve other colonies which had received special privileges.

allies who had remained faithful to Rome who should express a wish to be governed by the civil law.[1] The *lex Julia*, as this law was called, was followed a year afterwards by the *lex Plautia Papira* (B.C. 89) which extended the franchise to all citizens of a town in alliance with Rome, provided they were at the time resident in Italy and registered their names with the prætor within sixty days.[2] Finally a law of the Consul Pompeius (*lex Pompeia*) bestowed the Latin franchise upon all the citizens of the Gallic towns between the Po and the Alps. By these timely concessions the Social war was brought to a conclusion within the short space of two years, but not before some 300,000 men, the flower of Rome and Italy, had perished in the struggle. It was at first determined that the new citizens should be distributed into eight additional tribes, but before this arrangement could be completed the civil war broke out, and for a time put an end to the measure.[3] It would seem from a passage of Valleius Paterculus that these new citizens were subsequently enrolled in the thirty-five original Roman tribes.[4] This enormous increase to the number of Roman citizens did not facilitate the transaction of public business, but rather tended to split up the state into numerous private factions, each striving for mastery over the other, and thus to retard general progress. "When the people of Italy became "the citizens of Rome," observes Montesquieu, "every "city brought its own genius, its own particular interests, "and its dependence upon some great protector. All "affairs were decided by faction and violence. The "ambitious brought whole towns from the remote parts

[1] App. *de bell. Civ.* I. 35, 49, 68; *Val. Pater* II. 14, *et seq.*; Aul. Gell. *Noct. Attic*, 5, 4; 19, 8.

[2] Cic. *Pro Archia* 4; *ad fam*, XIII. 33.

[3] App. *de bell Civ.* I. 49, 53.

[4] Lib. II. 20.

of Italy to trouble the elections at Rome; so that it was "scarcely possible to know whether any act had passed "regularly by the suffrage of the people." After the Julian law there were no Latin colonies, till a year later a new Latium was introduced, which, remarks Niebuhr, compared with the old Latin franchise, was termed, and with great propriety, *the lesser Latium*.[1]

Latini Juniani.

It was upon the model of these later Latin colonies of the *lesser Latium* that the law proposed by the Consul Junius Norbanus (A.D. 19) conferred upon Latin freedmen, or those whose emancipation was defective under the requirements of the *lex Ælia Sentia*, to which we shall presently allude, a sort of limited citizenship.[2] They could not execute a testament (*testamentum facere non potest*,)[3] or receive an inheritance which had been conferred upon them (*jus capiendi ex testamento*), unless at the death of the testator, or within the *dies cretionis*, that is the period appointed by the testator for that purpose, they had acquired Roman citizenship.[4] But they could act as witnesses or scale bearers in a testamentary act made *per æs et libram*, and might also become purchasers of the patrimony by adopting the form of *familiæ emptio*,[5] and might also acquire by means of a *fidei commissum*.[6] They enjoyed moreover the rights of *commercium*[7] with Roman citizens, but not the *jus connubii*. "Roman men citizens," says Ulpian in a passage already quoted, "have *connubium* with Roman "women citizens; but with *Latinæ* and *peregrinæ* only "in those cases where it has been permitted."[8] At their

[1] Hist. vol. II. p. 79, 80.
[2] Gaius. *Comment.* 1, 22, *et seq.*
[3] Ulp. *Frag.* 20, 14; Gaius. *Comment.* 1, 23.
[4] Ulp. *Frag.* 17, 1; 22, s. 3.
[5] Ulp. *Frag.* 20, s. 8.
[6] Gaius. *Comment.* 1, 24.
[7] Ulp. *Frag.* 19, 4.
[8] *Ibid.* 5, 4. See also Gaius. *Comment.* 1, 57, 79.

death their former owners succeeded to their property exactly as if they had never been freed: and hence Justinian aptly observes that whilst they were permitted to live as free, yet, with their last breath, they lost their life and liberty.[1] The *Senatus-consultum Largianum* partly softened the severity of the *lex Junia* in the matter of succession, which was refused to the children of Latin freedmen by that law, for it enacted that the children of a manumittor, not disinherited by name, should in the succession to the goods of a Latin, be preferred to any strangers whom a manumittor might institute as his heirs.[2] Justinian elsewhere calls the freedom enjoyed by these Latin freedmen an *imperfecta libertas, et quasi per satyram inducta,*[3] and Constantine describes their condition as an intermediate one between liberty and slavery. Neither the *Latini Juniani* nor the *dedititii* were affected by the Constitution of Caracalla, which conferred the rights of citizenship upon all Roman subjects.[4] That these two classes still continued to exist is undeniable in the face of a passage in the Code, afterwards embodied in the Institutes, in which Justinian takes the credit of having abolished them by express ordinances of his own, and of having established but one form of liberty throughout the Roman world.[5] The emperor admits, however, that the lowest of these classes, the *dedititii,* had long since ceased to exist except in name, and that the title of Latin had become less frequent.[6]

[1] 4 J. 3, 7; Const. C. 7, 6.
Ibid.
[3] Const. 1, C. 7, 6.
[4] Fr. 17 D. 1, 5; Dion Cassius. lib. 77, s. 9.
[5] Const. 1, C. 7, 5; Const. 1, C. 7. 6; 3 J. 1, 5; 4 J. 3, 7.
[6] Const. 1, C. 7, 5; 3 J. 1, 5.

How (illegible) quired by Latini

There were several modes in which Roman citizenship might be acquired by *Latini Juniani*. For instance by the

1. *Causæ probatio ex lege Ælia Sentia.* This consisted in the Latinus proving before a magistrate (the prætor or the president of a province), that he had married a Roman or a Latin woman in accordance with the provisions of the *lex Ælia Sentia*, and had a son a year old (*anniculus*) born from this marriage.[1] If the magistrate was satisfied of the truth of the allegation, he adjudged the Latinus, his wife and child, to be Roman citizens.

2. *Iteratio.* That is a freedman who became a Latinus in consequence of some informality in the form of his manumission, or because he was only freed by one who held him *in bonis*, might by going through the ceremony of emancipation again in one of the solemn forms, and obtaining his freedom from the *dominus ex jure Quiritium*, become a Roman citizen.[2]

3. *Erroris causæ probatio.* By a Senatus-consultum, the name of which is not given by Gaius, but which Ganz conjectures to have been the one passed in the consulship of Pegasus and Pusio, in the reign of Vespasian;[3] if a Roman citizen married a Latin woman through ignorance, supposing her to be a Roman citizen, and had a son by her, by furnishing proof of this error, he might obtain the *civitas* for both the wife and son.[4] The same rule of law prevailed if a Latinus married a *peregrina* believing her to be a Latin or Roman woman;[5] or if a Latin woman married a *pere-*

[1] Gaius. *Comment.* 1, 29; Ulp. *Frag.* 3, s. 3.
[2] Ulp. *Frag.* I. s. 4.
[3] Gaius. *Comment.* 1, 31; 5 J. 2, 23.
[4] *Ibid.* 1, 67; Ulp. *Frag.* 7, s. 4.
[5] *Ibid.* 1. 70.

grinus whom she took for a Latinus.[1] But if a Roman citizen married by mistake a *dedititia*, or a Roman woman a *dedititius*, the *erroris causa probatio* would not have the effect of conferring Roman citizenship on the woman in the one case, or on the *detititius* in the other.[2]

4. *Triplex Enixus.* A freed woman who bore three illegitimate children (*vulgo quæ sit ter Enixa*) was entitled to claim the Roman *civitas* by virtue of a *Senatus-consultum* the name of which is unfortunately omitted by Ulpian.[3].

5. *Militia.* A Latinus became a Roman citizen under the provisions of the *lex Visilia* by serving for six years among the *vigiles* at Rome. This period was subsequently reduced to three years.[4] The *vigiles* according to Dion Cassius consisted of seven cohorts of watch soldiers, and were instituted by Augustus for the defence of the city. Tacitus, however, does not include them in the list which he gives of the Roman guards.[5]

6. *Navis fabricatio.* In the reign of Cladius Cæsar, who flourished between 41 and 54 A.D., a great famine was experienced at Rome, which is referred to in the Acts of the Apostles and is there stated to have been foretold by a Jewish prophet named Agabus.[6] In order to encourage the importation of grain, the emperor issued an edict by which he promised the rights of Roman citizenship to any Latinus who should

[1] *Ibid.* 69.
[2] *Ibid.* 67, 68.
[3] *Frag.* 3, s. 1.
[4] *Ibid.* s. 5. Unfortunately the corresponding paragraphs in Gaius (1 s. 31), consisting of fifteen lines, have come down to us in an illegible form. Gœschen supplies the *lacunæ* from the Fragments of Ulpian.
[5] *Annal.* 4, 5.
[6] Ch. IX. v. 27, 28.

build a ship capable of carrying not less than 10,000 bushels, and who should employ the same in carrying corn to Rome for six years.[1]

7. *Ædificio.* From a passage of Gaius, for the re-restoration of which we are indebted to the learned Gœschen, it appears that a Latinus could acquire the *jus Quiritium* in accordance with the provisions of the *lex Julia,* by expending not less than half of his patrimony upon the completion of a building at Rome.[2] Ulpian also mentions *ædificio* as a means of gaining the *jus Quiritium,* but he gives no particulars.[3]

8. *Pistrino.* By establishing a bake-house.[4]

9. *Beneficio Principali.* Lastly, the emperor could always by a special grant confer the rights of citizenship upon a Latin freedman.[5] The Emperor Trajan, however, decided that if this concession was obtained by a freedman without the consent or knowledge of his patron, although he would be entitled to enjoy the rights of Roman citizenship whilst he lived, and his children would be legitimate, yet, at his death, his rights would be those of a Latinus. The consequence was that he had the power of making a testament only to this extent, that he might institute his patron as his heir and nominate some other person as a substitute in case the patron declined to accept the inheritance.[6] But the hardship of this law induced the Emperor Hadrian to pass a *Senatus-consultum* which provided that freedmen in the above position might obtain by means of the *anniculi* or *erroris*

[1] Ulp. *Fraq.* 3 s. 6.
[2] Gaius. *Comment.* 1, 33.
[3] *Frag.* 3, s. 1.
[4] *Ibid.*
[5] *Ibid.*
[6] Gaius. *Comment.* 3, 72.

probatio, the same condition legally that they would have enjoyed if they had remained Latini.[1]

Peregrini. The term *peregrinus* was applied to a foreigner whose country, although subject to the Roman sway, did not enjoy the rights of Roman citizenship. In the early period of Roman history every foreigner who was governed by his own laws, and did not acknowledge the supremacy of Rome, was called *hostis;* whilst those against whom actual hostilities had been commenced, were styled *perduelles*. But in later times the former term came to be synonymous with the latter, meaning in each case an enemy of the State. *Quos nos hostes appellamus,* says Gaius, *eos Veteres perduelles appellabant, per eam adfectionem indicantes cum quibus bellum esset.*[2] During the Republican period no one but a Roman citizen could derive any benefit from the civil law; but when Rome began to extend her conquests and to enlarge her relations with foreign powers, numbers of foreigners naturally flocked to the city, and it became necessary to provide for the proper adjudication of disputes arising either between citizens and foreigners, or simply between foreigners. A *Prætor Peregrinus* was accordingly appointed to determine such disputes;[3] and since the technical rules of the civil law were for the most part inapplicable to any but Roman citizens, it became equally necessary to establish a set of principles, based upon the approved practice of nations, which should guide the magistrate in the discharge of his judicial functions. The matters which were brought before the Prætor Peregrinus were mostly connected with those

[1] *Ibid.* 73; Von Vangerow's *Latini Juniani*, p. 201,

[2] Fr. 234, D. 50, 16. Varro *de lingua latina*, lib. V. 3; Festus on the word *Hostis*: "*Hostis apud antiquos perigrinus dicebatur et qui nunc hostis perduellis.*"

[3] Fr. 2, s. 28, D. 1, 2. The first *Prætor Peregrinus* was appointed in 247 B.C. Lydus, *De Magist.* I. s. 45.

transactions of ordinary life, such as sale, letting, partnership and mandate, which experience proved were regulated for the most part by the same fundamental rules in most nations. It was thus from the *jus gentium* that the Prætor had to draw his law, and to prevent any arbitrary or capricious exercise of his power, he was bound on entering office to publish an edict containing the rules by which he intended to be bound during the year of his magistracy.[1] These prætorial edicts came at length, as Papinian observes, to supplement and correct the severity of the civil law, and were called *honorary*.[2] Marcianus indeed calls the *jus honorarium* of the prætor, the *Viva vox Juris Civilis*;[3] and Pomponius explains that the prætorian law was called *jus honorarium*, quod *ab honore Prætoris* venerat.[4] Frequently the new prætor simply adopted the edict of his predecessor, in which case he published what was called an *Edictum tralatitium*, but if he framed one himself it was called *Novum*; while those edicts which were framed to meet special cases and had no continuing force, were called *Edicta Repentina*. It was to repress the abuse which arose from the last mentioned edicts that the *lex Cornelia* (686 A.U.C.) required the præter to announce the general principles by which he intended to be guided during his incumbency immediately on assuming office. These edicts accordingly became obligatory for the year, and hence Cicero calls them the *lex Annua*, which expired in the calends of January.[5] They were finally collected and published in a condensed form by the Emperor Hadrian, under the title of *Edictum perpetuum*.

[1] This was expressly enacted by the *lex Cornelia*, but the same rule appears to have previously existed; for one of Cicero's main accusations against Verres is that he did not act up to his published edict. *In Verr.* I. s. 42, 46.

[2] Fr. 7, s. 1, D. 1, 1.

[3] Fr. 8; *Ibid.*

[4] Fr. 2, s. 10, D. 1, 2.

[5] *In Verrem.* 1, s. 42, 46.

Condition of the peregrini.

The *peregrini* had neither political nor civil rights at Rome. They were not permitted to wear the Roman dress, or *toga*;[1] they were not entitled to adopt *prænomina*, and Cicero mentions the instance of one *Demetrius Mega* who received the prænomen of Publius Cornelius with the citizenship;[2] they were liable to be expelled from the city, many instances of which are on record: thus in the year 627 A.U.C. by the *lex Junia*, and in 688 by the *lex Papia*, the *peregrini* were compelled to leave the city,[3] and Suetonius mentions another instance in the reign of Augustus.[4] They did not possess the *dominium ex jure Quiritium*, although they were allowed to exercise the ordinary rights of proprietors (*dominium*) over their goods;[5] they had no *connubium*,[6] and although their marriages were recognised as lawful,[7] provided they were contracted in accordance with the rules of the *jus gentium*, they produced no civil effects, and the children were not under the *patria potestas* of the father.[8] Nor again did foreigners at Rome enjoy the *testamenti factio*,[9] or the *jus capiundi ex testamento*,[10] that is, either the right to execute a testament in accordance with the rules of the civil law, or to receive testamentary gifts from others. In case of death their goods were either transferred to the *fiscus*, or

[1] Sueton. *Claud.* 15; Pliny. *Epist.* 4, 11; 7, 3; Fr. 32, D. 49, 14.

[2] Cic. *Epist. to Acilius*, 13, 36.

[3] Cic. *de Off.* III. 11; *In Brut.* 28; *Agrar.* I. 4; *Pro Archia*, 5; *Dio Cass.* 37, 9.

[4] C. 42. Medical men and teachers were exempted on this occasion.

[5] Gaius. *Comment.* 2, 40.

[6] Ulp. *Frag.* 5, s. 4; Seneca, *de Benef.* IV. 35.

[7] Thus the violation of conjugal rights, even in the case of foreigners, was punishable as adultery, fr. 13, ss. 1 & 4, D. 48, 5. Nor were the children born of such marriages deemed *liberi naturales*, for the general rule of law applied: *pater est quemnuptiæ demonstrant*, fr. 2, D. 2, 4. Fr. 3, D. 1, 6; Gaius. *Comment.* 1, 55.

[8] Ulp. *Frag.* 20, s. 14; Gaius. *Comment.* 2, 218.

[9] Fr 6, s. 2, D. 28, 5; Gaius. *Comment.* 1, 25; Const. 1, C. 6, 24.

treasury, as *bona vacantia,* or if they had attached themselves to a patron, which most foreigners were obliged to do in order to obtain that protection which the civil law denied to them,[1] the patron succeeded to their property *jure applicationis.*[2] They could not employ the *formula* prescribed by the civil law for contracting verbal obligations because it contained sacramental words which none but citizens could pronounce.[3] But still, as Sir Henry Maine remarks, "neither the interest nor the severity of "Rome permitted them to be quite outlawed,"[4] and accordingly other forms appertaining to the *jus gentium* were available to them, and they were generally governed "by those rules prescribed by natural reason which were "found to be observed by all nations alike."[5] Thus they could contract obligations by *chirographa* and *syngrapha* (that is, by an acknowledgement in writing),[6] or by means of *arcaria nomina,*[7] and also according to the Sabinians, by an entry in an account book (*nomen transcripticium*), provided it was *a re in personam,* that is, from a thing to a person, and not *a persona in personam,* or from one person to another.[8] But this opinion

[1] Livy. lib. 43, 2; Cic. *div. in Cæcilium,* 20.

[2] Cic. *de Orat.* 1, 39.

[3] Gaius. *Comment.* 3, 97. But the necessity of employing these solemn words was abolished by a constitution of the Emperor Leo, A.D. 469, which enacted that "stipulations, though not in consecrated formulas or direct terms, in whatever words the agreement of the parties is expressed, if otherwise legal, shall have binding force." Const. 10, C. 8, 38. Thus in Justinian's time the only requisites were the "the apprehension and consent of each party." 1 J. 3, 15.

[4] *Ancient Law,* p. 41.

[5] Gaius. *Comment.* I. I.

[6] *Ibid,* 3, 134.

[7] *Ibid,* 132. These were entries of actual cash payments from the cash-box (*ex arca*), and not of a ficticious loan like the *nomen transcripticium.* See fr. 26, D. 13, 5.

[8] *Ibid,* 133.

of the Sabinians was contested by Nerva on the ground that an obligation of this character appertained in a certain manner to the *jus civile*.[1] When the Constitution of Caracalla conferred the rights of citizenship upon all subjects of the Roman empire, those who had hitherto been regarded as foreigners (*peregrini*) became citizens; and thus Sidonius Appollinarius writes in the fifth century:—"Rome, the abode of laws, the school of "literature, the court (*curia*) of grandeur, the capital of "the world, the land of liberty, in which barbarians and "slaves are alone esteemed to be foreigners!"[2] The *toga*, the ancient distinguishing dress of the Roman, now began to be adopted everywhere, and the term "Quirites" was indiscriminately applied to all the various peoples who then acknowledged the supremacy of the Roman empire. "*Quirites*," says the Emperor Alexander Severus, addressing a mutinous legion of Asiatics, "*discedite, atque "arma deponite.*"[3] Finally under Justinian, as I have already observed, there was but one form of liberty,[4] and enemies, barbarians,[5] and slaves were alone excluded from the rights of citizenship.

Jus Italicum. It remains to say a few words on the *jus Italicum*. According to Sigonius the *jus Italicum* was a *personal* law constituting an intermediate condition of persons between the Latins and *peregrini*; and this opinion was the predominant one until Savigny successfully refuted

[1] Gaius. *Comment.* 3, 133.
[2] *Epist.* 1, 6.
[3] *Lampridius.* s. 53.
[4] 3 J. 1, 5.
[5] This term was in later times only applied to the *læti*, *ripuarii*, and *auxiliares*, mercenary bands in the pay of the emperor, from whom they received grants of land in the frontier provinces, where they were located for the purposes of defence against hostile invasion. They were exempt from the land tax, and their power at length became so great that they denied the sovereignty of Rome and largely contributed to the destruction of the Eastern Empire by Attila.

it by demonstrating that the *jus Italicum* had no reference whatever to any particular class of persons, but was simply a *territorial* law. It indicated that the Italian territory (*ager Italicus*) enjoyed the privilege of Quiritarian ownership, which provincial towns did not,[1] and that it was exempt from the annual impost (*vectigal*) which conquered lands were obliged to contribute.[2] The territory was also subject to the rules of the civil law relating to immovables, such as *mancipatio*, *usucapio*, and the like; and under the provisions of the *lex Julia* and the *lex Papea Pappæa*, the inhabitants of towns which enjoyed the *jus Italicum* were exempted from the office of tutors and curators if they had four children, whereas the inhabitant of a provincial town could only claim exemption if he had five children.[3] Another privilege enjoyed by the inhabitants of Italy was that they were entitled to the benefit of the *lex Furia*, by which *sponsors* and *fide promissors* were freed from their obligations at the end of two years: whereas in the provinces such persons continued liable without limitation of time.[4] Savigny and Puchta also consider that those

[1] Gaius. *Comment.* II. 7, 15, 21. *Nexum*, says Gaius, was a right peculiar to Italian soil. There is no *nexum* of the provincial soil; for the soil only admits the application of *nexum*, when it is a *res mancipi*, but the provincial soil is *res nec mancipi*. *Ibid*, 27.

[2] Fr. 8, s. 7, D. 50, 15. The *vectigal* was in fact a kind of rent paid by the person in possession and enjoyment of the land to the real proprietor. Thus in the case of conquered territories the entire lands were acquired by the conquering state, and were said to become *vectigalibus subjecti*. But if particular lands were specially restored to the real owners the *vectigal* was not assessed upon them. Hyginus, *de condit. agrorum* (ed. Goes. p. 265). Italy was also exempt from the tax on persons (*capitis tributum*), although it was subject to certain payments in kind (*annona*), whence its division into *Italia annonaria* and *Italia urbicaria*.

[3] Pr. J. 1, 25.

[4] Gaius. *Comment.* 3, 121.

towns on which the *jus Italicum* was conferred acquired thereby an entirely independent municipal organisation; but Demangeat thinks differently, and does not believe that there was any necessary connexion between the *jus Italicum* and municipal freedom.[1] It is true, however, that as a rule the Italian towns were governed by their own magistrates, but on the breaking out of a serious war, like the Social or the civil war, it was the practice to send a Pro-consul from Rome to keep them to their allegiance.[2] The inhabitants moreover did not enjoy the *jus Suffragii* or the *communia sacra*—*e.g.* participation in sacred rites—with the Romans, and in these two respects they were in an inferior condition to the Latins.[3]

Institution of —ascribed to Julius Cæsar.

The institution of the *jus Italicum* is ascribed by Savigny to Julius Cæsar, but it does not appear that it was a privilege which was very generally conceded, or that it was ever granted to an ordinary provincial town. It was probably confined to Roman colonies or to municipal towns. Pliny, for instance, only mentions two towns in Spain and seven in Italy which enjoyed this privilege,[4] although in the Digest the names of many other towns are given,[5] and grants of this kind appear to have been made creating an exemption from the impost to which the other provinces were subject, even after the Constitution of Caracalla had destroyed the exclusive character of Roman citizenship. Indeed without wishing to detract from the just praise which has been accorded to Caracalla, there is little doubt that the principal motive which induced him to confer the rights of citizenship upon all the subjects of the empire, was to replenish his exchequer by

[1] *Cours. Elémentaire de Droit Romain*, vol. I. p. 163-164.
[2] App. *de bell. civil.* 1, 38, 39.
[3] Sigon *de antiq jure Ital.* 1, 22.
[4] *Natur. Hist.* lib. III. 4, 25
[5] Fr. 1; Fr. 6; Fr. 7, D. 50, 15.

imposing those taxes to which Roman citizens were subject, but from which provincial towns were exempt; such for instance as the duties upon enfranchisement, legacies, and succession.[1] But Macrin, his successor, is said to have abolished these provisions concerning inheritances and enfranchisements,[2] and the Emperor Maximin deprived the Italian territory of its exemption from taxation. It would seem, however, that immunity from the land-tax still continued to form the distinctive feature of the *jus Italicum* down to the reign of Justinian in those rare instances in which that territorial privilege was then conferred.[3]

[1] Dion Cassius, lib. 77, s. 9. But as Demangeat aptly observes, the result would have been very different if the Emperor had conferred the *jus Italicum* instead of *civitas*. *Cours Elémentaire de Droit Romain*, 1, 64.

[2] Dion Cassius. 78, 12.

[3] See the title of the Digest *de censibus* (50, 15); Const. 1, C. 11, 20.

CHAPTER IV.

Freeborn Persons (*Ingenui*) and Freed-men (*Libertini*).

AN *ingenuus* is described by Justinian, who substantially borrows his definition from a fragment of Marcianus,[1] as "one who is free "from the moment of his birth, by being "born in matrimony, of parents who have been either "both born free, or both made free, or one of whom has "been born and the other made free."[2] From this definition it appears that two conditions were necessary to entitle a man to the position of an *ingenuus*. In the first place, he must have been born in matrimony, and *secondly*, his parents must have been both free persons at the time of his birth. Indeed the latter qualification is to some extent involved in the former, for no marriage could take place by the civil law except between free persons. But the law it will be seen not only required that the parents

[1] Fr. 5, s. 2, D. 1, 5.
[2] Fr. J. 1, 4.

should be free at the time of marriage but also at the birth of the child. It must also be observed that Justinian draws no distinction between a child whose parents were both *born* free or who were both *made* free: so long as the parents were free at the time of the child's birth, and were lawfully married, the child was recognieed by law as an *ingenuus*. But it would seem that this was not always the principle recognised by the civil law, for we have very clear testimony that in the Republican period at all events, the son of a freedman was subject to certain disqualifications. Thus Livy says that Appius Claudius, the Censor, was the first who degraded the senate by electing into it one Flavius, who was the son of a freedman; and he adds that this election was not admitted by any one as valid (*eam lectionem nemo ratam habuit*), and that it excited so much indignation that the nobles laid aside their gold rings and bracelets in consequence of it.[1] Again Cicero mentions that the censor Lentulus did not elect Publius Popillus, who had condemned Oppianicus, to the senate, because he was the son of a freedman; although he left him his place as a senator at the games, together with the other ornaments of that rank, and released him from all ignominy.[2] It appears, however, that the co-Censor (Lucius Gallius) alleged a totally different ground for degrading Publius Popillus, namely, that he had been bribed to vote against Oppianicus, an accusation which was brought forward by Lucius Quintius, a tribune of the people; and Cicero says plainly that the Censors merely acted to court popular favour, as the judges had become exceedingly unpopular. "We all understand," he says, "that in these votes of the censors the real object was to "catch at some breeze of popular favour." But it is to be observed that Cicero does not challenge the validity of the ground alleged by Lentulus, which we

[1] Lib. IX, 46.
[2] *Pro Cluentio*, 47.

may rest assured he would have done if it was either unprecedented or illegal. Indeed, according to Suetonius, in the time of the censorship of Appius Cæcus, and for some time afterwards, the term *libertini* was not only applied to freedmen but also to their sons.[1] And Cicero, as we have seen, excludes the posterity of freedmen from the character of Gentiles,[2] but in this Niebuhr thinks he was mistaken. "We know from "Cicero himself (*de leg.* ii. 22)," says the historian, "that no bodies or ashes were allowed to be placed in the "common sepulchre, unless they belonged to such as shared "in the *gens* and its sacred rites: and several freedmen were "admitted into the sepulchre of the Scipios."[3] Before the Censorship of Appius the Blind *libertini* were only regarded in the light of erarians; they were inferior to the plebs, and although they had the right of voting at elections, they were not themselves eligible for election; they were also excluded from military service, except when a general levy was ordained.[4] Appius for the first time received them amongst the plebians, and either distributed them in tribes, as he thought proper, or allowed them to choose

[1] *Ignarus, temporibus Appiis et deinceps aliqandiu. libertinos dictos non ipsos qui manumitterentur, sed ingenuos ex his procreatos.* Claud. 24.

[2] Topics. Cap. 6.

[3] Vol. II. page 321, note 820; see also p. 195, note 438.

[4] *Niebuhr* vol. III., 29. *Livy.* lib. 10, 21; 22, 11. They were at times allowed to serve in the fleet, but under the command of free born officers, lib. 40, 18. Thus great jealousy was caused by the appointment of Horace, whose father was a freedman, to the command of a Roman legion, to which the poet alludes in the following lines:—

Nunc ad me redeo libertino patre natum,
Quem rodunt omnes libertino patre natum;
Nunc, quia sum tibi, Mæcenas, convictor; at olim,
Quoc mihi pareret legio Romana tribuno.

Sat. I. VI. 46, *et seq.*

tribes for themselves.[1] But in the Censorship of Quintus Fabius and Publius Decius a redistribution took place, and the *libertini* were confined to four tribes, which were called city tribes.[2] During the war against Perseus, King of Macedon, they contrived to get themselves once more spread throughout the tribes, but after the war was successfully concluded the Censors Tiberius Sempronius Gracchus, and Caius Claudius Pulcher, after some discussion, agreed that all those who had ever been in servitude should be included in one of the four city tribes to be selected by lot. The lot fell on the Æsquiline tribe and Tiberius Gracchus thereupon published a decree that all sons of freedmen should be surveyed in that tribe.[3] Under the empire, however, they appear to have been included in the tribe of their former masters.[4] They were not eligible to public offices, and the *lex Visellia*, which is mentioned in a Constitution of the Emperor Diocletian and Maximian, rendered it a criminal offence for a freedman to obtain a dignity or position reserved for an *ingenuus*, unless he had obtained as a special privilege from the emperor, the *jus aureorum annulorum*:—*Tunc enim quoad vivunt*, proceeds the Constitution, *imaginem, non statum ingenuitatis obtinent.*[5] In fact the *jus Aureorum*

[1] Livy. 9, 46; Diodorus. 20, 36; Niebuhr. III. p. 300, 301.
[2] Livy. 9, 46; Niebuhr III. 320, 321.
[3] Livy. lib. 45, 14, 15.
[4] Tertull. *de resur. carnis.* 57.
[5] C. 9, 21. In the time of Nero, however, it would seem that except in the empty power possessed by a patron of banishing a freedman who proved himself unworthy of the favour bestowed upon him, to the distance of twenty miles from Rome, that is, to send him by way of punishment to the delightful plains of Campania; in every other point of view, the freedman was on a level with the highest citizen, and enjoyed equal privileges. Their numbers appear to have been very large; "from them" says Tacitus, "the number of tribes was completed, the magistrates were supplied with inferior officers, the

annulorum, although it placed a freedman in the same social position, as it were, with a freeborn citizen, did not deprive the patron of his rights of succession to the freedman's goods on his death.[1] It was necessary moreover that the patron should have been a consenting party to the grant of this privilege, for if it was obtained either without the patron's knowledge or against his will, the freedman might be deprived of all benefit under it.[2] The emperors also occasionally granted to freedmen a *restitutio natalium*, which had this additional advantage over the *jus aureorum annulorum*, that it destroyed the patron's right of succession. It was therefore rarely if ever granted without the patron's consent.[3] Indeed even under the legislation of Justinian, although in other respects all freedmen were placed on an equality with *ingenui*, the *jus patronatus* was still maintained.[4] We may therefore infer that the Constitution of the Emperors Honorius and Theodosius (425 A.D.), by which the sons of a freedman were involved in the consequences attached to their father's act of ingratitude towards his patron,[5] was still law in the time of Justinian.

Libertini had not the jus connubii prior to the lex Julia

Thus then we see that from the earliest period freedmen and their sons were not treated on anything like an equality with those who were descended from freeborn parents. Nor were they permitted to intermarry with *ingenui*. Thus Livy relates that a special decree of the senate was passed to enable the freedwoman Hispala Fecinia, who had revealed the Bacchanalian

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sacerdotal orders with assistants, the Prætorian Cohorts with recruits, and many of the Roman Knights, and even the Senators had no other origin." *Annal.* lib. 13, 26, 27. Licinius, a freedman of Julius Cæsar, obtained from Augustus the Government of Gaul. *Dion Cass.*

[1] Fr. 5, D. 40, 10.

[2] Fr. 3, *Ibid.*

[3] Fr. 2, D. 40. 11.

[4] Novel. 78, Cap. I., II., III.

[5] Const. 4, C. 6, 7.

ceremonies, to marry a freeborn man, and in order to prevent any disgrace or ignominy from attaching to her husband after marriage.[1] But this restriction of the *jus connubii* was removed in the reign of Augustus by the *lex Julia* (18 B.C.) and the *lex Papia Poppœa* (9 A.D.), by which the marriage of freedmen with freeborn women and *vice versa* was legalised, with this proviso that the law was not to apply to senators and their children.[2] In this state the law continued till the time of Justinian, who decided, as we have seen in his definition of an *ingenuus* already cited, that the children of parents whether free born or made free, should be *ingenui*.

Children of a freewoman were born free, a father slave.

It has already been explained that children who were not born in lawful wedlock followed the condition of the mother. Proceeding upon this principle Marcianus declares that the children of a free woman are born free;[3] and although the general rule was that the condition of the mother was to be regarded at the time of birth and not at the time of conception, yet in favour of liberty, a departure from this rule was permitted; so that if the mother was free at the time she conceived, but became a slave subsequently, and continued to be so at the time of birth, the child was nevertheless held to be born free: "because," adds Marcianus, "the misfortune of the "mother ought not to prejudice her unborn infant."[4] Moreover it was sufficient if the mother had been free during the intermediate period between conception and the birth of the child. Thus if a female slave during pregnancy was made free, but again became a slave before the birth of the child, the child was born free.[5] This

[1] Lib. 39, 19.
[2] Fr. 23; Fr. 27, D. 23, 2.
[3] Fr. 5, s. 2, D. 1, 5; See also Const. 11, C. 6, 3.
[4] Fr. 5, s. 2, D. 1, 5; See also Pr. I. 1, 4.
[5] Fr. 5, s. 3, *Ibid.*

doctrine is approved of by Justinian,[1] but it appears that many jurists drew a distinction between the case of a free woman who conceived in a lawful marriage and subsequently became a slave, and that of a free woman who conceived as a common prostitute: in the former case they considered that the child would be born a Roman citizen, but in the latter that he would be born a slave of that master whose slave the mother had become.[2] Ulpian does not state any exception to the general rule that the child should follow the condition of the mother at the time of birth;[3] but Paullus, on the other hand, propounds the same exception in favour of liberty as that stated by Marcianus and subsequently adopted by Justinian:— *Si libera conceperit,* he says, *et ancilla facta pepererit, liberum parit: id enim favor libertatis exposcit. Si ancilla conceperit, et medio tempore manumissa, sed rursus facta ancilla pepererit, liberum parit: media enim tempora libertati prodesse, non nocere etiam, possunt.*[4]

Effect of judicial decision as to status.

Again a person who was once judicially pronounced to be an *ingenuus* was ever afterwards treated as such, although it might have subsequently transpired that the judge had given a wrong decision through a misconception of the evidence or from partiality; because, says Ulpian, *res judicata pro veritate accipitur.*[5] Indeed according to the jurists, a judgment by a competent tribunal possessed the magic power of a wizard's wand: it could turn black into white, and make that which was crooked appear perfectly

[1] Pr. J. 1, 4

[2] Gaius. *Comment.* 1, 91.

[3] *Frag.* V. 10. He records, however, a rescript of the Emperor Hadrian, in which it is decided that a child born of a free woman who was sentenced during her pregnancy to a capital punishment, is free. Fr. 18, D. 1, 5.

[4] *Sententiæ* lib. II. tit. 24, s. 2, 3.

[5] Fr. 25, D. 1, 5.

straight, or *vice versa*: *Res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum.*[1]

Enfranchisement did not prejudice rights of birth

A free born person did not cease to be *ingenuus* in the eye of the law, because he had been wrongfully treated as a slave, and had subsequently been enfranchised; for enfranchisement could not prejudice the rights of birth.[2] Thus if a free man who was captured by brigands or pirates and reduced by them to slavery, was subsequently emancipated, he became an *ingenuus* and not a *libertinus*, because the law did not consider that he was manumitted *ex justa Servitute.*[3] *Veritati et origini ingenuitatis manumissio*, says Paulus, *quocumque modo facta fuerit, non*

Provisions of the Senatus-consultum Claudianum.

According to the *Senatus-consultum Claudianum* (A.D. 52) if a Roman woman (*civis Romana*) had intercourse with the slave of another person with the consent of the owner, it might be agreed that her children should be born slaves while she herself retained her freedom. But Hadrian restored the rule of the *jus gentium* and enacted that the children should follow the condition of the mother.[5] The same *Senatus-consultum* contained another provision to the effect that if a free woman knowingly cohabited with a slave against his master's will and notwithstanding a warning given three times by the master or his tutor, the mother might be pronounced by a judge to be the property of the owner of the slave: and her children, whether born before or after such adjudication, became the slaves of the same person.[6] But this portion of the law, as I have already had occasion to point out, was abrogated by Justinian.[7]

[1] Heineccius. *Jus. Civile Insti.* lib. 1. tit. IV. s. 92.
[2] 1 J. 1, 4.
[3] Fr. 24, D. 49, 15.
[4] *Sententiæ*, lib. V. tit. I. s. 2.
[5] Gaius. *Comment.* 1, 84
[6] *Ibid.* 1, 86.
[7] 1 J. 3, 12.

Libertini.

We have next to consider who were comprised in the term *Libertini*. Gaius explains it as referring to freedmen who had been manumitted from *just* servitude: *Libertini sunt, qui ex justa servitute manumissi sunt.*[1] Accordingly, as Modestinus observes, a freedman who permitted himself to be sold as a slave (that is with the corrupt intention of participating in the price), would not, on regaining his liberty by emancipation, recover his original status as an *ingenuus*, but he would become a *libertinus*, as one manumitted from just servitude.[2] With reference to his patron a freedman was called *libertus*, but with respect to his status he was styled *libertinus*. Thus: *Tiro fuit libertus Ciceronis*, but if we merely wished to speak of him as a slave, we would then write: *Tiro fuit libertinus*.[3]

Three classes of libertini.

Gaius mentions three classes of *libertini*,—Roman citizens, *Latini*, and *Dedititii*.[4] The former comprised those freedmen who had obtained complete liberty; the second class were those who had received a less complete form and were assimilated to the Latins by the provisions of the *lex Junia Norbana*; while the third class were those, who, while slaves, had been guilty of a crime for which they had been fettered, branded, put to torture, or had been subjected to some other ignominious punishment. Such persons by virtue of the *lex Ælia Sentia* (A.D. 3) were only raised by emancipation to the position of *dedititii*, or people vanquished in war.[5] But all these distinctions between freedmen were abolished by Justinian, who prides himself upon having "made all freedmen "whatsoever Roman citizens, without distinction in the "age of the slave, or the interest of the manumittor, or "the mode of manumission."[6]

Manumissio defined.

Manumissio was the process of giving from the hand.

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[1] Fr. 6, D. 1, 5. See also Fr. J. 1, 5; Gaius. *Comment.* 1, 11.
[2] Fr. 21, D. 1, 5.
[3] *Heineccius. Jus. Civile Insti.* lib. I. tit. 5, s. 93
[4] *Comment.* 1, 12.
[5] *Ibid.* 1, 13, 16, 17, 22 3 J. 1, 5; Ulpian, *Frag.* 1, s. 11.
[6] 3 J. 1, 5.

Now *manus* in the ancient Roman law signified power or *potestas* of any kind. Thus Ulpian writing on the origin of the law, says that when the city of Rome was first founded the people had no fixed laws, and that therefore *omniaque manu a Regibus gubernabantur*.[1] But in course of time the original expression came to be restricted to the power which a husband exercised over a wife, while in other cases special terms were adopted to denote power according to the object over which it was exerted. Thus *potestas* in later Roman law, signifies the power of a father over children; *dominium*, that over material objects; and *mancipium*, that over free persons whose services have been transferred to another by their own ancestor.[2] So long as a man was a slave he was under "the hand" and power of his master (*manui et potestati suppositus est*), but by manumission he became freed from that power.[3] There were cases, however, in which a slave was freed from the power of his master without manumission.

1. Thus a slave who was sold subject to the condition that he should be manumitted by the purchaser within a stated time, (*ut intra certum tempus manumitteretur*), obtained his liberty when that time arrived, although the purchaser may have changed his mind as to the manumission of the slave during the interval, or both the purchaser and vendor may have died without heirs.[4]

2. Or if he was sold subject to the condition *ut a vivo emptore manumittatur*, that is, that he should be manumitted during the life of the purchaser, the slave regained his liberty immediately on the death of the purchaser.[5]

[1] Fr. 2, s. 1, D. 1, 2.
[2] Maine's *Ancient Law*, Chap. IX. p. 317.
[3] Fr. 4, D. 1, 1; Pr. J. 1, 5.
[4] Fr. 1, 3, D. 40, 8.
[5] Fr. 4, *Ibid.*

3. A slave abandoned by his master on account of disease or infirmity (*ob gravem infirmitatem*) was pronounced free by an Edict of the Emperor Claudius.[1]

Three requisites of valid manumission.

In the time of Gaius the three following requisites were necessary to entitle a freedman to the position of a Roman citizen:—

1. That he was not more than thirty years of age.
2. That he was held *ex jure Quiritium*.
3. That he was manumitted by one of the three legal modes of manumission, namely, *Census*, *Vindicta*, *Testamentum*.

If any of these requisites were wanting, the person manumitted merely became a *Latinus*.[2]

Provisions of Lex Ælia Sentia as to age for manumission.

The first of the above requisites was prescribed by the *lex Ælia Sentia* (A.D. 4), but persons under the age of thirty might be emancipated so as to obtain the rights of Roman citizenship, provided they were manumitted by *vindicta* and proof of a legally acknowledged ground of manumission (*justa causa manumissionis adprobata,*) had been adduced before the *Consilium*.[3] The *Consilium* was a Council consisting at Rome of five senators and five Roman knights, of the age of puberty; and in the provinces of twenty *recuperatores*, all of whom were required to be Roman citizens.[4] It was held in the provinces on the last day of the Assembly, or *Conventus*, fixed annually for the disposal of civil business; but at Rome certain fixed days were appointed for bringing manumissions before the Council.[5] The manumission of a son, daughter,

[1] Fr. 2, *Ibid.*

[2] Gaius. *Comment.* 1, 17.

[3] *Ibid.* 18; Ulpian *Frag.* 1, s. 12.

[4] The *Recuperatores* were Judges usually appointed by the Prætor to determine money disputes, actions of assault, and questions relating to the rights of freedom. Some of Cicero's speeches, the one *Pro Cæcina* for instance, were delivered before judges of this description.

[5] Gaius. *Comment.* 1, 20.

natural brother or sister, foster child (*alumnus*),[1] preceptor, or of a slave in order to make him a procurator, or of a female slave for the purpose of marriage, are instances given by Gaius of what the law considered adequate motives of manumission.[2]

Jus Quiritium

In the second place, says Gaius, the slave must have been held *ex jure Quiritium*, that is, in full ownership (*pleno jure*) by the rules of the Roman civil law (*jus civile Romanorum*). The Romans, as Justinian explains, were called *Quirites* from Quirinus, which was the cognomen of Romulus; and hence the *jus Quiritium* was simply the equivalent term for the *jus civile Romanorum*.[3] The *dominium bonitarium* on the other hand was the ownership which was derived from the principles of the *jus gentium*, and was protected by the authority of the Prætor. It is spoken of by jurists as *in bonis*, and is thus contrasted with *dominium ex jure Quiritium*. Thus the same slave might be held by one person *in bonis* and by another *ex jure Quiritium*; but he who simply possessed a *nudum jus Quiritium* in the slave, was not understood to have the *potestas*.[4] This distinction involved at times serious consequences. The owner, for instance, who had merely a *nudum jus Quiritium* could not acquire in any case by his slave; so that even if the slave stipulated expressly that something should be given to his master, or if he received anything by mancipation in his master's name, the master according to some jurists,

[1] According to Marcianus foster children were more naturally manumitted by women than by men, though not exclusively; and it suffices, adds the jurist, to allow the manumission of a child who has won his proprietor's affection in the course of his education. Fr. 14, pr. D. 40, 2.

[2] *Comment.* 1, 19. See also 5 J. 1, 6. The approval of a ground of manumission once given, says Justinian, whether the reasons on which it is based be true or false, cannot be retracted. 6 J. 1, 6.

[3] 2 J. 1, 2.

[4] Gaius. *Comment.* 1, 54.

derived no benefit.[1] But in the eye of the civil law the man who possessed quiritary over the slave, was alone recognised as the legal owner; and hence it was necessary that he should manumit the slave. The distinction between *jus Quiritium* and *in bonis* was abolished by Justinian.[2]

by the Census

The most solemn of the three recognised modes of manumission was that by the *Census*. The census was an institution which owed its introduction to Servius Tullius, and was held every five years. The primary object no doubt was to settle how the services of war and peace were to be performed, and these were fixed in proportion to the amount of property.[3] The census was in fact a complete register of all who enjoyed the rights of citizenship, and contained particulars concerning the age, sex, wealth, dignity and status of every member of a citizen's family. None but freedmen and citizen's were allowed to be enrolled; slaves were indicated simply by numbers amongst the chattels of their masters; and accordingly if a slave had his name recorded with the consent and by the direction of his master, he instantly acquired his freedom.[4] Ulpian describes this mode of manumission, which was no longer in use in his time, in the following terms:—"Those persons were formerly "manumitted by *Census*, who, at the lustral census at "Rome, by command of their masters, gave in their

[1] Gaius. *Comment.* III. 166

[2] C. 7, 25.

[3] Livy. 1, 42.

[4] Heineccius. *Jus. Civile. Insti.* lib. I. s. 97. Some of the old jurists, however, were of opinion that liberty was acquired not on the day on which the slave's name was described, but on the closing of the lustrum.—*i.e.* the *dies qua lustrum conditur* (Livy. 1, 44). Cicero thus refers to this controversy. "It is a question of Civil law, when "a slave is registered with his owner's sanction, whether his freedom "dates from the actual inscription on the register or from the close of "the censorial period (*lustrum*)." De Orat. 1, 40. See also Dosith. *Disput. de Manumis.* s. 17.

"census among the Roman citizens."[1] Niebuhr seems to think that slaves who were freed by the Census were in a superior position to those who were manumitted by *vindicta*. The latter he thinks enjoyed only the rights of metics, and by acquiring their freedom they stood in no better position than foreigners who settled at Rome. "I cannot persuade myself," he says, "that a slave who "was set free by the *vindicta*, gained the same degree of "freedom as one by the census. By being registered in "the census the Italians might acquire the franchise of "citizens. But a person who was to have the same "power as they had of exercising this great privilege, "must surely have been free already. This, and no "more, I conceive, did the slave become by the *vindicta*: "and even by the census, before the censorship of Appius "the Blind, he merely attained the rights of an erarian. "In both stages, as merely free, and as a Roman citizen, "he was still a client of the master who had released him: "in the former he would only have the rights of a metic."[2] Although no direct authority is quoted for this opinion it seems to receive some support from the account which Livy gives of the origin of the *vindicta* form of manumission. He states that the first person who was manumitted by *vindicta* was a slave of the Vitellii, who, as a reward for disclosing the conspiracy of the Tarquins, obtained his freedom. His name was Vindicius, and the term *vindicta* is supposed to have been derived from him. *Post illum*, says Livy, *ut, qui ita liberati essent, in civitatem accepti viderentur*.[3] In this form of manumission it was necessary to have recourse to a fictitious suit called *causa liberalis*,[4] in which a third person, who was either a friend of the slave or one of the lictors of the magistrates, and who was termed the *assertor libertatis*,

Origin of manumission by vindicta.

[1] *Frag.* 1, s. 8
[2] Vol. 1, 594-595.
[3] Lib. 2, 5: Fr. 2, s. 24, D. 1, 2.
[4] D. 40, 12.

asserted that the slave was free by touching him on the head with a wand (called *vindicta* or *festuca*);[1] the master acknowledged the validity of the demand, and in token of his consent he turned the slave round and let him go, saying, *Hunc hominem ego liberum esse volo.* The magistrate then pronounced the slave free (*Aio te liberum more Quiritium*), and the ceremony concluded. This serves to explain the well-known lines of Persius:—

Vindicta postquam meus a prætore recessi,
Cur mihi non liceat jussit quodcunque voluntas,
Excepto si quid Masuri rubrica vetavit.[2]

The magistrates before whom this proceeding could be conducted were the Prætor, Consul or Pro-consul; but it seems that it was not absolutely necessary that the magistrate should pronounce his judgment while seated on his judicial bench (*pro tribunali*). He might do so on his way to the bath or to the theatre,[4] nor was even the presence of a lictor essential.[5] Moreover in the time of Hermogenianus the *verba solemnia* were accepted as having been uttered, although in point of fact they may not have been used by the parties.[6]

Manumission per testamentum.

The third of the ancient recognised solemn modes of manumission was that *per testamentum*, which was sanc-

[1] This staff or rod was used in the place of a spear (*hastæ loco*) as a symbol of absolute dominion; since that was especially regarded as the property of a man which he had captured in war; and hence a spear was placed before the tribunal of the centumvirs. Gaius. *Comment.* IV. 16.

[2] *Sat.* 5, 88-90. Sir Walter Scott represents the Saxon Cedric emancipating his slave Gurth by the wand in his charming romance of Ivanhoe. Ch. 32.

[3] Ulp. *Frag.* 1, s. 7.

[4] Fr. 7, D. 40, 2. Justinian adapts this opinion in the Institutes 2 J. 1, 5.

[5] Fr. 8, *Ibid.*

[6] Fr. 23, *Ibid.*

tioned by the law of the Twelve Tables.[1] If freedom was given by the testator as a legacy to the slave himself, the slave was called *Orcinus*, because when he gained his freedom his patron was dead.[2] If, however, the slave obtained his freedom by virtue of a *fideicommissum*, that is if the testator charged his heir to manumit his slave —as *Rogo, fidei committo heredis mei, ut iste eum* (or *Stichum*, as it is written in some MSS.), *servum manumittat*—the slave became a *libertus manumissoris* and not *testatoris*.[3] An heir might also be charged to secure the manumission of another's slave, in which case he was bound to purchase the slave and then emancipate him.[4] It is necessary moreover to bear in mind an important distinction between a slave who was enfranchised in pursuance of a *fideicommissum*, and one who received his liberty directly from the testament. The former, as I have shown, became the freedman of the person who gave him his freedom, and to him he owed the *jura patronatus*; whereas the latter became the freedman of the testator, whose death at once secured him his liberty, and no one else could claim to be his patron. Liberty was held to be given directly, when a testator did not request that freedom should be given to his slave by another, but gave it himself by virtue of his own testament.[5] The law of the Twelve Tables also permitted a slave to be freed

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[1] Ulp. *Frag.* 1, s. 9. This form of manumission, according to Ulpian, while conferring actual liberty, which was protected by the Prætor, still left the freedman a legal slave.

[2] *Ibid.* 2, s. 8.

[3] Ulp. *Frag.* 2, s. 8.

[4] According to the opinion of Gaius if the owner of the slave refused to sell him for a reasonable price, the *fideicommissum* was at an end, because, says Gaius, "no pecuniary compensation can be "weighed against liberty." *Comment.* II. 265. See also Ulp. *Frag.* 2, s. II. Justinian, however, following a rescript of the Emperor Alexander, (Const. 6, C. 7, 4.) decides that it is only delayed. 2 J. 2, 24.

[5] Gaius. *Comment.* 2, 266-267; 2 J. 2, 24.

by a testament subject to a condition,[1] as that the slave was to be free when he attained a certain age,[2] or after he had performed his services for a certain period,[3] or upon payment of a certain sum.[4] In such cases the slave was called *statu liber*, and, as Ulpian informs us, while the testamentary condition remained unsatisfied or *in pendenti*, he was the slave of the heir.[5] In the early period of the empire the position of *statu liberi* differed in no way from that of ordinary slaves. The same disabilities concerning the institution of actions, or the making of contracts, attached to both alike; and they were both liable to the same punishments. This was certainly the law in the time of Pomponius,[6] but under the later emperors the *statu liberi* began to enjoy certain privileges, and to be treated in many respects as if they were actually free.[7] Thus by a rescript of Salvius Marcianus it was decided that they should only suffer punishment as freemen,[8] and this continued to be the law in the time of Modestinus, the pupil of Papinian, who flourished in the reign of the Emperor Alexander Severus.[9]

Manumission by census superceded by that in SACRO SANCTIS ECCLESIIS.

Manumission by *census* had become obsolete before the reign of Justinian, for Ulpian himself speaks of it as a thing of the past, and it is therefore not mentioned among the various existing forms referred to in the Institutes.[10] Indeed the practice of holding the census had fallen into desuetude under the first emperors, for it appears to have

[1] Ulp. *Frag.* 2, s. 1-4; Fr. 1, D. 40, 7.
[2] Fr. 13, s. 5, D. 40, 7.
[3] Fr. 14, s. 1, *Ibid.*
[4] Fr. 3, s. 1; s. 5, 6, 7; Fr. 13, s. 1, *Ibid*; Ulp. *Frag.* 2, s. 4.
[5] *Frag.* 2, s. 2.
[6] Fr. 29, D. 40, 7.
[7] Warnkœnig *Inst. Juris. Romani. Privati*, s. 148.
[8] Fr. 9, s. 16, D. 48, 19.
[9] Fr. 14, D. 48, 18.
[10] 1 J. 1, 5.

been only once taken from the reign of Vespasian to that of Decius, and after the latter reign it was altogether discontinued. In the place of manumission by census the Emperor Constantine introduced that *in sacro sanctis Ecclesiis*, which was required to be performed in a church, or consecrated building, in the presence of the congregation (*sub aspectu adsistentibus Christianorum antistibus*), and verified by a written memorandum drawn up by the parties and attested by the presiding bishop.[1] This mode of manumission appears to have been practised until feudal times, for Cujas mentions that the following inscription, which was still to be seen in Pothier's time,[2] was written over the door of the old Cathedral of Orleans: "By the grace of the Holy Cross, and by the ministry "of Bishop Joannes, Albertus, vassal of the Holy Cross, "manumitted Letbertus in the presence of this Holy "Church."

Effect of lex JuniaNorbana

By the operation of the *lex Junia Norbana* slaves whose emancipation was defective in any of the requisites of the ancient law, were placed on a footing with Latins, and were hence called *Latini Juniani*. Prior to this law such persons were not recognised by the *jus civile* as really free, but the Prætor extended his protection towards them and intervened in their favour if their masters at any subsequent time wished to compel them to return to slavery.[3] *Eos qui nunc Latini Juniani dicuntur*, says Gaius, *olim ex jure Quiritium servos fuisse, sed auxilio Prætoris, in libertatis forma servari solitos; unde etiam res eorum peculii jure ad patronos pertinere solita est.*[4] "Those who are now called *Latini Juniani* were originally "slaves by law of the Quirites, though maintained by the

[1] Const. 1, 2, C. 1, 13.
[2] *Pand.* lib. 40, Tit I. s. 1.
[3] Dosith. *Disput. de manumis.* s. 5.
[4] Gaius. *Comment.* 3, 56.

"Prætor's protection in a condition of *quasi* freedom, so "that their possessions devolved to their patrons by the "title of peculium."

Other forms of manumission.

Justinian mentions other forms of manumission, in which no formal ceremony was required, as still in vogue in his reign—such as *per espistolam, inter amicos, aut per aliam quamlibet ultimam voluntatem.*[1] Before

Per epistolam

Justinian's time a master could manumit his slave, if absent, by simply writing a letter to him intimating his intention; and if the slave was present, by

Inter amicos.

the master declaring his intention *inter amicos,* without the necessity of any formality being observed. But by a Constitution of Justinian it was enacted that in both the above cases the presence of five witnesses was necessary, in accordance with what was required in the execution of codicils: *quasi ex imitatione codicilli.*[2]

Per convivium.

A slave was also considered to have received his freedom if he was invited by his master to dine with him at the same table; for it was considered in ancient times to be discreditable for slaves to eat at the same table with their masters,[3] and it was accordingly presumed when a master bid his slave to dine with him, that he had tacitly given him his freedom.[4]

By giving title of 'son' to slaves.

Again a slave to whom a master by a solemn deed applied the title of son (*filium*) was thereby made free, although he did not acquire the rights of a son.[5] Justinian decided this in accordance with the opinion of

[1] 1 J. 1, 5.

[2] Const. 1, s. 1, 2, C. 7, 6.

[3] *Haud postulo equidem, me in lecto adcumbere:*
Scis tu, me esse imi subselli virum. PLAUT. *Sticho.* Act. III. sc. 2, v. 32, *et seq.*

[4] Pliny. *Epist.* 7, 6; Heineccius, *Antiq. Rom.* lib. 1, tit. IV. V. s. 8.

[5] Const. 1, s. 10, C. 7, 6.

Cato, that slaves when adopted by their masters became free.[1]

Restrictions

Although generally speaking a master was at liberty to free his slave whenever he pleased, certain restrictions were placed on this power by the *lex Ælia Sentia*, which, as we have already pointed out, also required that the slave, if under thirty, should be manumitted by *vindicta*. Thus a master could not free his slave *in fraudem creditorum*, or *in fraudem patroni*.[2] The latter restriction is not, however, preserved in the legislation of Justinian, who also at first permitted a minor of the age of eighteen to manumit a slave by testament, contrary to the provisions of the *lex Ælia Sentia* (7 I. 1, 6), and by a later law removed all distinction between the power of a minor to alienate slaves or other goods by testament, so that a a person who had completed his fourteenth year became competent to give his slaves freedom by testament or otherwise.[3]

In fraudem patroni.

In fraudem creditorum.

"A person is understood to manumit in "fraud of creditors," says Gaius, "who is either insolvent "at the time that he manumits, or becomes so by the "manumission itself."[4] The same rule is confirmed by Justinian, who adds, however, that according to the prevailing opinion, which he accordingly sanctions, the gift of liberty was not invalidated, although the master's goods were insufficient for the payment of the creditors, unless the manumittor intended to commit a fraud, for men often hope their circumstances are better than they really are. In order therefore that the gift of liberty should be invalidated at the suit of creditors, it was necessary to prove not only that there was an insufficiency of assets to meet their just claims, but also that the

[1] 12 J. 1, 11.
[2] Gaius. *Comment.* 1, 37; Ulpian *Frag* 1, s. 15.
[3] Novell. 119, cap. 2.
[4] Fr. 10, D. 40 9

manumittor *intended* to commit a fraud.[1] This was simply an application of the general principle stated by Papinian, *fraudis interpretatio semper in jure civili, non ex eventu duntaxat, sed ex consilio quoque desideratur.*[2] The jurist Julianus was therefore of opinion that the *animus fraudandi* must have related to the creditor who actually suffered damage in consequence of the manumission. Thus suppose an insolvent debtor manumitted his slave and subsequently contrived to pay off his creditor Titus; if he afterwards contracted a similar debt with Sempronius, the latter, although actually damaged in point of fact, would not be able to challenge the act of manumission: because, says the jurist, the debtor did not intend to defraud him, but the first creditor.[3] But it is obvious that if the debtor, knowing himself to be insolvent, first manumitted his slave and then paid off the original creditor by obtaining the necessary funds from a second creditor, the latter would to all intents and purposes have as much right to complain of his debtor's fraud as the original creditor. Accordingly Paulus in more accordance with the dictates of natural justice, adds the important proviso to the proposition broadly stated by Julianus, "unless indeed it is proved that the first creditor was paid off with the money of the second" (*nisi priores pecunia posteriorum dimissi probentur.*[4] Ulpian writes to the same effect. "If the debtor," he says, "has simply paid off the original creditors whom he wished to defraud, and has subsequently contracted with others, the *revocatio* is not permitted; but if he has paid off the original creditors, whom he intended to defraud, with the money of those whom he did not intend to defraud, Marcellus says, that the right of *revocatio* is preserved."[5] Again if an insolvent debtor

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[1] 3 J. 1, 6.
[2] Fr. 79, D. 50, 17.
[3] Fr. 15, D. 42, 8.
[4] Fr. 16, D. 42, 8.
[5] Fr. 10, s. 1, *Ibid.*

freed his slave by testament with full knowledge that his creditor would be prejudiced thereby, and instituted as his heir a person whose condition was perfectly solvent; this last circumstance would not deprive the creditor of his right to set aside the manumission of the slave. This doctrine is concurred in by both Julianus[1] and Gaius:[2] but the former jurist goes even still further and holds that a testamentary manumission by an insolvent debtor, subject to the condition that the manumission should not take effect until his (*i.e.* the testator's) debts were paid off, is invalid as being *in fraudem creditorum*. Gaius, however, justly dissents from this opinion, for he says, "so far from the debtor in such a case wishing to defraud his creditors, it would seem that he was particularly careful to provide against this contingency."[3] If the manumission were made in fraud of the public treasury or *fiscus*, the law required that it should be impugned within ten years; and although Paulus does not refer to any other kind of debts, it is not likely that private creditors were allowed a longer period of limitation.[4] A master who was insolvent might, however, by his testament, institute a slave to be his heir, at the same time giving him his liberty, so that the slave becoming free might be his only and necessary heir (*solus et necessarius heres*).[5] By the civil law the heirs if they accepted the inheritance, became responsible for all the liabilities of the testator;[6] it

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[1] Fr. 5, D. 40, 9.
[2] Fr. 57, D. 40, 4.
[3] *Ibid.*
[4] Fr. 16, s. 5, D. 40, 9.
[5] 1 J. 1, 6; Gaius. *Comment.* 2, 154.
[6] Gaius. *Comment.* 2, 163; 5 J. 2, 19. An instance, however, is recorded where the Emperor Hadrian allowed a person of full age to relinquish an inheritance, when it appeared to be encumbered with a great debt, of which he was ignorant when he entered on the inheritance. The Emperor Gordian extended this power of relinquishment as a general privilege to soldiers, and finally Justinian by a constitution of the year 531 A.D., laid down a certain procedure by

therefore frequently happened that when a testator died insolvent, the *heres institutus* naturally refused the inheritance, and the consequence was that the creditors intervened and sold the estate in the name of the testator, in order that the ignominy of the sale might not fall on the heir.[1] To avoid this disgrace on the memory of the deceased the *lex Ælia Sentia* permitted an insolvent to appoint his slave his heir; and as the Prætor would not permit a slave to decline the inheritance, he was thence called *heres necessarius*.[2] If the goods of the deceased proved insufficient for the discharge of his debts, the sale was made in the name of the slave, and it was the opinion of Fufidius, a Sabinian, that the slave in such a case was himself exempted from infamy, because he suffered the sale of the property by necessity of law, and not by his own fault. But Gaius, although belonging to the same school, differs from this opinion.[3] As some compensation, however, for the inconvenience of being compelled to accept an insolvent inheritance, a slave enjoyed the exceptional privilege of reserving to himself those things which he acquired after the death of his patron, whether before or after the sale.[4]

Effect of instituting slave as heir.

In the time of Gaius a slave could not be instituted heir

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the proper observance of which, the heir might relieve himself of all liability beyond the value of the estate. Const. 22, C. 6, 30. See also 6 J. 2, 19.

[1] Gaius. *Comment.* 2 154, 158; 2 J. 2, 19.

[2] But this was only if he continued in slavery up to the time of his master's death, for if the master had enfranchised him before dying, he had the option of either accepting or refusing the inheritance. In such a case he was not regarded as a *heres necessarius* (or necessary heir), because he did not obtain both his liberty and the inheritance by the testament of his master. Gaius. *Comment.* 2, 188, 1 J. 2, 14. Nor yet would he be a necessary heir if he merely shared the inheritance with others. 1 J. 1. 6.

[3] Gaius. *Comment.* 2, 154.

[4] Gaius. *Comment.* 2, 155; 1 J. 2, 19.

unless he received his freedom by the same testament.[1] The form to be adopted was: *Stichus servus meus liber heresque esto,* or *heres liberque esto.* "My slave Stichus "shall be free and heir," or "shall be heir and free."[2] Ulpian also declares that without the gift of freedom a slave could not be instituted heir—*Sed si sine libertate sit institutus, omnino non constat institutio.*[3] But Justinian altered the law in this respect and decided that the mere institution of a slave implied the grant of liberty. "For it is highly improbable," he adds, "that a testator, "although he has omitted an express gift of freedom, "should have wished that the person he has selected as "heir should remain a slave, and that he himself should "have no heir."[4] Again under the ante-Justinian law, as I have already pointed out, a person who merely possessed a bare property (*nudum jus Quiritium*) in the slave, another person being entitled to his services, could not give him his freedom. *Servus, in quo alterius est usufructus,* says Ulpian, *alterius proprietas, a proprietatis domino manumissus, liber non fit, sed servus sine domino est.*[5] Justinian however, expressly includes among a testator's own slaves one in whom the testator had only a bare owner-

[1] *Comment.* 1, 123.

[2] *I bid.* 2, 186-188.

[3] *Frag.* 22, s. 12. But the slave of another could be instituted *sine libertate* provided the master had *testamenti factio* with the testator *Ibid.* s. 7. So might also a slave who belonged to the testator in co-partnership with others, s. 7, s. 10. The term *servus alienus* included one of whom the testator had the usufruct. Pr. J. 2, 14. A slave who was only held *in bonis* could not be instituted heir, because by manumission he only became a Latinus, and could not as such receive an inheritance. Ulp. *Frag.* tit. 22, s. 8,. See also tit. I. s. 16.

[4] Const. 5, C. 6, 27; 2 J. 1, 6. The same result followed if the master appointed his slave to act as tutor to his children. 1 J. 1, 14. The appointment of the slave of another as tutor was also valid if made with this condition. "When he shall be free." *I bid.*

[5] *Frag.* 1, s. 19.

ship, another having the usufruct;[1] and accordingly under his legislation a slave in this condition might obtain his freedom by being instituted heir, although he would still be obliged to perform the usual services for the usufructuary so long as the usufruct continued. *Ipse tamen libertus, quasi servus apud usufructuarium permaneat, donec usufructuarius vivit, vel usufructus legitimo modo peremptus est.*[2]

A slave guilty of adultery could not be made free before sentence, by his partner in the crime.

By a constitution of the Emperors Severus and Antoninus, a mistress with whom a slave was accused of adultery, was not permitted to give him his freedom before his sentence was pronounced. Hence if she instituted such a slave as her heir the appointment was of no avail.[3]

Lex Fusia Caninia.

In order to check the manumission of crowds of slaves by testators to gratify their vanity at the expense of their heirs, the *lex Fusia Caninia,* which was passed four years after the *lex Ælia Sentia* (A.D. 4),[4] provided that not more than a certain number should be freed by testament. The owner of two slaves might free both: of three, two; of from four to ten, half; of from ten to thirty, one-third; of from thirty to one hundred, one-fourth; of from one hundred to five hundred, one-fifth; and so on, provided that in no case the number enfranchised exceeded one hundred.[5] It was also required that the slaves whom the testator wished to manumit, should be individually named in the testament,[6] or at least that a sufficient reference should be made to their office or calling for the purpose of identification.[7] If several slaves occupied the same office, it then became necessary to add the names,

[1] Pr J. 2, 14.
[2] Const. 1, C. 7, 15.
[3] Fr. 48, s. 2, D. 28, 5; pr. J. 2, 14.
[4] Suet. *Aug.* 40.
[5] Gaius, *Comment.* 1, 44; Paul. *Sentent.* lib. 4, tit. 14, s. 4.
[6] Gaius. *Comment.* 2, 239; Ulpian *Frag.* 1, s. 25; 25 J. 2, 20.
[7] Paul. *Sentent.* lib. 4, tit. 14, s. 1.

so that there might be no doubt as to the persons who were intended to be freed.[1] If these formalities were neglected the manumission was treated as a nullity. And if a greater number of slaves were manumitted than the law allowed, those only received their freedom whose names were first mentioned up to the prescribed limit. In order moreover to stop any evasion of the law, it was provided that if the names of the slaves were written in a circle (*in orbem*), the manumission would be entirely invalid and none of the slaves would be free.[2]

Only cable to manumission by testament.

The *Lex Fusia*, however, only applied to those who were enfranchised by testament; and accordingly a master might during his lifetime free all his slaves by one of the recognized modes of manumission, provided there was no other impediment to their freedom.[3] Justinian abolished the *lex Fusia*,[4] and pronounced it unreasonable that the power of a master should be restricted in the one case and not in the other.[5] But the distinction was in truth based on a very accurate knowledge of human nature; for while it might be fairly left to the discretion of a master to dispose of his slaves during his lifetime as he thought proper, because it could be safely presumed that he would not ruin himself to appear generous, and if he did he would be the immediate and principal sufferer; yet in the case of a testamentary manumission, the testator in order to gratify his vanity by swelling his funeral train, and knowing full well that while he lived he would be entitled to the services of his slaves, might unhesitatingly prejudice his heirs by suddenly depriving them of the most valuable part of their patrimony. The tangible objection

[1] *Ibid.*
[2] Gaius. *Comment.* I, 45, 46.
[3] *Ibid.* 44.
[4] C. 7, 3.
[5] Pr J. 1, 7

indeed to any such restriction is that stated by Justinian himself in the sentence immediately preceeding the one to which I have just alluded—namely, as invidiously placing obstacles in the way of liberty. On this ground Justinian may well be said to have wisely abolished the old law, and accordingly under his legislation there was no limit to the number of slaves a master could manumit whether in his lifetime or by testament. Again under the old law, except in the case of a military testament, freedom could not be given before the institution of the heir, because it was considered that a testament derived its efficacy *ex institutione heredum,* which was looked upon as the head and foundation (*caput atque fundamentum*) of the testament.[1] But Justinian rightly regarding it as unreasonable that the mere order of a writing should be attended to in contempt of the real intention of a testament, amended the law by a constitution of the year 528 (A.D.) and decided that a legacy or a grant of liberty might be given *before* or *after* the institution of the heir.[2]

Certain persons not permitted to manumit.

Besides those persons whom I have already mentioned, there were certain others who were not permitted to manumit their slaves; for instance:

1. Persons accused of a capital offence, *e.g.* under the *lex Cornelia* (B.C. 82.) of killing a slave.[3]

2. Persons who were reduced to the position of *servi pœnæ,* because they were themselves nothing better than slaves.[4]

3. A woman within sixty days of her divorce under the provisions of the *lex Julia.*[5] But this restriction

[1] Gaius. *Comment.* 2, 229; Ulp. *Frag.* 1, s. 20; 24 s. 15.
[2] 34 J. 2, 20.
[3] Fr. 8, s. 1-2, D. 40, 1.
[4] Fr. 8, pr. *Ibid.*
[5] Fr 12; Fr. 14, pr. and s. 1, D. 40, 9.

did not apply if the divorce was *bona gratia, i.e.* by mutual consent of the married parties.[1]

4. A woman *in tutela,* and a *pupillus* or *pupilla.*[2]

Slaves guilty of certain crimes could not acquire freedom.

On the other hand the law deprived slaves of the privilege of acquiring their freedom if they had been guilty of certain delicts or crimes.

1. Thus the *lex Favia* or *Fabia,* which is mentioned by Cicero,[3] prohibited the manumission for a period of ten years, of a slave who was guilty of the offence called *plagium,* the pecuniary punishment for which the master was compelled to discharge.[4]

2. The Præfect or the President of a province might also prohibit the manumission of a slave who was guilty of a delict.[5]

3. Slaves who were sentenced to temporary imprisonment, could not be freed by their masters during the period of such imprisonment. This was decided by a rescript of the *fratres imperatores,* as Papinian calls them: probably Caracalla and Geta.[6]

Again a slave might be kept in perpetual servitude by the master selling him with the condition that the purchaser should not manumit him; or by a testator imposing a similar injunction on his heir.[7]

[1] Fr. 14, s. 4, *Ibid.*

[2] Ulp. *Frag.* 1, s. 17.

[3] *Pro Rabiris* 3.

[4] Fr. 12, D. 40, 1. *Plagium* (from πλάγιον) was the fraudulent taking away or concealing of a freeman, or of another man's slave, for the purposes of sale, gift, exchange or the like. It was at first punishable with fine and condemnation to the mines, and was at length made a capital offence punishable with death. D. 48, 15.

[5] Fr. 9, *Ibid.*

[6] Fr. 33, D. 48, 19.

[7] Fr. 9, D. 40, 1.

Tax levied on manumission by Lex Manlia

By a law passed on the motion of the Consul Cneius Manlius, from whom it derived its name of *lex Manlia* (B.C. 357), a tax was impossed on manumission of the twentieth part of the value of those who were set free,[1] which was subsequently raised by Caracalla to a tenth.[2] It would seem that the receipts derived from this tax were set apart in the most sacred part of the treasury as a resource in cases of extreme exigency. Thus in the second Punic war we find no less a sum than four thousand pounds of gold drawn out from this vicesimary reserve.[3]

[1] Livy. lib. 1, cap. 16.
[2] *Dion Cassius.* 77, 9.
[3] Livy, lib. 27, cap. 10.

CHAPTER V.

PERSONS *sui vel alieni Juris.*

WE now come to the second division of persons, according as they happen to be independent (*sui juris*), or subject to the power of others (*alieni juris.*) The primary division adopted by the Roman Jurists by which they classified all mankind into freemen and slaves, had reference to public or political rights; while the present division considers persons as members of a family. We have already explained that the word *familia* had various meanings in Roman law,[1] but its most ancient signification perhaps, was *the patrimony* or *inheritance of a deceased person*, in which sense the word is used in the law of the Twelve Tables.[2] *Jure proprio*, however, the word *familia* is used to mean the whole group of persons who are under the power of one man, either by the law of nature or by the

Second division.

[1] *Ante*, page 57.
[2] Fr. 195, s. 1, D. 50, 16.

civil law.[1] The head of this family group was called *paterfamilias*, a term which, as Ulpian defines it, did not necessarily imply paternity,—for a pupil might be a *paterfamilias*,—but was simply applied to a person who was *sui juris*, that is not subject to the power of another. Hence when the head of a family died as many freeborn persons (*capita*) as were subject to him, became the founders of separate families, and were each invested with the title of a *paterfamilias*.[2] An unmarried woman also on the death of her father became *sui juris*, and was called *materfamilias*; but inasmuch as she could not exercise *potestas* over free persons, and if she married her children would be in her husband's power, she was hence pronounced to be *familiæ suæ, caput et finis est*.[3] It would seem moreover that the title of *materfamilias* was not applied to every woman who was *sui juris*, for it appears from a passage of Ulpian to have been more strictly employed as a term of respect for a woman who led a chaste and honourable life. *Matrem-familias accipere debemus eam quæ non inhoneste vixit: Matrem enim familias a cæteris fœminis mores discernunt, atque separant: proinde nihil intererit, nupta sit, an vidua, ingenua sit, an libertina.*[4]

Persons alieni juris.

In contradistinction to those who enjoyed rights of their own, non-independent persons were said to be *alieni juris*; and Gaius[5] divides such persons into three, or more correctly speaking, into four classes, because the first was subdivided into two:—namely,

1. Persons under *potestas*, which was called *dominica potestas* when exercised over slaves, and *patria potestas* when exercised over children.

[1] Fr. 195. s. 2, *Ibid.*
[2] Fr. 195, s. 2, D. 50, 16.
[3] *Ibid.* s. 5.
[4] Fr. 46, s. 1, *Ibid.*
[5] *Comment.* 1, 49

2. Wives *in manu*, that is under the power of their husbands.

3. Persons in *mancipio*, that is who were sold by the head of the family or by themselves with the form of *mancipatio*, and who were said to be *servorum loco* towards the purchaser.

Wives ceased to be in manu in

But the subjection of wives *in manu* had ceased before Justinian's time, and by facilitating the emancipation of children, which was formerly accomplished by means of imaginary sales each followed by a manumission,[1] Justinian did away with the last traces of *mancipium*. Accordingly in the Institutes we only find mention made of two classes of persons *alieni juris*, *e.g.* (*a*) children in the power of parents, and (*b*) slaves in the power of masters.[2]

Dominica potestas, whence derived?

Adopting the course followed by Gaius and Justinian let us first treat of those who were subject to *dominica potestas*: because, as Gaius observes, when we have ascertained who these were, we shall at the same time discover those who were *sui juris*.[3] The *dominica potestas* was a power derived from the *jus gentium*, to which Gaius appeals to prove that masters without distinction could exercise the power of life or death over their slaves, and were entitled to whatever was acquired by them.[4]

But this power could not be exercised under the old law by one who merely possessed a *nudum jus Quiritium* in his slave, that is a mere civil or legal right, while another held the slave *in bonis*. In such a case the *dominica potestas* appertained to the latter, or equitable owner.[1] But this distinction vanished when Justinian

[1] 6 J. 1, 12.
[2] Pr. J. 1, 8.
[3] *Comment.* 1, 50; pr. J. 1, 8.
[4] *Comment.* 1, 52; 1. J. 1, 8.
[5] Gaius. *Comment.* 1, 54.

placed bonitary on an equality with Quiritarian ownership.

Excessive punishment of slaves restricted by later laws.

The explanation of the extraordinary power possessed by Roman masters over their slaves is to be sought in the outlawed condition of the latter. In the eye of the law slaves were mere things, and it accordingly came to be recognised as an established principle that whatever rights a proprietor could exercise over his goods, he could exercise in the same degree over his slaves—*Quæcumque jura competunt domino in rem suam, eadem competunt in servum.* Thus as we have already seen a master could sell, transfer, or dispose of his slaves in any form he thought fit, and in ancient times it is undeniable that he also possessed the power of life and death (*jus vitæ et necis*) over them. Indeed even in the golden reign of Augustus a memorable instance is recorded of one of the emperor's select friends, a Roman knight named Pollio, ordering a slave, who had unluckily broken a crystal vase, to be thrown into his fishpond to serve as food for his lampreys, a fate from which the unfortunate slave was only preserved on the intercession of the Emperor.[1] The classical reader will also remember that remarkable passage of Horace, himself a freedman's son, in which he satirically remarks that a man who hangs a slave for having licked up the half-eaten fishes and warm sauce on a dish which he was ordered to remove, must surely be reckoned by wise men more insane than Labeo.[2] It is to be observed that the poet does not pronounce such treatment, however monstrous and cruel, beyond the capacity of a master to inflict; and it would seem that the *lex Cornelia*, passed during the Dictatorship of Sylla,

[1] Seneca. *de Ira*, lib. 111. C. 40; *de Clmentia*, C. 18; Dion Cassius says this Pollio was the son of a freedman "who never did anything "in his life that deserved to be mentioned," and it is only the extraordinary piece of cruelty mentioned in the text which has served to immortalise his name.

[2] *Sat.* lib. 1, 3, v. 80-84.

(B.C. 82.) was the first law which rendered the killing of a man, irrespective of his condition in life, punishable as homicide.[1] Under the provisions of the *lex Petronia* and several *senatus-consulta* referring to it, a master was prohibited "*suo arbitrio*" to compel his slaves to contend with wild beasts;[2] and Ulpian records that the Emperor Hadrian banished a woman of Umbricia for five years who had treated one of her slaves with great cruelty, (*quod ex levissimis causis ancillas atrocissime tractasset*).[3] The same Emperor required the sanction of a magistrate in all cases before a slave could be put to death.[4] In the time when Gaius wrote two constitutions of the "most sacred" Emperior Antoninus had considerably restrained the power of masters over their slaves; and thus Gaius proudly boasts that "at the "present day neither Roman citizens, nor any other "persons under the dominion of the Roman people dare "punish their slaves with excess and without legally "recognised ground."[5] By the first constitution it was provided that he who *sine causa legibus cognita* killed his slave, would be no less guilty of homicide than he who killed the slave of another.[6] Demangeat following Heineccius[7] and others, explains this by supposing that the *lex Cornelia* only applied to the murder of a freeman or the slave of *another* person, and that Antoninus, by the above consti-

[1] Fr. 1, D. 48, 9; Fr. 23, s. 9, D. 9, 2.

[2] Fr. 11, s. 1-2, D. 48, 8. This law is ascribed by Haubold and Hugo to the latter part of the reign of Augustus (764 A.U.C.), but Hotomann and others refer it to the year 814 A.U.C. in the reign of Nero.

Fr. 2, D. 1, 6.

[4] Spart. in *Hadr.* cap. 18.

[5] *Comment.* 1, 53; 2 J. 1, 8.

[6] If a master caught his slave in the act of adultery with his wife or daughter, this was esteemed a *causa legibus cognita*, and he might slay him on the spot. Fr. 20 and 24, D. 48, 5. So also if a master killed the slave in his own defence. *Theoph.*

[7] *Antiq. Roman.* lib. 1, tit. 8, VII.

tution, made it equally penal to murder one's own slave.[1] The second constitution was addressed in reply to a reference by certain governors of provinces on the subject of slaves who had sought refuge either at the temples or the statues of the Emperors—The words of the rescript addressed by the Emperor on this occasion to Ælius Marcianus, the pro-Consul of *Bœtica,* are preserved by Ulpian in a fragment inserted in the Digest,[2] and are also quoted by Justinian in his Institutes.[3] "The power of "masters over their slaves" says Antoninus, "ought to be "preserved unimpaired, nor ought any man to be deprived "of his just right. But it is for the interest of all masters "themselves, that relief prayed on good grounds against "cruelty, the denial of sustenance, or any other intolerable "injury, should not be refused. Examine, therefore, into "the complaints of the slaves who have fled from the "house of Julius Sabinus, and taken refuge at the statue "of the Emperor; and, if you find that they have been "too harshly treated, or wantonly disgraced, order them "to be sold, so that they may not fall again under the "power of their master; and if Sabinus attempt to evade "my constitution, I would have him know, that I shall "severely punish his disobedience." Finally, Constantine (A.D. 312) restricted the punishment of slaves by masters *suo jure* to moderate corporal punishment,[4] and the law continued in this state under Justinian.

Exportation of slaves.

For the security of the master, a dangerous slave (*distractus servus*) might be sold with the condition of exportation,[5] under penalty of forfeiture by the purchaser to the vendor if the slave with his privity, continued

[1] *Cours Elémentaire de Droit Romain,* vol. I. p. 219.
[2] Fr. 2, D. 1, 6.
[3] 2 J. 1, 8. See also Gaius. *Comment.* 1, 53.
[4] C. 9, 14.
[5] Fr. 1, D. 18, 7.

to reside in the same place contrary to the stipulations of sale.[1]

Runaway slaves.

To protect the interests of masters the law moreover afforded every facility for the capture of runaway slaves, and the presidents of provinces and the pro-consuls were charged with their arrest. Thus a penalty of five thousand sesterces was to be levied on persons who either purchased or took part in the sale of fugitive slaves.[2] No such slave could be manumitted within ten years without the consent of the previous owner;[3] slave catchers by a constitution of the Emperors Valentinian and Valens, of the year 365 A.D., were liable to the same punishment as *occultatores*, or smugglers. (Cod. Theod. lib. x. Tit. 12, 1, s. 1), and no usucapion however long conferred the right of property in a fugitive slave.[4] The title of the original master was preserved, and hence Hermogenianus says: *Per servum in fuga agentem, si neque ab alio possideatur, neque se liberum esse credat, possessio nobis adquiritur*.[5] This proceeded no doubt upon the principle that a slave by running away committed a species of theft against his master, by unlawfully depriving him of his services;[6] and the Law of the Twelve Tables prohibited the *usucapio* of a thing stolen.[7]

Incapacity of a slave to contract, except for the benefit of his master.

With respect to property acquired by slaves the power of the master was always recognised by the Roman law as indisputable, for slaves being devoid of civil capacity could not possess property in their own right; and accordingly it was a well established principle, that a slave could only

[1] Fr. 9, *Ibid.*
[2] Paul. *Sentent. Recep.* lib. I. tit. VI. a, s. 2.
[3] *Ibid.* s. 1.
[4] 1 J. 2, 6.
[5] Fr. 50, s. 1, D. 41, 2.
[6] Fr. 60, D. 47, 2.
[7] Gaius. *Comment.* 2, 45; 2 J. 2, 6.

acquire for his master.[1] But the clemency of later times ameliorated the condition of slaves in this respect, and it not unfrequently occurred that slaves purchased their freedom with money which they had acquired by their own labour and exertion.[2] Even Justinian speaks of the *peculium* of slaves as a kind of patrimony (*quod veluti patrimonium est*), and it appears that under the Prætorian law masters were bound to the extent of such *peculium* by the contracts of their slaves.[3] The master, however, could always dispose of the slave's *peculium* by gift or legacy, and it did not pass to a slave manumitted by testament, unless expressly given. But according to a rescript of the Emperors Severus and Antonius, if a master manumitted his slave in his lifetime, it required express words to deprive the slave of his self-acquired property; and the same emperors decided that a slave was entitled to his *peculium* if freedom were given to him by testament subject to the condition of producing his accounts and making up any deficiency out it. Under no circumstances, however, could a slave claim to be reimbursed for such portion of the *peculium* as had been expended for the master's use.[4]

Liability of masters on contracts made by their slaves.

A slave having no legal capacity was of course unable to bind himself by civil contracts, but the Prætor gave the creditor a remedy against the master if the contract were made with his knowledge,[5] or if the master had employed his slave to carry on his business,[6] or had permitted the slave to trade with his own *peculium*.[7] In the

[1] 1 J. 1, 8; Gaius. *Comment.* 1, 52.
[2] Tacitus. *Annal.* 14, 42; Fr. 53, D. 15, 1.
[3] 10 J. 4, 6.
[4] 20 J. 2, 20. See also *Digest*, Bk. 33, tit. 9, *de peculio legato.*
[5] 1 J. 4, 7.
[6] 2 *Ibid.*
[7] 3 *Ibid.*

two former cases the master was liable for the whole sum due, but in the last he was only responsible to the extent of the profits arising from the trade, from which however he was entitled to deduct any sum due to himself by the slave. A master was also liable to the extent of the profit he may have derived personally from any contract made by a slave even without his consent.[1]

Extent of liability for wrongful act of slaves.

Masters were again primarily liable for the wrongful acts of their slaves, from the consequences of which they could only relieve themselves by delivering up the delinquent in satisfaction of the injury.[2] In such a case the property in the slave was transferred for ever to the complainant, but if the slave could subsequently procūre money and satisfy the injured person for all damage he may have sustained, he might through the intervention of the Prætor claim to be manumitted even against the wish of his new master.[3] Noxal actions, however, followed the delinquent—*Omnis noxalis actio caput sequitur*—and, consequently, the action for a delict committed by a slave was required to be brought against the person to whose *dominica potestas* he was subject *at the time of the commission of the wrongful act*. But if the slave were manumitted he might then be sued in person.[4]

No obligation could arise between master and slave.

Slaves being thus completely subject to *dominica potestas*, and having no independent existence in the eye of the law, no obligation could arise between them and their masters. Hence a master could not sue his slave for a wrongful act against himself even after the slave obtained his freedom; nor in case the slave had passed under the power of another, could he sustain an action against the new master. So that if the slave of B. committed a wrongful act against C., and subsequently

[1] 4 *Ibid.*
[2] Gaius. *Comment.* 4, 75; pr. 2 J. 4, 8.
[3] 3 J. 4, 8; Fr. 20, D. 9, 4.
[4] Gaius. *Comment.* 4, 77; 5 J. 4, 8.

became the slave of C., the action of which C. might at first have availed himself against the former owner, was immediately extinguished, and was not revived by any subsequent change of circumstance.[1] Neither could a slave after having been alienated or manumitted, bring an action against his former master for any injury sustained by him whilst his slave.[2]

Patria potestas.

There was but little if any distinction between the power possessed by a master over his slaves and that exercised by a *paterfamilias* over his children. In both cases the power was absolute, and the father and son were regarded as constituting but one person.[3] Hence no civil obligation could exist between them,[4] nor could they bring actions against each other,[5] although a *filius-familias* could enter into an obligation with others, which a slave could not do so as to bind himself.[6] Again no person under the power of the testator could be a witness to his testament;[7] and descendants in the power of the deceased at the time of his death were called *sui et necessarii heredes*, because they were family heirs who, even in the lifetime of their father, were considered owners of the inheritance in a certain degree, and became heirs whether they wished it or no, that is, without any option as to accepting or refusing the inheritance until the Prætor interfered to relieve them of the burden.[8] But whereas the *dominica potestas* was an institution derived from the *jus gentium*, the *patria potestas* was more peculiar to the *jus civile* of the Romans.[9] By the

[1] 6 J. 4, 8; Gaius. *Comment.* 4, 78.
[2] *Ibid.*
[3] Const. 11, C. 6, 26.
[4] Gaius. *Comment.* 1, 78.
[5] Fr. 4, D. 5, 1.
[6] 6 J. 3, 19.
[7] 9 J. 2, 10.
[8] 2 J. 2, 19; Gaius. *Comment.* 2, 156-158.
[9] 2 J. 1, 9; Gaius. *Comment.* 1, 55.

law of nature the parental power over children—to the extent at least of directing their education and administering moderate correction—is common to both parents; but by the *jus civile* it was confined to the father, the mother having no power over her children, whether begotten in lawful marriage or otherwise. The foundation of *patria potestas* was the *dominium Quiritarium*, or that *dominium* which Roman citizens could alone exercise; and hence it was, as we shall presently see, that the loss of citizenship by a *paterfamilias* involved also the loss of his *potestas*: because, says Gaius, "it is not in accordance with the "analogy of our law, that a man who has the legal status of a *peregrinus* should hold a Roman citizen under his "*potestas*."[1] The institution of this power is ascribed by Dionysius Halicarnassus to Romulus,[2] and Papinian also refers its origin to a *lex regia*;[3] but Ulpian speaks of a *customary* right of *potestas*: *nam cum jus potestatis* MORIBUS *sit receptum*.[4] It is clear at all events that *patria potestas* was fully sanctioned and developed in the law of the Twelve Tables, and that it continued to hold an important feature in the system of Roman law even down to the reign of Justinian, although in a considerably modified form.

Foundation of

There were three modes by which *patria potestas* could be acquired.

How potestas was acquired, and over whom it could be exercised.

1. By a lawful marriage.
2. By legitimation.
3. By adoption.

It was a well established principle in Roman law that children born in lawful wedlock should follow the legal condition of the father. Thus Celsus says: *Cum legitimæ*

Ex ju nuptiis

[1] *Comment.* 1, 128; 1 J. 1, 12; Fr. 7, D. 1, 6.
[2] *Archæol.* II. 26, 27.
[3] *De Adult.* extracted from *Collatio leg. Mosaic. et Rom.* tit. 4, s. 8
[4] Fr. 8, D. I, 6.

nuptiæ factæ sint, patrem liberi sequuntur.[1] And Gaius has a similar passage: *Cum enim conubium id efficiat, ut liberi patris condicionem sequantur.*[2] As a legal consequence of this principle every child begotten in lawful marriage (*justæ nuptiæ*) fell under the *potestas* of the father, provided he was *sui juris*: *Item in potestate nostra sunt liberi nostri,* says Gaius, *quos justis nuptiis procreavimus.*[3] Justinian transcribes this passage in his Institutes, and borrowing the definition of *Modestinus,*[4] proceeds to explain in the next paragraph, that "marriage "or matrimony is a binding together of a man and "woman to live in an indivisible union."[5] But if the father himself happened to be a *filiusfamilias,* his son was not in his power but in that of his father: *Item qui ex filio meo et uxore ejus nascitur,* writes Ulpian, *id est, nepos meus et neptis, æque in mea sunt potestate; et pronepos, et proneptis, et deinceps cæteri.*[6] Marriage in fact did not relieve sons from the *potestas* of the father; and although as we shall see when we come to treat of adoption, a father could not force a *suus heres* on his son against his will, yet he could give his grandson by a son in adoption without the son's consent.[7] Nor did the marriage of a daughter necessarily break the *potestas* of her father, for unless she passed *in manum viri,* that is into the power of her husband by means of *confarreatio, coemptio* or *usus,* she remained in her own *familia.* But her children in every case were under the power of her husband: *Qui tamen ex filia tua nascitur,* continues Justinian, *in tua potestate non est, sed in patris ejus.*[8]

[1] Fr. 19, D. 1, 5.
[2] *Comment.* 1, 56.
[3] *Ibid.* 1, 55; Fr. 3, D. 1, 6. See also Ulpian, *Frag.* lib. 5, s. 1.
[4] Fr. 1, D. 23, 2.
[5] 1 J. 1, 9.
[6] Fr. 4, D. 1, 6; 3 J. 1, 9.
[7] 7 J. 1, 11.
[8] 3 J. 1, 9.

The second mode of acquiring *potestas* was by means of legitimation, which was effected in four ways: (*a*) by oblation to the *Curia*, (*b*) by subsequent marriage, (*c*) by imperial rescript, and (*d*) by testament.

(*a*) *By oblation to the* CURIA. In provincial towns the *Curia* formed a privileged class of senatorial magistrates, who enjoyed many exclusive rights but were responsible, on the other hand, for many heavy and exceptional burdens. Thus they were responsible for the due collection of the public imposts,[1] and were alone called upon for the payment of any extraordinary demands, such as the *aurum coronarium*.[2] If they died without heirs the *Curia* and not the public treasury succeeded to their inheritance.[3] Indeed the burdens which the *Curiales* were called upon to meet became in course of time so onerous, that they were felt to more than out-balance the privileges which were attached to the order; and thus many devices were resorted to by members of Curial families to cast off a dignity which required a very considerable fortune for its support. Thus the Emperors Leo and Marjorian observe in one of their Novels;—*Multi, patrias deserentes, natalium splendore neglecto, occultas latebras et habitationem*

[1] Fr. 18, s. 26, D. 50, 4.

[2] Const. 3, *Cod. Theo.* lib. 12, tit. 13. The *Aurum coronarium* was supposed to be a voluntary gift which could not be solicited except by command of the Emperor. See a constitution of the Emperor Julian of the year 362 A.D. *Cod Theod.* lib. 12, tit. 13. 1. It was not however unlike the old English "benevolences"—voluntary in name but compulsory in fact. In ancient times golden crowns (whence the name) were presented by the principal cities and neighbouring towns to Roman generals for any great victory, but in Cicero's time money and not crowns were sent. CIC. *Leg. Agr.* 11, 22; AUL. GELL. *Noct. Attic.* 5, 6. Julius Cæsar passed a law that it should not be given unless a triumph had been decreed. (*Cic.* in *Pis.* 37,) but it was afterwards exacted under various pretexts.

[3] Const. 4, C. 6, 62.

elegerunt juris alieni.[1] Accordingly in order to recruit the ranks of the *Curia*, Theodosius and Valentinian (A.D. 442) devised the expedient of permitting citizens who had no legitimate offspring, whether themselves members of the *Curia* or not, to present their illegitimate children to the order, and by this means make them their lawful heirs. They also decided that a natural daughter by marrying a *curialis* could be legitimated by her father, and thus obtain the capacity of inheriting his wealth.[2] It was thought that by holding out this exceptional method of legitimising bastard issue the ranks of the *Curia* might be increased by the introduction of fresh members, and that by allowing the marriage of a woman with a member of that body to carry certain privileges, the existing numbers might at all events be maintained: *Ut novos lex faciat curiales, aut foveat quos invenit,* as the Imperial Constitution puts it. But as this constitution of Theodosius only applied to those who had no lawful issue, Justinian (A.D. 528) *quoniam omnino favendum est curiis civitatum,* removed this restriction, and permitted even those who had sons born of a lawful marriage to legitimise their natural children by means of oblation to the *Curia*.[3] A remarkable feature of this mode of legitimation was that while it gave birth to the right of *potestas* by the father over the son, and entitled the son to succeed his father as a legitimate child,[4] it established no relationship between the son and the father's relatives.[5] The son's consent was moreover required before the oblation could take place.

[1] Tit. 7, *De Curialibus.*

[2] Const. 3, C. 5, 27.

[3] Const. 9, s. 3, C. 5, 27. See also Novel. 89, cap. 2.

[4] Const. 4. *Ibid.* But with legitimate sons the legitimised son took a less share. Const. 9, s. 3, *Ibid.*

[5] Const. 9, pr. *Ibid.* Novel. 89, cap. 4.

(*b*) *By subsequent marriage.* In the republican period of Rome children born out of wedlock were not subject to parental power, nor was there any general law by which such children could be subsequently legitimated. The *lex Ælia Sentia* and the *lex Junia* it is true provided certain means for the acquisition of *patria potestas*, but these were special laws relating to the acquisition of the rights of citizenship by Latins and others, which became obsolete when the privileges of Roman citizenship were conferred generally upon all subjects of the empire. It is only in the reign of Constantine (A.D. 335) that we find it established that natural children should become legitimate by the subsequent marriage of their parents. The Emperor Zeno decided that the benefits of this law should only be extended to those who had illegitimate issue at the time that his constitution was published (A.D. 476),[1] but Justinian by a Constitution of the year 529 A.D. re-established legitimation by subsequent marriage as a general law, and removed the restrictions which had been introduced by his predecessors.[2] It was necessary, however, (*a*) that no impediment should have existed to the marriage of the parents at the time of conception of the child, (*b*) that an instrument settling the dowry (*dotalibus instrumentis compositis*), or at least, testifying to the marriage (*instrumenta nuptiala*), should have been drawn up, and (*c*) that the child should have ratified the legitimation (*hoc ratum habuerint*).[3] It was immaterial whether any children had been born subsequent to the execution of the instrument of dower, or whether those born had all died.[4] Under the ante-Justinian law the concubine mother was required to be an *ingenua*,[5] and

[1] Const. 5, C. 5, 27.
[2] Const. 10, *Ibid.*
[3] Novel. 89, cap. 11; 13 J. 1, 10; Const. 10, C. 5, 27.
[4] 2 J. 3, 1.
[5] Const. 5, p. 5, 27.

even in the Institutes and Code Justinian only speaks of the children born of a *libera*, or free woman;[1] but in two of his later Novels Justinian departs from the principle that the parents should have been capable of contracting marriage at the time of conception of the illegitimate issue, and permits the legitimation of the children of female slaves by subsequent marriage of the parents, provided, however, the father had no legitimate children by a former marriage.[2] Legitimation, moreover, was only permitted in the case of children who were born in recognised concubinage, thus *spurii*, or those who were born in prostitution and who had no recognised father in the eye of the law, were not made legitimate by the subsequent marriage of the mother with the reputed father. An important distinction between legitimation by subsequent marriage and that by oblation to the *Curia*, was, that whereas by the latter, as we have already remarked, no relationship was established between the children thus legitimised and the father's agnates and cognates, in the former the children became members of the father's family and entitled to the same rights as if they had been born in lawful wedlock. Thus Justinian says: *Semel eos efficientes legitimos, damus habere etiam successiones illas, quas habent ii qui ab initio legitimi sunt.*[3]

Legitimation by Imperial rescript, or by testament.

The two remaining modes of legitimation, viz. by imperial *rescript* and by *testament*, were introduced by Justinian. If the father had no legitimate issue, and it was impossible for him to contract a lawful marriage with the mother of his natural children by reason of her previous death, or her disappearance, or other valid cause, natural children could be rendered legitimate by obtaining an imperial rescript.[4] So also if the father under

[1] 13 J. 1, 10; Const. 10, C. 5, 27.
[2] Novel. 18, cap. 11; 78 cap. 4.
[3] Novel. 89, cap. 8.
[4] Novel. 74, pref., cap. 1 and 2.

the above circumstances had died before obtaining the imperial rescript, but had expressed in his testament a wish that his natural children should succeed him as if they were legitimate, the children could obtain a legal confirmation of the father's wishes from the Emperor.[1]

Legitimation by adoption not allowed.

Anastasius (A.D. 508) also permitted natural children to be legitimated by means of adoption,[2] but the Emperor Justin (A.D. 519) abrogated this law,[3] and his nephew and adopted son Justinan confirmed his constitution on the subject.[4]

Patria potestas acquired by adoption.

The third and last mode of acquiring *patria potestas* was by means of adoption—or arrogation. Under the ante-Justinian law a *filiusfamilias* who was given away by adoption, lost all claims on his natural family, and passed from the *potestas* of his own father into that of the adopter. Reserving for a future chapter a more minute enquiry into the Roman law concerning adoption, it will be sufficient for the present to say that the adopted child acquired by this transfer, as Cicero says, the inheritance, the name, and the sacred rights of the new family."[5] But while assuming the name of his adopter he maintained that of his own *gens* with the change of the termination *us* into *anus*—as *Scipio Æmilianus, Cæsar Octavianus*. Under Justinian's legislation, however, adoption lost much of its original character, for by a constitution of 530 A.D. it was enacted that the adoption of a *filiusfamilias* by a stranger did not dissolve the *potestas* of the natural father;[6] but if the adoption was effected by an ascendant the old law was still permitted to regulate its effect. "In this case,"

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[1] Novel. 74, cap. 2, s. 1; Novel. 89, cap. 10.

[2] Const. 6, C. 5, 27.

[3] Const. 7, *Ibid.*

[4] Novel. 74, cap. 3; Novel. 89, cap. 11, s. 2.

[5] *Pro Domo.* 13. A Hindu adoption produced the same effects. I shall point out other analogies between the Hindu and Roman systems in the chapter on Adoption.

[6] Const. 10, C. 8, 48.

to quote the words of Justinian, "as the rights of "nature and adoption concur in the same person, the "power of the adoptive father, knit by natural ties and "strengthened by the legal bond of adoption, is pre- "served undiminished, so that the adopted son is not only "in the family, but in the power, of his adoptive father."[1]

Extent of patria potestas.

Children *ratione patris* were included in the category of things, although with respect to strangers they were invested with the legal character of persons, and had a capacity for rights—Indeed it is only in the domain of private law that the *jus potestatis* exercised any important influence; for as to what concerned the *jus publicum* a son under power (*filiusfamilias*) was clothed with the full capacity of a *paterfamilias*. Thus he could vote in the Comitia, and hold any public office, as that of a magistrate or tutor.[2] In fact, as Savigny observes, the incapacity of a *filiusfamilias* did not proceed from any disability inherent to his person, but was a natural consequence of the principle which attributed to the father all the rights belonging to his son.[3] Accordingly so long as the father lived and maintained intact the rights of a *paterfamilias*, his children were completely subject to his power, which in ancient times differed in no respect from that which a master possessed over his slaves. Thus the father originally possessed the power of life and death,[4] and Livy mentions that according to some accounts it was asserted that the famous Spurius Cassius, who had been three times Consul but had fallen into disfavour by proposing to allow the Latin allies to share in the distribution of lands belonging to the conquered Hernici, was privately tried by his father, who ordered him to be

[1] 2 J. 1, 11.

[2] Fr. 9, D. 1, 6; Fr. 13, s. 5; Fr. 14, pr. D. 36, 1.

[3] Vol. II. ch. II. s. 67.

[4] Collatio. *Elg. mosaic.* tit. 4, s. 8; Fr. 11, D. 28, 2; Const. 80, C. 8. 47.

first scourged and then put to death, and all his property to be confiscated to Ceres.[1] Under the Empire, however, the rigour of the ancient law began to be relaxed, and fathers were restrained from behaving in a cruel manner towards their children. Thus we learn from Marcianus that the Emperor Hadrian banished a father who had killed his son in a hunt, although it appeared that the son had committed adultery with his stepmother,[2] upon which the jurist adds: *nam patria potestas in pietate debet, non atrocitate, consistere.*—The Emperor Trajan also compelled a father who had cruelly illtreated his son to emancipate him, and the son dying soon afterwards, the emperor, by the advice of Neratius Priscus and Aristo, refused to grant the possession of his goods to the father.[3] And the Emperor Alexander Severus in a rescript addressed to one Artemidorus in the year 228 A.D., writes as follows:—"If your son fails to show you filial respect, "your paternal power (*jus potestatis*) allows you to "chastise him; and should he after that persevere in "his disobedience, you can produce him before the Pre- "sident of the province, who will pass such sentence as "you may desire."[4] Finally, Constantine by a Constitu- of the year 319 A.D. condemned the father who killed his child to the punishment of a parricide.[5]

(*b*) A father might also in case of real necessity sell his son, but he could not transfer him by way of pledge or security; and if a creditor knowingly accepted his debtor's son in contravention of this rule, he was liable to deportation. The son, moreover, was not deprived of his status as an *ingenuus* by being sold by the father.[6] According to the

[1] Lib. 2, cap. 41.
[2] Fr. 5, D. 48, 9.
[3] Fr. 5, D. 37, 12.
[4] Const. 3, C. 8, 47.
[5] Const. 1, C. 9, 17.
[6] Paul. *Senten. Recep.* lib. 5, tit. 1, s. 1, *C. Theo.* lib. 1, tit. 3. See also Cicero. *Pro Cæcina*, 34.

law of the Twelve Tables the sale of a son was required to be repeated three times before the *patria potestas* could be extinguished.[1] But in later times the assertion of this power fell into disrepute. Thus we find that the Emperor Antoninus Caracalla pronounced it to be an illicit and dishonorable act for a father to sell his freeborn sons (*filios ingenuos*);[2] and the Emperors Diocletian and Maximian declared it to be quite beyond a father's power to transfer his rights over his sons either by way of sale, gift, pledge, or under any other pretext.[3] Constantine however, by a later constitution permitted a father to sell his newly born children (*sanguinolentos*) in case of extreme distress, reserving to himself the right of reclaiming the child upon reimbursing the purchaser. The child could also claim to have the sale set aside subject to the same condition.[4] This is the latest constitution to be found in the Code, and we may therefore infer that the law remained in this state under Justinian.

(*c*) *Noxæ dandi.* The delicts of children and slaves gave rise to what were technically termed *noxal actions*, which allowed the father or master the option of either paying the estimated damages or of surrendering the wrongdoer (*noxa*).[5] But Justinian restricted such actions to slaves only, and even before he expressly abolished them with respect to children, they appear to have fallen into disuse.[6] Indeed it was the opinion of the older jurists that the sons of a family could be sued by a direct action for their wrongful acts, and Justinian seems to accord a tacit sanction to this opinion.[7] Gaius, however,

[1] Gaius. *Comment.* 1, 132; Ulpian. *Frag.* 10, s. 1.
Const. 1, C. 7, 16.
[3] Const. 1, C. 4, 43.
[4] Cod. *Theod.* lib. 5, tit. 8; Const. 2, C. 4, 43.
[5] Gaius. *Comment.* 4, 75.
[6] 7 J. 4, 8.
[7] Fr. 33-35, D. 9, 4; 7 J. 4, 8.

distinctly asserts that so long as a son who has committed a wrongful act remains under the *potestas* of his father, the action can only be brought against the father.[1]

A *paterfamilias* had also the power— Other rights

(*d*) To demand the production of a child subject to his *potestas*, by means of exhibitory interdicts.[2]

(*e*) To appoint a tutor by testament,[3] whose suitability for the office was assumed *sine inquisitione*, unless some change had occurred in his circumstances subsequent to the making of the testament, which obviously unfitted him to be entrusted with the charge of the ward.[4]

(*f*) To appoint an heir to his son in case the latter should die before he attained the age of puberty.[5] This right was technically denominated *pupillary substitution*, and was intended to avert the misfortune of a child dying intestate, for until he attained the age of puberty, that is fourteen years, the law did not invest him with the *testimenti factio*.[6] This power of appointing substitute heirs could be exercised even in the case of disinherited children; and in such a case whatever was acquired by the *pupillus* either by succession, by legacies, or by gifts from relations, passed over to the substituted heir.[7] A pupillary testament, however, being simply a part of, and accessory to, the testament of the parent, the law did not permit a father, except in the case of a soldier, to make a testament for his children, unless he also made one for himself. And if the testament of the father was inoperative by reason of some illegality, that of the son became

[1] *Comment.* 4, 77.
[2] 1 J. 4, 15.
[3] Gaius. *Comment.* 1, 144; 3 J. 1, 13.
[4] Fr. 1, s. 2; Fr. 8, 9. D. 26, 3.
[5] Gaius. *Comment.* 2, 179; pr. J. 2, 16.
[6] Fr. 19, 20, D. 28, 1; 1 J. 2, 12.
[7] Gaius. *Comment.* 2, 182; 4 J. 2, 16.

equally void.[1] The *substitutio pupillaris* came to an end by the pupil attaining the age of puberty, or by his undergoing a *capitis deminutio* before that age, or dying before the father.[2]

(*g*) Lastly, the sanction of the *paterfamilias* was necessary to legalise the marriage of children under his power,[3] unless indeed the father was incapable of giving his consent, as if he were a madman,[4] or had been in captivity for three years.[5]

Rights of father over son's property

With respect to the father's rights over the property of a *filiusfamilias*, the ancient law was that whatever children under power acquired they acquired for the benefit of their parents; so much so, that the *paterfamilias* who had thus acquired anything through one of his children, could give, sell, or transfer it in any way he pleased to another child, or even to a stranger.[6] "He who is under "our *potestas*," writes Gaius, "can have nothing as his "own; and therefore, if he be instituted heir, he cannot "enter upon the *hereditas* except by our order, and if he "has entered by our permission, he acquires the estate "for us, just as if we ourselves had been instituted heirs. "And thus by their means a legacy is in like manner "acquired for our use."[7] But in the reign of Augustus the sons of a family who were soldiers obtained the privilege of holding property acquired by them while on actual service quite independently of the father, and of bequeathing the same by testament.[8] This kind of pro-

[1] Fr. 1, s. 3; Fr. 2, s. 1, D 28, 6; 5 J. 2, 16.
[2] Fr 14; Fr. 41, s. 2, D. 28, 6; 8 J. 2, 16.
[3] Pr. J. 1, 10; Fr. 10, D. 23, 1; Fr. 9, D. 23, 2.
[4] Const. 25, C. 5, 4.
[5] Fr. 9, s. 1; Fr. 10, D. 23, 2.
[6] 1 J. 2, 9.
[7] *Comment.* 2, 87.
[8] Ulp. *Frag.* tit. 20, s. 10; pr. J. 2, 12. Under the ancient law a *filius familias* had not the *testamenti factio*. Fr. 6, D. 28, 1.

perty was called *castrense peculium*, and Ulpian says that with regard to such property sons who were in other respects subject to *potestas*, enjoyed the full rights of a *paterfamilias*: *Filiifamilias in cestrense peculio vice patrum familiarum funguntur*.[1] The privilege of disposing of this *peculium* by testament, first conceded by Augustus to soldiers on actual service, was confirmed to the same extent by the Emperors Nerva and Trajan, and was afterwards extended by Hadrian to veterans who had received their discharge.[2] But if a *filiusfamilias* died without exercising the power of executing a testament, his *peculium* belonged to his father according to the ordinary law of *patria potestas*.[3] At a subsequent period a new description of separate property was instituted for the benefit of *filiifamilias* in imitation of the *castrense peculium*, and was hence called *quasi castrense peculium*. It appears to have existed in the time of Ulpian, unless indeed we are to pronounce, as Baldwin does, the various passages in which it is mentioned in the Digest, to be mere interpolations for which we are to hold Tribonian responsible.[4] In the Institutes it is said "both old laws (*anteriores* "*leges*) and imperial constitutions have permitted certain "persons to have a *quasi castrense peculium*,"[5] but in what form it existed prior to the reign of Constantine we have no means of judging. That emperor by a Constitution published in the year 320 A.D. placed on the same footing as *castrense peculium*, things acquired by *filii-*

[1] Fr. 2, D. 14, 6.

[2] Pr. J. 2, 12. Juvenal writing of the Domitian period, observes:—

Nam, quæ sunt parta labore
Militiæ, placuit non esse in corpore census,
Omne tenet cujus regimen pater.—Sat. 16, v. 52, *et. seq.*

[3] *Ibid.*

[4] Fr. 1, s. 6, D. 36, 1; Fr. 1, s. 15, D. 37, 5; Fr. 7, s. 6, D. 39, 5 Fr. 3, s. 5, D. 37, 1.

[5] 6 J. 2, 11.

familias who were officers of the Palace (*Palatini Principis*), either by their own economy or as gifts from the emperor.[1] The same privilege was extended to advocates by a Constitution of Honorius and Theodosius (422 A.D.),[2] and by Leo to certain ecclesiastical dignitaries. But although the *quasi castrense peculium* might be enjoyed during the lifetime of the acquirer as independent property, it was not every person who possessed the right of disposing of it by testament. That was a privilege which was at first only conceded to persons who held certain dignities in the state, such as pro-consuls, præfects, and presidents of provinces;[3] but Justinian by a Constitution of the year 531 granted it to all who possessed such property.[4]

Peculium paganum.

Besides the *castrense peculium* of soldiers, and the *quasi-castrense peculium* which was instituted in imitation of it, the commentators speak of another description of separate property which they term *paganum*, and which they divide into *profectitium* and *adventitium*.[5] If the *peculium* was derived from the father's fortune, or consisted of a gift or legacy which was originally intended for the father, it was called *profectitium*, because it came (*proficiscitur*) from the father, either directly or indirectly.[6] *Profectitium vocatur*, says Hubur, *quod ex re et substantia Patris proficiscitur*.[7] If it was derived from any other source, as from the mother or her ascendants, from a husband or wife, or from an *extraneus*, irrespective of any

[1] Const. 1, C. 12, 31.
[2] Cod. *Theod.* lib. 2, tit. 10, s. 3.
[3] Const. 37, C. 3, 28.
[4] Const. 12. C. 6, 22; 6 J. 2, 11.
[5] Heineccius. *Jus. Civile. Insti.* lib. II. tit. IX. s. 473, 476 Huber *Prælec. Jur. Civil.* lib. II. tit. IX.
[6] Fr. 5, s. 2, D. 23, 3; Fr. 45, s. 4, D. 29, 2.
[7] *Prælect. Jur. Civil.* vol. I. p. 161-162.

consideration for the father, it was called *adventitium*.[1] In the former case the *peculium* belonged to the father, and Justinian maintained the old law with regard to it: "for what hardship" he says "is there in that which comes from the father returning to him."[2] But with respect to the *peculium adventitium*, Justinian enacted that while the father lived he was entitled to have the usufruct, but that the ownership belonged to the son.[3] In the case of the *castrense peculium* and *quasi castrense peculium*, however, the son had both the usufruct and proprietary right just as if he had been *sui juris*.[4] And a father might be even deprived of his right to the usufruct of the *peculium adventitium* if the son acquired the property with the condition attached thereto, that the father should not enjoy the usufruct or participate in the property in any way (*neque usumfructum neque quodlibet penitus participium.*)[5] If a father emancipated his son he was entitled by a constitution of Constantine to deduct a third part of the son's *peculium adventitium*, as a compensation for the loss of his usufruct; but Justinian altered the law and decided that the father, instead of retaining a third as owner, should retain half as usufructuary: the effect of which was that the ownership in the whole remained with the son, while the father during his lifetime enjoyed the benefits of a larger portion than he would have have been entitled to under the previous law, *viz.* a half instead of a third.[6]

Although from what has been said above it is clear that a *filiusfamilias* in respect to his father was in very much the same condition as a slave towards his master,

Destinction between a filiusfamilias and a slave.

[1] Const. 1, 2 C. 6, 61.
[2] 1 J. 2, 9.
[3] Const. 6, C. 6, 61.
[4] Novel. 22, cap. 34.
[5] Novel. 117, cap. 1.
[6] C. 6, s. 3, C. 6, 61; 2 J. 2, 9.

there was still a very wide difference between the two. Thus a *filiusfamilias* enjoyed the rights of *connubium* and *commercium;* he could form a *justum matrimonium;* he enjoyed the rights of agnation; he could appear as a witness in a mancipation or a testament; he could contract debts, which were recognised as *civiles obligationes* and gave rise to civil actions;[1] and, as we have seen, he could fill public offices. But a slave possessed no such capacity, and Savigny quotes the law concerning adstipulations as still further illustrating the distinction between the incapacity of a *filiusfamilias* and that of a slave.[2] The distinctive feature of an *adstipulation* was that it was confined to the immediate contracting parties, for a stipulation for a third person was invalid. Gaius accordingly says that a slave can make no valid stipulation (*nihil agit*), whereas a *filiusfamilias* can do so to a certain extent (*agit aliquid*), although he cannot proceed to enforce it until he is freed from *potestas*.[3] Again a slave could be *sine domino*, as in the case of a slave of punishment, but a *filiusfamilias* could only exist in a family of which the head, or *paterfamilias*, was still alive.

How patria potestas was dissolved.

There were several modes in which *patria potestas* could be dissolved—namely—1. By death of a parent; 2. by the parent or son losing the right of citizenship; 3. by the emancipation of the son, or his adoption into a new family; 4. by the son attaining certain dignities; 5. and by the father conniving at the prostitution of his daughter, or the exposure of his child. Each of these

[1] Thus Gaius says: *Filiusfamilias ex omnibus causis tanquam paterfamilias obligatur, et ob id agi cum eo tanquam cum paterfamilias potest.* Fr. 39, D. 44, 7; Fr. 57, D. 5, 1; Fr. 44, 45, D. 15, 1; Fr. 141, s. 2, D. 45, 1; Fr. 8, s. 4, D. 46, 4. The principle of the Roman law in fact was, that the condition of a paterfamilias might be improved by those subject to his power, but could not be made worse. Fr. 133, D 50, 17.

[2] Lib. II. ch. II, s. 67.

[3] *Comment.* 3, 114.

require to be considered separately. And first with respect to the dissolution of *potestas* by the death of the parent, it is necessary to bear in mind that this result only occurred when the father was himself *sui juris*, for if he were *alieni juris* his death would not free his children. Conversely, on the death of the grandfather, the grandchildren would not necessarily become *sui juris*, but only in the event of their father having already died or lost his rights in his natural family. Therefore, if their father was alive at the death of the grandfather, and was in his power, then, on the grandfather's death, they would become subject to the *potestas* of their own father.[1]

1. By death of parent.

In the next place *potestas* was dissolved if the parent or child suffered loss of citizenship. "Since a man who "is convicted of crime" writes Gaius, "and is punished "by the *aquæ et ignis interdictio*, loses the Roman *civitas*, "it follows, that the children of a person thus struck "out from the number of the citizens cease to be under "his *potestas* exactly as if he were dead, for it is not "according to the analogy of our law, that a man who "has the legal status of a *peregrinus* should hold a Roman "citizen under his *potestas*. According to the same prin- "ciple, when a child, under the *potestas* of his father is "condemned to the *aquæ et ignis interdictio*, he ceases to "be under the *potestas* of his father, because our legal "principles do not admit that a man in the status of a "*peregrinus* should be under the *potestas* of a Roman "citizen."[2] I have already pointed out that *patria potestas* was a peculiar institution of the civil law, which no one but a Roman citizen could exercise and only over fellow citizens: *Neque autem peregrinus civem Romanum*, says Ulpian, *neque civis Romanus peregrinum in potestate*

2. By the parent or losing the rights of citizenship.

[1] Gaius. *Comment.* 1, 127; Ulp. *Frag.* 10, s. 2; pr. J. 1, 12

[2] *Comment.* 1, 128; 1 J. 1, 12.

habere potest.[1] If a *paterfamilias* were captured by the enemy, so long as he remained in captivity his rights over his family were suspended, but they revived again as soon as he regained his liberty.[2] So also in the case of a *filius-familias* who was made prisoner, the father's *potestas* revived by means of the *jus postliminii* immediately as he escaped from captivity, while the son himself regained his rights of agnation and succession.[3] It was immaterial how the captive effected his release,[4] and in the eye of the law the period of his enforced detention was completly blotted out, and he was considered exactly in the same position that he would have occupied if he had not been taken captive.[5] If the father died in captivity his sons were reckoned to have been *sui juris* from the date of his first captivity. Gaius, it is true, leaves it an open question whether the sons would be *sui juris* from the period of their father's captivity, or from that of his decease;[6] but Ulpian states the rule as we have given it without the smallest qualification: *In omnibus partibus juris is, qui reversus non est ab hostibus, quasi tunc decessisse videtur cum captus est.*[7] Justinian, moreover, sanctions it in his Institutes.[8] Deportation while it lasted put an end to all family rights and consequently destroyed *patria potestas;*[9] but if the culprit were restored by means of a *restitutio in integrum* granted by the Emperor, he regained his former

[1] *Frag.* 10, s. 3.

[2] Gaius. *Comment.* 1, 129; Ulp. *Frrg.* 10, s. 4; 5 J. 1, 12. *Omnia jura civitatis in personam ejus*, says Gaius, *in suspenso retinentur, non abrumpuntur.* Fr. 32, s. 1, D. 28, 5.

[3] *Ibid*, Fr. 14, D. 49, 15.

[4] Fr. 26, D. 49, 15.

[5] Fr. 12, s. 6; Fr. 21. *Ibid.*

[6] *Comment.* 1, 129.

[7] Fr. 18, D. 49, 15,

[8] 5 J. 1, 12.

[9] 1 J. 1, 12; Fr. 15, D. 48, 22.

position in every respect.[1] Mere relegation, however, did not affect the civil status of a person and consequently did not destroy *patria potestas*.[2]

3. By emancipation or adoption into a new family.

Thirdly, the *potestas* of the father was dissolved by his either emancipating the son, or by his giving the son in adoption to another. In the ancient law we have seen that emancipation was effected by means of imaginary sales (*per imaginarios venditiones*) which were carried out something in this way. A father who wished to free his son in his own lifetime transferred him by *mancipatio* to another, the effect of which was to place the son in the *mancipium* of the *quasi* purchaser; but as the law of the Twelve Tables only provided for the dissolution of *patria potestas* when the father had thrice sold his son,[3] it was necessary that this ceremony should be repeated three times. Because if the sale took place only once or twice, this result ensued, that in the event of the purchaser subsequently manumitting the child, the child did not become *sui juris*, but, on the contrary, again fell into the power of his natural father. Hence the necessity that the son should be three times sold by his father and on each occasion emancipated by the purchaser, before he could acquire his independence.[4] Upon the third sale the father's power was indeed dissolved, but the child was simply in the condition of a *nexus* and was not yet free. It still remained for the purchaser to manumit him, and in order to ensure this a clause was usually inserted in the agreement of sale, termed the *contracta fiducia*,[5] by which the purchaser bound him-

[1] Fr. 2, D. 48, 23; Const. 1, C. 9, 51; 1 J. 1, 12.

[2] Fr. 4, D. 48, 22; Fr. 14, s. 1; Fr. 18, *Ibid*; 2 J. 1, 12.

[3] Gaius. *Comment.* 1, 132; Ulp. *Frag.* 10, s. 1; Paul. *Sentent.* lib. II. tit. 25, s. 2.

[4] *Ibid.*

[5] 8 J. 3, 2.

self to manumit upon certain conditions therein set forth. Hence the *quasi* purchaser was styled *pater fiduciarius*, and under the old law if the father wished to retain his rights of patronage, he was bound to reserve them at the time of sale and to require, the *pater fiduciarius* to re-mancipate the son to him after the third sale, so that he might then be able himself to effect the final act of emancipation.[1] But under the Prætorian Edict a condition of this character was always held to be implied in the contract even if it were not expressed;[2] and the prætor granted a *bonorum possessio unde* DECEM PERSONÆ, to the ten following persons in preference to a patron, if a stranger: namely, a father, a mother, a grandfather or grandmother, paternal or maternal; a son; a daughter; a grandson or granddaughter, as well by a daughter as by a son; a brother or sister, either consanguine or uterine.[3] In the order of succession, however, brothers and sisters took precedence over the father who emancipated the deceased.[4] If the child at the time of emancipation was within the age of puberty, the father became his tutor.[5]

Single mancipation sufficient in case of descendants other than sons.

In the case of descendents other than sons, however, a single mancipation sufficed to remove them from the power of the father, in accordance with a literal construction of the text of the Twelve Tables "which speaks of three manu-"missions," says Gaius, "only in relation to the persons "of sons in these words: 'If a father has exposed his "'son three times for sale, let the son be free from the "'father.'"[6] It is also to be observed that a parent

[1] Gaius. *Epit.* 1, 6. s. 3; Domenget. *Inst. Gaii*, p. 74.
[2] 6 J. 1, 12.
[3] 3 J. 3, 9; 8 J. 3, 2.
[4] Const. 2, C. 6, 56.
[5] 6 J. 1, 12.
[6] Gaius. *Comment.* 1, 132.

having in his power a son, and by that son a grandson or grand-daughter, could emancipate the son, and retain the grand-child in his power; or conversely, he could emancipate the grandchild, and retain his son in his power; or again he could make them all *sui juris* (*omnes sui juris efficere.*)[1] Again if during the pregnancy of his daughter-in-law, a father emancipated his son, the child would be born in his power; but if the child were conceived subsequently to the emancipation, he would be born in the power of his emancipated father.[2] This rule was in strict accordance with the general principle to which I have already referred, that in the case of children born in lawful wedlock, their rights were determined by reference to the period of conception and not of birth.[3] But as marriage created an indivisible union between the contracting parties, a wife always followed her husband.[4]

Emancipation could not be effected without son's consent.

Even under the ante-Justinian law, notwithstanding the contrary opinion expressed by Mr. Long in his able article on the subject of emancipation, it appears to be clearly established that a son could not be emancipated by his father without his consent. At all events Paulus very clearly asserts this to have been the law in his time: *Filiusfamilias emancipari invitus non cogitur.*[5] Even under the form of emancipation introduced by the Emperor Anastasius in 503 A.D., to which I shall presently refer, the consent of sons was still declared to be necessary unless they were *infantes*, in which case they might be emancipated *sine consenu.*[6] And Justinian also declared

[1] Gaius. *Ibid.* 1, 133; Fr. 28, D. 1, 6; 7 J. 1, 12.

[2] Gaius. *Comment.* 1, 135; 9 J. 1, 12.

[3] *In his qui jure contracto matrimonio nascuntur*, says Ulpian, *conceptionis tempus spectatur; in his autem qui non legitime concipiuntur, editionis.* FRAG. tit. 5, s. 10.

[4] 1 J. 1, 9.

[5] *Sentent.* lib. II. tit. 25, s. 5.

[6] Const. 5, C. 8, 49.

Father not bound to emancipate.

it to be just that sons should not be freed from power against their will.[1] Nor, on the other hand, could a son compel his father to emancipate him. *Non potest filius, qui est in potestate patris, ullo modo compellere eum, ne sit in potestate, sive naturalis, sive adoptionis.*[2] This was the general rule, subject however to certain exceptions, which are alluded to by Justinian in the words *neque ullo pene modo* in the concluding section of the Twelfth Title of the Institutes.

Except in certain cases.

The exceptional cases were: 1. A child adopted during minority could compel his adoptive father to emancipate him on attaining the age of puberty;[3] 2. If the father contracted an incestuous marriage his *liberi legitimi* became *sui juris.*[4] 3. If the father exposed his children,[5] or, according to a Constitution of the Emperors Theodosius and Valentinian of the year 428 A.D., if he encouraged the prostitution of his daughter,[6] he was deprived of *potestas.*

Mode of effecting emancipation by the later Roman law.

The ancient mode of emancipation continued in force down to the reign of Anastasius, who introduced a new mode *ex imperiali rescripto.* This consisted in obtaining from the emperor a rescript authorising the emancipation, and registering the same before a magisratte.[7] The presence of the child became no longer necessary as under the old procedure, when the ceremony had to be performed in the presence of five witnesses, exclusive of the *libripens,* the manumittor, and the child who was the subject of the sale.[8] Justinian introduced still further reforms, and in

[1] Novel. 89, cap. 11, pr.
[2] Fr. 31, D. 1, 7.
[3] Fr. 33, *Ibid.*
[4] Novel. 12, cap. 2.
[5] Const. 2, C. 8, 52; Novel. 153, cap. 1
[6] Const. 6, C. 11, 40.
[7] Const. 5, C. 8, 49.
[8] Gaius. *Epist.* 1, 6, see 3.

order to facilitate emancipation he decided that a father could free his children by a simple declaration before a competent magistrate.[1]

Emancipation was revocable

A child who had been emancipated might be again brought under *potestas* if he subsequently misconducted himself towards his father, or behaved in a contumacious manner. In such a case the emancipation was rescinded and the *patria potestas* at once revived.[2]

4. By adoption.

In the case of a father giving his son in adoption, the old law was, as we have seen, that the child at once passed from his *potestas* into that of the adoptive parent. But under the Justinian law this effect was only produced when the child was adopted by an ascendant, and then only if the father declared his intention before a competent judge, in the presence and without the dissent of the person adopted, and also in the presence of the adopter.[3]

5. In consequence of son attaining certain dignities.

We have next to consider the dissolution of *potestas* in consequence of the son attaining certain dignities. In ancient times the only offices which freed a child from *patria potestas* were those of a *Flamen Dialis* and a Vestal Virgin.[4] Persons holding these offices, although retaining membership in their families, became *sui juris*. Justinian however conferred this privilege on persons holding the dignity of the supreme patriciate, an *ex officio* nobility created by the Emperor Constantine;[5] and at a later period of his reign (529 A.D.) he extended it to consuls, bishops, præfects, and, generally, to all those who were exempted from the obligations of the *Curia*, such as the

[1] Const. 6, C. 8, 49; 6 J. 1, 12.
[2] Const. 1, C. 8, 50.
[3] Const. 11, C. 8, 47; 8 J. 1, 12.
[4] Gaius, *Comment.* 1, 130; Aul. Gell. *Noct. Attic.* 1, 12.
[5] Const. 5, C. 12, 3; 4 J. 1, 12.

magistri militum, the commanders of the horse and foot, and the quæstor of the palace.[1]

6. By misconduct of father

Finally, children were freed from *potestas* if the father showed himself unworthy to exercise it, or insensible to the obligations which it imposed; as if he prostituted his daughter,[2] or abandoned the child,[3] or contracted an incestuous marriage.[4] In such cases the father was compelled to emancipate whether he wished it or no.

[1] Novel. 81; Const. 66, C. 10, 31.
[2] Const. 6, C. 11, 40; Const. 12, C. 1, 4.
[3] Const. 2, C. 8, 52; Novel. 153, cap. 1.
[4] Novel. 12, cap. 2.

CHAPTER VI.

Juridical Persons.

WE have hitherto treated of physical persons, but the Roman law, as stated in an earlier chapter, extended the quality of a *persona* to things other than human beings, and accordingly, under the term *juridical, fictitious*, or *moral persons*, invested with rights certain corporations and religious institutions, which next require to be carefully considered.

Corporations

By a Corporation (*universitas, corpus, collegium, ordo*), is meant an association of several persons for the prosecution of a common object, to which the state has attributed the quality of a physical person and invested with a capacity for rights. The most important of these corporate associations in Roman jurisprudence was the state itself (*respublica*), that is the nation, or the *populus Romanus*, and, in the empire, the prince, as holder of the supreme power,[1] The *municipia*, the *curiæ* of the

[1] Fr. 9, s. 1, D. 4, 2; Fr. 56, Fr. 57, D. 31; Fr. 20, s. 1, D. 33, 1; Fr. 1, pr. D. 1, 8; Novel. 134, cap 6.

different towns, and the colonies, were also invested with corporate rights; and even small boroughs and villages (*fora, conciliabula, castella, vici*), which had no political organisation, were yet regarded as juridical persons capable of acquiring and defending their rights before the public tribunals.[1] Thus also we find in republican and pagan Rome colleges of Pontiffs and Vestal Virgins, besides several guilds, among the most respectable of which was that of the *scribæ* or notaries, composed entirely of *libertini*. Each of these corporations had its own presidents, property, and special religious rites, and most of them traced their institution to the period of Numa.[2]

Organisation and rights of Universitates

The foundation of corporations in Roman law was specially confined to the *jus publicum*, and required the confirmation of a *lex*, a *senatus-consultum*, or an imperial constitution.[3] They required moreover the association of at least three persons for their original institution, but not for their continuance.[4] Thus they were not affected by any subsequent change in the numbers of the mem-

[1] Fr. 73, s. 1, D. 30; Const. 2, s. 5, C. 2, 59.

[2] Niebuhr. *Rom. Hist.* III. p. 298-299.

[3] Fr. 1; Fr. 3, s. 1, D. 47, 22; Fr. 1, D. 3, 4. I have followed in the text the opinions of Savigny (vol. II. p. 275), Mackeldey (*Compendium of Civil Law*, s. 142,) Pfeifer (I. c. p. 36) and other eminent jurists; but Arndts (s. 44, obs. 4), Goudsmit (*Pandects*, s. 36, note) and some others do not think that any special authorisation of the State was needed by corporations of a lawful character in order to enjoy the privileges of legal persons. Goudsmit cites as a conclusive authority in support of his view, a passage of Paulus where the jurist alluding to the constitution of the emperor Marcus Antoninus which permitted bequests to be left to *collegia*, observes: *Nulla dubitatio est, quod, si corpori, cui licet coire, legatum sit, debeatur.* The Prussian and Netherland laws require recognition by the State, but the Austrian law does not.

[4] Fr. 85, D. 50, 16. Pfeifer (I c. p. 28,) Arndts (s. 44, obs. 2,) and others think that Neratius Priscus merely intended to fix the number of persons necessary to render an association illicit.

bers.[1] Each corporation was regulated by the rules embodied in the act of the legislature by which it was established, as regards the administration of its property, the admission or exclusion of members, and the extent of its rights, privileges, or obligations. But the right of admitting new members, of appointing officers, and of making by-laws for the administration of the officers of the corporate body, were inherent to every corporation.[2] Thus even in the law of the Twelve Tables we find the power of making by-laws distinctly conceded to *Collegia*, provided they contained nothing contrary to the general law of the land : *Dum ne quid ex publica lege corrumpant.* This regulation Gaius points out was borrowed from the laws of Solon.[3] A right of succession *ab intestato* to property left by its members did not, however, belong to a *collegium* unless specially conceded by the State, as we learn from a constitution of the Emperors Diocletian and Maximian of the year 290 A.D.[4] Moreover, since judicial persons are deficient in the natural power of volition, the business of a corporation had to be conducted by certain selected persons (*actores, syndici, curatores*), who acted as representatives in all external transactions, and were bound by the constitution of the corporation, and, generally, by the rules applicable to mandataries.[5] If the representative acted beyond his general authority, the Corporation which he represented was not bound by his acts ; nor yet by any acts which were not done in the due discharge of his functions and in the interests of the common body. Thus Ulpian says that a *civitas* was not

[1] Fr. 7, s. 2, D. 3, 4.
[2] Fr. 1, s. 1, D. 3, 4 ; Fr. 1, s. 2 ; Fr. 18, D. 50, 4.
[3] Fr. 4, D. 47, 22.
[4] Const. 8, C. 6, 24.
[5] Fr. 1, s. 1 ; Fr. 2, D. 3, 4 ; Fr. 6 ; Fr. 9, s. 8, D. 50, 8 ; Fr. 11, 12, 13, D. 50, 1.

bound by a loan (*mutuum*) raised by its representatives unless it derived some benefit from it, although the representatives themselves would be personally responsible.[5] With regard to resolutions by the joint body, the general rule in the absence of any express provision to the contrary in the constitution of the particular corporation —appears to have been that a majority of at least two-thirds of its voting members should be present, and that a majority of such members should agree, in order to render a resolution obligatory upon all.[1] Thus Ulpian says: *Lege autem municipali cavetur, ut Ordo non aliter habeatur, quam* DUABUS PARTIBUS *adhibitis.*[2] And Scævola: *Quod* MAJOR PARS *Curiæ effecit, pro eo habetur, ac si omnes egerint.*[3] But opinions differ as to the majority required in the case of resolutions concerning the division of property belonging to corporations. Some jurists, such as Runde, Bülow and Hagemann—consider that the unanimous consent of all the members was required; while others, as Gönner and Danz, think that the consent of a majority was sufficient, and Mackeldey insists that the confirmation of the government to the resolution was also requisite. In the absence of any express resolution by the majority of the members, or of an *actual legal right* to a more extensive claim on the part of individual members, the distribution of corporate property was usually made *per capita*, irrespective of the proportion in

[1] Fr. 27, D. 12, 1. Savigny considers that the same principles applied to all corporations (II. 294), but Pfeifer is of a different opinion, I. c. p. 103.

[2] Glück. *Comment.* 1, s. 91; Kind. *Quæst.* vol. 3, cap. 96; Savigny I. c. p. 330.

[3] Fr, 3, D. 50, 9; Fr. 3, 4, D. 3, 4; Const. 46, C. 10, 31.

[4] Fr. 19, D. 50, 1. See also fr. 160, s. 1, D. 50, 17; Const. 5, C. 10, 63; Novel. 120, cap. 6, s. 1-2.

which it had been formerly used.[1] The property, however, belonged to the corporation as a juridical person, and not to the individual members who composed it.[2] A distinction, moreover, was drawn between *res universitatis*, or that property of a corporate body which could be used by every member of the *universitas*, and *patrimonium universitatis*, which was not subject to the use of the individual members, but the profits of which were preserved for the purposes of the corporation. As instances of the former may be mentioned the theatres, race-courses, and other similiar places;[3] and of the latter the *agri vectigales*, or slaves and lands belonging to a *collegium*, which formed the patrimony of the corporation and were hence said to be *in patrimonio universitatis*. Again the liabilities of a corporation did not attach to the members individually, but to the body at large. Thus Ulpian writes: *Si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent.*[4] So also the rights of patronage, in the case of slaves manumitted by a corporation, college or state, belonged to the members in the aggregate.[5]

Res universitatis.

Patrimonium universitatis.

Liabilities of Corpc not cl able against individual members.

A Corporation continued to subsist so long as the essential conditions required for its existence were maintained intact. Thus if the state withdrew its sanction, the corporation was at once brought to an end[6]—for, as already shown, no corporation could exist unless ratified by an express sanction of the state by means of a *lex*, a *Senatus-consultum*, or a constitution. So also if the corporation was designed for purely private purposes, it

Duration and extinction of corporations.

[1] Mittermaier, I. c; Thibaut. system, s. 221.
[2] Fr. 6, s. 1, D. 1, 8; Fr. 2, D. 3, 4.
[3] Fr. 6, s. 1, D. 1, 8; 6 J. 2, 1
[4] Fr. 7, s. 1, D. 3, 4.
[5] Fr. 10, s. 4, D. 2, 4.
[6] Fr. 21, D. 7, 4; Fr. 56, D. 7, 1; Fr. 7, s. 2, D. 3, 4.

ceased to exist when the last member died;[1] but according to Savigny, this result did not occur in the case of corporations of a permanent character and designed for public purposes.[2] Lastly, a corporation which had not a public character might become extinct by virtue of a resolution of the majority of its members in the absence of any contrary provision in the original charter of foundation, although this point is controverted by Savigny,[3] Puchta,[4] Arndts,[5] and Pfeifer. These jurists consider that the approbation of the state, which could alone give existence to a corporation, must have followed the resolution of the members before the legal personality of the association could be annihilated. Thus Puchta contends that since a natural person, although he can destroy his own life, is unable to divest himself of his personality by a mere act of his will, the same principle should be applied by analogy to the case of a legal, or artificial person. But, as Dr. Goudsmit has well observed,[6] Puchta loses sight of the fact, that the interests of the state require that every individual should have, and retain his personality, but not at all, that every association should be and remain a legal person. Nor can it be fairly argued that because the authorisation of the state alone could give existence to a corporation, that therefore the corporation can be annihilated only by the same power; for the state, by the authorisation which it gives, confers a favour, but does not impose a necessity.

Descent of property, how regulated on dissolution of a corporation.

As regards the descent of property on the dissolution of a corporation, the rule was that in the case of public

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[1] Fr. 7, s. 2, D. 3, 4.
[2] *System*, II. s. 80, p. 280; Fr. 76, D. 5, 1.
[3] *System*, II. 279.
[4] *Vorles.* s. 28.
[5] S. 45.
[6] *Pandects.* s. 36, note, p. 82.

institutions endowed directly or indirectly by the state, it reverted to the state; but that in the case of other corporations the property was acquired by the state only when there was no surviving members or heirs to whom it could be made over, in which case the property was considered as *bona vacantia* like the estate of a physical person who died without heirs.[1] In the case of a *collegium illicitum* dissolved by the state, the property was distributed amongst the members composing it.[2]

Corporations under the ancient law could not be instituted heirs or receive bequests

In the time of Ulpian corporate bodies, such as *municipia* and *collegia* subject to the laws of Rome, could not be instituted heirs, unless they had obtained that capacity as a special privilege,[3] although they were entitled to *bona liberti*, *e.g.*, the goods of their freedmen, by the ordinary law of patronage.[4] Bequests were first permitted to towns by a Constitution of the Emperor Nerva, which was afterwards confirmed by a *Senatus-consultum* in the reign of Hadrian;[5] and the same privilege was extended to *collegia* properly constituted by Marcus Antoninus.[6] Finally, the right to inherit by testament was generally conceded to towns in a constitution of the Emperor Leo of the year 469 A.D.[7]

[1] Mackeldey. *Compendium of Mod. Civil Law*, vol. I. pp. 148-149.

[2] Fr. 3, D. 47, 22.

[3] *Frag.* 22, s. 5; Const. 8, C. 6, 24. It would seem, however, that a legacy might be left to a colony *per vindicationem*, and the Emperor Antoninus ordained that in such a case the *Decuriones* should decide whether they wished this legacy to belong to themselves in the same manner as if it had been bequeathed to a single individual. Gaius. *Comment.* 2, 195. As to the peculiarity of this kind of legacy see Tomkin's *Commentaries of Gaius*. p. 368, *et. seq.*

[4] Fr. 1, s. 1, D. 38, 3.

[5] Ulp. *Frag.* 24, s. 28. The *Senatus-consultum Apronianum*, however, recognised the validity of a trust left to a town. Fr. 26, 27, D. 36, 1.

[6] Fr. 20, D. 34, 5.

[7] Const. 12, C. 6, 24.

Corporation cannot be guilty of crimes.

Although juridical persons could sue and were liable to be sued in a civil action, they could not as such be guilty of a criminal offence; because the commission of a crime involves an act of volition, and it is manifest that a corporation cannot exercise such volition (*consentire non possunt.*)[1] "Penal enactments," it has been well observed, "are applicable only to beings really capable of thinking, "feeling and exercising the power of volition; while the representation by an agent, or artificial organ, has no "necessity for existence but in the domain of private "law."[2] Thus Justinian, following Gaius, observes that "there is no theft without the intention to commit theft "(*sine affectu furandi*)."[3] Hence too the rule was established that noxal actions follow the delinquent;[4] and Majorianus, in analogy with this well understood principle of criminal jurisprudence, decides that a *Curia* is never to be condemned as a body, but that judgment should be passed against the individual members who were guilty.[5] Again with respect to delicts short of actual crimes, the general principle was that a corporation could not collectively commit a delict, because, as above explained, every delict pre-supposes *dolus* or *culpa*, which again requires consciousness and prepense on the part of the delinquent. Thus Ulpian says, the *actio doli* is not available against a *municipium*, but only against those who administer its affairs, that is, the *decuriones*.[6] If, however, a corporation was benefited by the illegal act of its representatives, the Prætor could be moved either by *actio* or *exceptio* to compel it to make a *restitutio in integrum* in favor of the

[1] Fr. 1, s. 1, D. 38, 3.
[2] Goudsmit's *Pandects*. s. 34, note.
[3] 7 J. 4, 1; Gaius. *Comment*. 3, 197.
[4] Gaius. *Comment*. 4, 77; 5 J. 4, 8.
[5] Novel. Major. tit. 7.
[6] Fr. 15, s. 1, D. 4,

person defrauded. Thus Ulpian cites the instance of the town of Capua which was called upon to make restitution to an individual from whom a *cautio pollicitationis*, or written promise, had been extorted.[1]

A *societas*, or partnership, although bearing this general resemblance to a corporation, that it is an association of several persons for a common object, differs in many essential respects from a corporation or *universitas*, as defined by Roman jurists. Thus a *universitas* was not affected by any subsequent change in the number of its members, and hence it was said *universitas non moritur*. But in the case of a *societas* the death,[2] *capitis deminutio*,[3] or the public or private sale of the property,[4] of a single member, caused an immediate dissolution of the partnership, although, of course, the survivors might agree to continue it as a new firm. The law in fact invested a corporation with an independent personality, which altogether absorbed the individuality of the members; whilst in a partnership, each member retained his indiviual *persona*, and his liabilities were generally adjusted with reference to his rights in the profits of the partnership. Thus in a corporation the creditors could only look to the common property in the absence of any express agreement;[5] but in the case of a partnership, as we have just observed, each partner was responsible to the extent of his individual interest.[6] Again, the continuance of a corporation was quite independent of the individual will of its members; whereas in the case of a partnership, it only

corporation and a partnership.

[1] Fr. 9, s. 1-3, D. 4, 2.

[2] Gaius. *Comment.* 3, 152; 5 J. 3, 25; Fr. 65, s. 9, D. 17, 2.

[3] Gaius. *Comment.* 3, 153.

[4] *Ibid.* 154; 7-8 J. 3, 25.

[5] *Si quid universitati debetur, singulis non debetur, nec quod debet universitas, singuli debent.* Fr. 7, s. 1, D. 3, 4.

[6] Gaius. *Comment.* 3, 150; 1-3 J. 3, 25.

existed as long as the partners agreed that it should do so, and the renunciation of a single partner caused a dissolution.[1]

Different kinds of partnership.

Gaius [2] and Justinian [3] only mention two kinds of partnership, namely, 1st. *Societas totorum bonorum*, which the Greeks called κοινοπραξίαν, and in which everything belonging or in any way accuring to each partner, was held in common.[4] 2nd. *Societas negotionis alicujus*, in which the partnership was formed for a particular business, as the sale or purchase of slaves, wine, oil or wheat.[5] Besides these two kinds of partnership the Roman law also recognised the following: 3. *Societas universorum quæ ex quæstu veniunt.* That is of all gains acquired by each partner through such transactions as were contemplated by the partnership agreement and were not illegal,[6] with the exception of inheritances, legacies, or gifts.[7] 4. *Societas vectigalis*, for the farming of the public revenues (*vectigal*), which was a branch of the *societas negotiationis alicujus* but was governed by its own particular rules.[8] 5. *Societas rei unius*, when one or more determinate things were held in common.[9]

General rules concerning partnership contracts.

A partnership could be formed on the terms of one partner contributing money, and the other labour;[10] and, according to the better opinion, which is confirmed by Justinian in the Institutes, it might be agreed that certain

[1] Gaius. *Comment.* 1, 151; 4 J. 3, 25.
[2] *Ibid.* 148.
[3] Pr. J. 3, 25.
[4] Fr. 1, s. 1, D. 17, 2; Fr. 5; Fr. 7, *Ibid.*
[5] Gaius. *Comment.* 3, 148; pr. J. 3, 25.
[6] *Quæstus* says Paulus, *enim intelligitur, qui ex opera cujusque dcscendit.* Fr. 8, D. 17, 2.
[7] 9-13 *Ibid.*
[8] Fr. 5, D. 17, 2.
[9] *Ibid.*
[10] Gaius. *Comment.* 3, 149; 2 J. 3, 25.

of the partners should share the net profits, and yet not be responsible for the losses.[1] But an agreement by which a partner was entirely excluded from all participation in the profits was void; and the Roman jurists termed such a partnership a *leonina societas*, because the other partner would enjoy the lion's share, that is the profits of the undertaking.[2] Subject, however, to this restriction, the *socii* were permitted to settle the proportions of profit and loss amongst themselves; and they might also agree that one partner should take a share in the gain and yet not be responsible for any portion of the loss.[3] But, in the absence of any special agreement, the law assumed the shares of the several partners in profit and loss to be equal.[4] A partnership moreover might either be formed for a fixed period, or without limitation as to time, or even conditionally;[5] but not for ever,[6] because no one could be forced to continue in a partnership against his will.[7] Those only were reckoned partners who were parties to the contract of partnership, and thus if one of the partners entered into a private understanding with a stranger concerning the division of his share in the partnership assets, this was a contract with which the other partners had no concern;[8] because, as Ulpian expresses the principle, "the partner of my partner is not "my partner" (*socii mei socius, meus socius non est*).[9] Partners were responsible to each other not only for a

Leonina societas.

Who were partners.

[1] *Ibid.* Fr. 30, D. 17, 2.
[2] Fr. 29, s. 1, 2, 30; D. 17, 2.
[3] Fr. 29, pr. and s. 1, D. 17, 2; Gaius. *Comment.* 3, 150; 1 J. 3, 25.
[4] *Ibid.*
[5] Fr. 1, pr. D. 17, 2.
[6] *Nulla societatis in æternum coitio est.* Fr. 70, *Ibid.*
[7] Const. 5, C. 3, 37.
[8] Fr. 19, D. 17, 2.
[9] Fr. 20, *Ibid.*

Degree of care required from partners

malicious wrong, but also for losses arising from acts of carelessness and negligence.[1] But in estimating the degree of care required from a partner in the management or protection of the common property, the *exactissima diligentia* of a *bonus paterfamilias* was not required. He was only expected to be as careful of things belonging to the partnership as he was of his own property.[2] Thus he was not responsible for what the Roman jurists termed *damna fatalia,* that is losses resulting from mere imprudence,[3] or from robbery or incendiarism. "For he who accepts as partner a person of careless "habits," says Justinian, "has only himself to blame;"[4] and it is worthy of observation as showing the practical utility of the study of the Roman law, that this principle was applied by the English Chancery Court in deciding a claim arising between partners on the ground of defendent's negligence and incompetence, in which it appeared that before entering into partnership, the plaintiff had ample opportunity of estimating the defendent's fitness for the business.[5]

Action pro socio.

The action *pro socio,* however, afforded a partner a remedy againt his copartners to indemnify him for losses which he had sustained in consequence of their fraud or misconduct; to reimburse him for expenses which he had necessarily incurred in carrying on the business of the firm; to compel the production of accounts; and to dissolve the partnership.[6] But as partnership created a sort of fraternal union between the members, (*societas jus quodammodo fraternitatis in se habeat*), each partner was only held respon-

[1] 9 J. 3, 25.
[2] Fr. 72, D. 17, 2; 9 J. 3, 25.
[3] Fr. 52, s. 3, *Ibid.*
[4] 9 J. 3, 25.
[5] *Atwood* v. *Maude,* III. L.R. ch. 369.
[6] Fr. 65, D. 17 2.

sible to the extent of his means, (*in quantum facere potest*).[1] A partner who was condemned in an action *pro socio* was reckoned infamous;[2] but this effect was not produced by the mere condemnation in actions arising out of delicts, such as *furti* or *vi bonorum raptorum*, unless the accused had agreed for the commission of the offence.[3] The action *communi dividundo* was resorted to when the sole object was to obtain a partition of the profits, or other property of the partnership: *Communi dividundo judicium ideo necessarium fuit*, says Paulus, *quod pro socio actio magis ad personales invicem præstationes pertinet, quam ad communium rerum divisionem*.[4] This passage itself serves to explain the distinction between the last named action, and that *pro socio*; and in deciding the shares to which each partner was entitled in the common property, the *judex* was authorised to take account of any compensation which individual partners might claim against their co-partners in connection with the partnership business.[5]

Partners could not bind each other, except as to acts of simple administration of the partnership business, unless authorised in the particular transaction by the remaining members of the firm. Nor, indeed, according to the strict rules of the ancient civil law, could a partner sue or be sued upon any contract to which he was not individually a party, because the law did not permit a person to contract through the agency of another. But the technicality of this rule naturally found no favour under the Prætorian system; and accordingly we find that the Prætor by his Edict allowed the remaining partners to sue upon

[1] Fr. 63, pr. s. 3, D. 17, 2; Fr. 16, D. 42, 1.

[2] Fr. 1; Fr. 6, s. 6, D. 3, 2; Gaius. *Comment.* 4, 182; 2 J. 4, 16.

[3] 2 J. 4, 16. I have already explained the consequences resulting from *infamy* in Roman law. *Vide ante*, page 84.

[4] Fr. 1, D. 10, 3.

[5] Fr. 31, 32, 38, s. 1, 43, D. 17, 2; Fr. 1-3, D. 10, 3.

the contract made by their representative or mandatary, if they had no other means of protecting their interests ;[1] and, on the other hand, gave an action against them to a stranger if they had profited by the contract and it was made by one who was duly authorised by them to act as *institutor* or *exercitor*.[2]

Grounds for dissolution of partnership.

Ulpian mentions four valid grounds for the dissolution of partnerships[3] :—1. *Ex personis*, by the natural or civil death of a partner ;[4] 2. *Ex rebus*, when the object for which the partnership was formed is accomplished, or when its subject-matter has perished or has ceased to be in commerce ;[5] 3. *Ex voluntate*, by a partner asserting his right of renunciation ;[6] and, 4. *Ex actione*, when one partner compels a dissolution by means of an action.[7]. To these we may add *ex tempore*, by the expiry of the term for which the partnership was formed.[8]

The fiscus.

The *fiscus*, or treasury, is another instance of a fictitious or juridical person invested by the Roman law with a

Derivation of the word

certain capacity for rights. The word *fiscus* originally meant a wicker-work basket used for olives in the oil press,[9] and afterwards a money-bag, from whence it came to be employed for the Treasury itself. The Treasury, however, constituted, at least in theory, but one sole person, and not so many persons as they were departments corresponding to the various branches of the public service.[10] Nevertheless this separation into divers branches,

[1] Fr. 1, 2 D. 14, 3.
[2] Fr. 82, D. 17, 2 ; 2 J. 47 ; D. 14, tits. 1 and 3.
[3] Fr. 63, s. 10, D. 17, 2.
[4] Gaius. *Comment.* 152-153 ; 5 J. 3, 25.
[5] Fr. 65, s. 10, D. 17, 2 ; 6-8 J. 3, 25 ; Gaius. *Comment.* 3, 153-154.
[6] Gaius. *Comment.* 3, 151 ; 4 J. 3, 25.
[7] Fr. 65, pr. D. 17, 2.
[8] *Ibid.* s. 6 and 10.
[9] Fr. 19, s. 2. D. 19, 2.
[10] Const. 2, C. 8, 43.

established for public convenience and to secure greater accuracy in accounts, sometimes exercised an influence in the domain of private law.[1]

Distinction

During the republican period the whole income of the state was thrown into the *ærarium*, or public treasury, but under the empire a distinction was made between the *imperial* and the *public* treasury. The former was called *fiscus*, and represented the emperor's privy purse, as alike distinguished from his purely private property (*ratio cæsaris*),[2] and from the *ærarium*, or public treasury.[3] Hence the Roman jurists speak of *jura fisci et populi*.[4] This distinction was probably devised by Augustus and it certainly existed in the reign of Tiberius, for we read in the Annals of Tacitus, *bona Seiani ablata* ÆRARIO *ut in* FISCUM *cogerentur*.[5]

Abolished under later Emperors.

But under the later emperors the *ærarium* became merged in the *fiscus*, and its administration passed entirely into the hands of the emperor.[6] So long, however, as the above distinction prevailed, the public treasury was composed of the income derived from the ordinary state revenues, and it also received a considerable accession from caducary estates, or estates which the real heirs

Composition of ancient ærarium.

[1] Fr. 2, s. 4, D. 50, 8; Const. 1, C. 4, 31.

[2] Fr. 6, s. 1, D. 49, 14.

[3] ANT. SCHULTING. *Jurisprudentia Vetus Ante-Justinianea*, p. 475, (1717 ed.); Heineccius, *Antiq. Roman.* lib. I. tit. 25, s. 10.

[4] Paul. *Sentent.* lib. 5, tit. 12.

[5] Lib. VI. 2.

[6] Dion Cassius. 53, 22; Vopiscus, *Aurel.* 9, 12, 20. Besides the ancient *ærarium*, or public treasury, also called *Saturni*, because the money was deposited in the temple of Saturn, Augustus instituted a military treasury, called the *Ærarium Militare*, which was formed out of a tax of five per cent, subsequently increased by Carcalla to ten per cent. and again restored by Macrin to the original rate, on all successions devolving upon Roman citizens, and a quarter of the value of slaves sold. *Dion Cassius.* lib. 55, s. 25, 31; 56, s. 28; 58, s. 16; 59, s. 9; 77, s. 9, 12. *Coll. leg. Mos.* 16, s. 9.

were either prevented by some law (as the *lex Julia et Papia Poppœa*) from taking, or had declined to accept.[1]

Of the fiscus.

The *fiscus*, on the other hand, claimed the revenues from provincial towns, the administration of which was reserved to the emperor, as well as gifts presented by towns, forfeitures, fines, and *bona vacantia*.[2] Caracalla also added the *caduca* to the income of the *fiscus*.[3]

Privileges enjoyed by the fiscus.

The *fiscus* also enjoyed many special privileges in the domain of private law; and under the empire the private property of the prince or princess was invested with similar privileges. *Quodcumque privilegii fisco competit* says Ulpian, *hoc idem et Cæsaris ratio et Augustæ habere solet*.[4] Among these privileges were the following:— Priority over other creditors,[5] a pledge or lien on the whole estate of debtors and especially of comptrollers of the taxes from the time that they began to manage the revenues,[6] the power of seizing the property of debtors,[7] exemption from all customs or taxes,[8] and the right of reclaiming property irrespective of any length of usucapion by the person in possession, with the exception of *bona vacantia* which had not been reported to the *fiscus*, and with regard to which, in accordance with a decision of Papinian, a *bona fide* purchaser could acquire a valid title by use.[9] Again it was provided by an Edict of the Emperor Marcus, that a person who purchased from the *fiscus* any thing

[1] Gaius. *Comment.* 2, 286; Facitus. *Annal.* 3, s. 25, 28.

[2] Pliny. *Hist. Nat.* 33, 16; *Dion Cass.* 77, s. 9; Tacitus *Annal.* 2, 48; Fr. 1, s. 2, Fr. 2, D. 1, 19; Fr. 96, s. 1, D. 1, 30; Fr. 6, s. 3 D. 36, 1; Fr. 16, s. 10, D. 39, 4.

[3] *Frag.* Ulp. I, s. 21; 17, s. 2; Fr. 13, pr. Fr. 15, s. D. 49, 14.

[4] Fr. 6, s. 1, D. 49, 14.

[5] Paul. *Sentent*, lib. 5, tit. 12.

[6] Const. 2, C. 8, 15.

[7] Const. 5, C. 10, 1.

[8] Paul. *Sentent.* V. tit. 12, s. 12; Fr. 9, s. 8, D. 39, 4.

[9] Fr. 18, D. 41, 3; 9 J. 2, 6.

belonging to another, could not be disturbed in his possession by the real owner after the lapse of five years.[1] And a constitution of the Emperor Zeno went even still further, and completely protected those who received anything from the *fiscus* by sale, gift, or other title, by enacting that if any other person laid claim to such property the action should be brought against the treasury within four years.[2] Finally, Justinian (531 A.D.) extended the benefit of this constitution to those who received anything from the palace of the emperor or empress.[3]

In case of doubt judgment to be given a the fisc

A fragment of Modestinus is usually cited to establish the general rule, that in case of doubt sentence should be given *against the fiscus*.[4] The words of the Roman jurist are : *Non puto delinquere cum, qui in dubiis quæstionibus contra fiscum facile responderit.*[5] But it is probable that all he intended to affirm was, that in case of doubt, the rights of the *fiscus* should be confined within the strict limits of recognised law. In other words, that the *fiscus* should not be permitted to assert special privileges which were not clearly proved to belong to it.[6] Indeed it can hardly be supposed that a jurist writing under the empire, would have ventured to lay down as an inflexible rule, that judgment was to be pronounced in every case arising out of a doubtful state of facts against such a favoured institution as the imperial Treasury. Nor

[1] Const. 3, C. 2, 37. In Gaius's time if the State sold land pledged to itself, and the *prædiator* or purchaser did not use his right for two years, but allowed the former owner to continue in possession, the latter regained the ownership. This was called *usureceptio ex prædiatura*. *Comment.* 2, 6.

[2] Const. 2, C. 7, 37.

[3] Const. 3, *Ibid* ; 14 J. 2, 7.

[4] Mackeldey. *Compendium of Roman Law*, s. 144.

[5] Fr. 10, D 49, 14.

[6] Maynz. *Eléments de Droit Romain*, tit. I. 239, 210.

would such a rule have been at all equitable. But if, as is more probable, Modestinus merely wished to limit the *fiscus* to those privileges which it was proved to possess, this would be but a simple application of the well acknowledged principle that a privilege, or special right, is not to be assumed to exist.

Ancient

The ancient lands and estates belonging to the Crown could not be permanently alienated, although they might be hired out ;[1] but things which the emperor acquired by means of gift, legacy, or succession, were regarded as *res privata principis*, and could be disposed of by him as he pleased.

Piæ causæ.

The quality of a legal *persona* was also accorded to institutions of a pious, charitable, or public character, which were termed in Roman law *piæ causæ*, provided they had been duly recognised and confirmed by the state.[2] But whether this confirmation on the part of the state should *precede* their foundation, or whether it was sufficient if it had been accorded at any subsequent period, carrying with it a retrospective effect, is a question on which modern writers on Roman law are not agreed. Thus Mackeldey is of opinion that a foundation *ad pias causas* created by last will and appointed heir, were capable of inheriting, although confirmation by the state had not taken place until after the testator's death, but Mühlenbruch thinks otherwise.[3] Churches, monasteries, hospitals, and poor-houses, were among the institutions recognised as *piæ causæ*; and even in pagan Rome certain deities, such as Tarpeian or Capitoline Jupiter, Ephesian Diana, and Gallic Mars, to whom the privilege had been specially accorded by a Senatus-consultum or an imperial constitution, might be

[1] Const. 13, C. 11, 61.
[2] Mackeldey. *Compendium of Modern Civil Law*, s. 145.
[3] *Ibid.* note.

instituted heirs under a testament.[1] We also learn from a fragment of Scævola that legacies might be left to temples, or to the priests by name.[2] Under the Christian emperors the institution of a saint or the deity as heir was held to vest the property in the Church; and Justinian (530 A.D.) decided that the institution of Jesus Christ as heir was to be understood to indicate the Church of the testator's domicile; of an archangel or martyr, the Church dedicated to such saint in the testator's place of residence, and if no such church existed in the latter place, then to that so dedicated in the metropolis of the province: if there should be many so dedicated, the one to which the testator had shown a preference in his lifetime, and in default of such, the poorer one, received the benefit of the bequest.[3] The same rule was applied by Justinian to inheritances or legacies left generally to the poor, which, in the absence of any indication of the testator's intention, were to be distributed by the bishop amongst the poor of the residence.[4] Justinian also appointed the Church, represented by the bishop, trustee in all legacies left for the release of captives—and charged it with the duty of carrying out the testator's wishes according to the rules established in other cases.[5] In every case the intention of the testator governed the appropriation of the gift in the first instance, and it was only when that intention was unexpressed and could not be ascertained that Justinian established the above rules, in order to carry out as near as possible the presumed intention of the testator, just as the English Court of Chancery applies the *cy près* doctrine in the case of general chari-

[1] *Frag.* Ulp. 22, s. 6.
[2] Fr. 33, s. 1, D. 33, 1; Fr. 38, s. 6, D. 32, 1.
[3] Const. 26, C. 1, 2; Novel. 131, cap. 9.
[4] Const. 49. C. 1, 3; Novel. 131, cap. 11.
[5] *Ibid.*

table bequests.[1] It would seem, however, from a Constitution of the Emperors Valentinian and Marcianus that they were the first to establish the validity of a general bequest, which had formerly been void for uncertainty.[2] Property belonging to churches (such as chalices, ornaments, vestments, and the like) could not be alienated, unless for the relief of the poor in times of great distress or famine, or for the payment of debts due by the church itself, if the necessary funds could not be raised from any other source, or for the ransom of captives : *quoniam*, as Justinian quaintly remarks, *non absurdum est, animas hominum quibuscunque vasis, vel vestimentis præferri.*[3] If a person purchased church property, except under the above circumstances, he was bound to restore the same to the church, as well as all intermediate profits he might have gained from it, without receiving any allowance for the price he had paid. But he was allowed to bring an action against the person who had sold the property to him.[4] Indeed, even if a church were destroyed by an earthquake, or pulled down, the ground on which it was built remained consecrated and inalienable.[5] By a Constitution of Justinian of the year 528 A.D., the period of prescription against actions brought against churches, monasteries, and other charitable institutions, was fixed at a hundred years, which was considered the longest period of human

[1] See Snell's *Principles of Equity*.

[2] Const. 24, C 1, 3.

[3] Const. 24, C. 1, 2 : Novel. 7, cap. 1, 6, 8.

[4] Const. 14, s. 1, C. 1, 2 ; Novel 7, cap. 5

[5] Fr. 73, D. 18, 1 Whether a foundation *ad pias causas* ceased to exist by reason of a total absence of resources, is a disputed question. Windscheid's opinion that it did not is shared by Dr. Goudsmit (*Pandects*, B. s. 37, p. 86, note), but Roth and some others assert the contrary, and regard the property as the *substratum* of the foundation]

life (*longissimum vitæ hominum tempus*);[1] but this period was subsequently reduced by the emperor to forty years,[2] and the same limitation applied to actions on account of the patrimonial property of the emperor (*fundi patrimoniales*),[3] while thirty years was the prescribed period with respect to *res fiscales*.[4] According to the Canon law, however, the Romish Church still enjoys the right to bring actions within a hundred years after the cause of action arises.[5] The privilege of a *restitutio in integrum* was also enjoyed by *piæ causæ*, as well as the ordinary rights of acquisition *inter vivos* or by means of a *donatio mortis causa*.[6]

[1] Const. 23, C. 1, 2; Novel. 9.
[2] Novel. III; Novel. 131, cap. 6.
[3] Const. 14, C. 11, 61.
[4] Const. 6, C. 11, 65.
[5] C. 16, 17, C. 16, qu. 3, cap. 13, 14, 17, X. 2, 26.
[6] Cap. 1, 3, X. 1, 41; Const. 35, C. 1, 3; Const. 23, C. 1, 2; Novel. 120. cap. 1, s. 2; cap. 6, s. 2.

CHAPTER VII.

Marriage. (*De Nuptiis*).

Definition of justum matrimonium.

MODESTINUS in a passage which we have already referred to, defines *justum matrimonium* as the *union of a man and woman in a constant society of fellowship, and in an interchange of all divine and human laws.*[1] A somewhat similar definition is given by Justinian in his Institutes. "Marriage or matrimony," he says, "is a binding together "of a man and woman to live in an indivisible union."[2] The husband was called *vir* and the wife *uxor*.[3]

Different forms of marriage.

The ancient Roman law only recognised three forms of lawful marriage. The first and most solemn was the *confarreatio*, so called from the loaf or cake (*farreum*)

Confarreatio.

used as an offering in the ceremony and of which the bride partook.[4] It had to be performed with a fixed

[1] Fr. 1, D. 23, 2.
[2] 1 J. 1, 9.
[3] Fr. 4, D. 23, 2, *et seq.*
[4] Gaius. *Comment.* 1, 112.

solemn form of words in the presence of the Pontifex Maximus and of ten witnesses.[1] It was still in vogue when Gaius wrote, for he says: "This right is also "practised in our times; for we see that the *flamines* "*majores, i.e.*, the *Diales, Martiales,* and *Quirinales* are "not consecrated as *reges Sacrorum,* unless they have "been born after marriage celebrated by *confarreatio.*"[2] It subsequently fell into disuse, and even towards the close of the republic it is probable that it was but rarely if ever practised, for Cicero although he mentions *co-emptio* and *usus* does not allude to *confarreatio.*[3] The second and most common form was *co-emptio,* in which the woman was purchased in a fictitious form of sale called *mancipatio,* in the presence of not less than five Roman citizens of full age, and a *libripens,* or scale-bearer,[4] who was supposed to weigh the copper employed in the purchase. A certain form of words had to be gone through as in the case of *confarreatio,* and the parties were closely questioned as to their consent. A distinction, however, was drawn between a *co-emptio matrimonii causa,* and a *co-emptio fiduciæ causa.* The former took place when the woman had marriage in view and wished to stand related to her husband as a daughter (*loco filiæ*); but when the woman had some other object in view, as that of avoiding the *tutela,* or wardship (*tutelæ evitandæ causa*), the *co-emptio* was understood to be made for the

Co-emptio.

[1] *Frag.* Ulp. tit. 9.

[2] *Ibid.*

[3] *Pro Flacco.* 34. Tacitus says that in his time it was for the most part abandoned, and this was owing to several reasons; as the tiresome detail of the ceremony, the great expense attending it, and more especially, from a desire to avoid the *conventio in manum mariti,* which was one of the most serious consequences attending this form of marriage. *Annal.* 4, 16.

sake of a trust, and was hence called *co-emptio fiduciæ causa*.[1] In the latter form no permanent relationship was formed with the man, and he was bound by a *pactum fiduciæ* to remancipate the woman the very moment after she was brought *in manum*.[2] Servius in his Commentary on Virgil's *Georgics* 1, 34, describes *co-emptio* as an ancient nuptial form wherein husband and wife made a mutual purchase, to bar the inference that the wife became a slave. And Plutarch says that the wife claimed to be mistress in the house of which her husband was master. *Ubi tu Caius, ego Caia.* "Where thou art "Caius, I am Caia."[3] Hence women who were married by *co-emptio* were calls Caias,[4] probably after Caia Cæcilia, the good wife of Tarquinius Priscus.[5] If the wife was subject to *patria potestas* she required the authority of the father before she could make a *co-emptio*; and if she was independent of parental control, she was obliged to obtain the sanction of her agnates.[6] The third and last

Usus.

form of a valid Roman marriage was that which arose from *usus*, or co-habitation with the express intention of living together as man and wife. If this co-habitation continued unbroken for the space of one year, the law clothed it with the consequences of a legal marriage, and the woman passed into the *manus* of her husband, provided: *First*, that the parties had cohabited with a real intention of forming marriage (*affectio maritalis*), because it

[1] Gaius. *Comment.* 1, 114. The latter form of *co-emptio* might also be resorted to for the sake of making a testament (*Ibid*, 115a) and, according to Cicero, for the extinction of private sacrifices (*sacrorum causa*). *Pro Murena* 12.

[2] *Ibid.* 115.

[3] *Quæst. Rom.* 28.

[4] Cicero. *Pro Murena*, 12.

[5] Plin. *Hist. Nat.* 8, 48.

[6] Gaius. *Comment.* 1, 115; *Collatio Mosaic.* ed. by Autonius Schulting, tit. IV. 2, p. 744-745.

was after all the mere fact of intention which distinguished a *justum matrimonium* from simple concubinage. As Paulus writes: *Concubinam ex sola animi destinatione æstimari oportet.*[1] And *secondly*, that the wife had not absented herself for three successive nights in the year, because by doing so the law held that the "usus" was broken, and the woman continued to belong to her natural *familia*, that is, she did not pass into the *manus* of her husband, although she still continued to be regarded as his *uxor*, or wife.[2] Gaius informs us that the law of the Twelve Tables concerning the acquisition of *manus* by *usus*, had been partly abolished by statute and had partly fallen into desuetude before his time.[3]

Marriage

The above forms, however, were more important with reference to the wife's position in the family of her husband, than with respect to the actual formation of the marriage tie; for amongst the Romans, marriage was looked upon as a purely civil contract, depending mainly upon the consent of the parties. The ceremonies and nuptial rites were mere accessories, not essentially necessary for the validity of a marriage, but important only as establishing the *manus* of the husband, and destroying the wife's connection with her natural family. Du Caurroy indeed draws an ingenious distinction between *nuptiæ* and *matrimonium*: the former he thinks comprised the religious ceremonies, (*pompa . . . aliaque nuptiarum festivitas*) and required the presence of the woman, while the latter was the actual contract of marriage for which the consent of the parties was the only requisite.[4] But this theory is

[1] Fr. 4, D. 25, 7.

[2] Aulus Gellius. 3, 2. See the note of Oiselius on this passage, page 210, note 18, ed. of 1666; and Heineccius, *Antiq. Rom.* lib. 1 tit. X. s. 14; Gaius. *Comment.* 1, 111.

[3] *Comment.* 1, 111.

[4] *Inst. de. Justinien*, Tom. I. s. 117, page 79. The Latin verb *nubere* alludes, says Du Caurroy, to the veil with which a bride

hardly consistent with the many passages in the Digest and Code in which the term *nuptiæ* is applied to the marriage itself. Thus Modestinus says: *nuptiæ sunt conjunctio maris et feminæ,*[1] and both Paulus[2] and Julianus[3] expressly use *matrimonium* and *nuptiæ* as synonymous terms. Justinian does the same in the Instiutes—*Nuptiæ autem sive matrimonium est viri et mulieris conjunctio.*[4] Something more, however, than the mere consent of the parties was required to constitute a binding marriage.

Mere consent not sufficient to constitute valid marriage.

It is true indeed that Ulpian writes—*nuptias non concubitus, sed consensus facit:*[5] "marriage does not depend on cohabitation, but on consent."—and upon the strength of this passage many modern civilians have affirmed that marriage was formed by simple consent. Thus the learned Warnkœnig says: *contrahuntur nuptiæ sine omni solemnitate,* NUDO CONSENSU, *si de maritandi affectione constat.*[6] But there can be no doubt that something more than mere consent was necessary even to constitute the civil contract of marriage; for it is clear that a woman could not contract such a tie in her absence, although if it could be formed *solo consensu* she might obviously communicate such consent *per epistolam* or *per nuncium.* Thus Paulus expressly says: *Vir absens uxorem ducere potest; femina absens nubere non potest.*[7] The reason of this distinction is well explained by the jurist Pomponius in the following passage: *Mulierem absenti per literas ejus vel per nuncium*

covered herself when she was led to her husband, and the phrase *uxorem ducere* refers to the mode in which the wife was conducted *in domum mariti.*

[1] Fr. 1, D. 23, 2.
[2] Fr. 10, *Ibid.*
[3] Fr. 11, *Ibid.*
[4] 1 J. 1, 9.
[5] Fr. 30, D. 50, 17.
[6] *Institutiones Juris Romani Privati,* s. 173
[7] Paul. *Sentent.* lib. II. tit. 19, s. 8.

posse nubere placet, si in domun ejus deduceretur ; eam vero quæ abesset, ex literis vel nuncio duci a marito non posse : deductione enim opus esse in mariti, non in uxoris domum, quasi in domicilium matrimonii.[1] In other words an absent man could contract a marriage with a woman by letter or message, and if the woman was conducted to his house, the marriage was complete ; but as it was impossible to conduct an absent woman to the house of her husband, the actual presence of the woman was necessary. The husband's house was the *domicilium matrimonii,* and the *deductio in domum mariti* was required to make the *consensus,* or consent of the parties, still more manifest.[2] The delivery of the woman into the possession of her husband, was in fact the final act of confirmation of the previous consensual contract, and this delivery was held to be complete when the woman took up her abode in the house of her husband. The same principle of constructive possession was observed in other cases. Thus Celsus says : *Si venditorem, quod emerim, deponere in mea domo jusserim : possidere me certum est, quanquam id nemo attigerit.* "If a vender deposits any article that "I have purchased in my house by my order, I have "possession of it though I have never touched it."[3] But it was not necessary that the *deductio* should take place immediately after the marriage, for Scævola expressly says *deductio plerumque fit post contractum matrimonium.*[4] The husband, for instance, might reside with his wife for some days in the house of her parents, and then conduct her to his own house. On the other hand the *deductio in domum mariti* might take place before marriage, and consequently the

[1] Fr. 5, D. 23, 2.

[2] Schulting. *Jurisprudentia Vetus Ante-Justinianea,* p. 301, note 20.

[3] Fr. 18, s. 2, D. 41-2.

[4] Fr. 66, D. 24, 1.

marriage was not to be always reckoned from the date of such *deductio*. Thus where a woman had been led to her future husband's house and there provided with separate apartments three days before the day fixed for marriage, upon the question subsequently arising whether a present which the husband had made to her before the celebration of the nuptial rites and while she occupied her own rooms, (*priusquam ad eum transiret, et priusquam aqua et igni acciperetur*) was valid—because by Roman law a husband and wife could not contract with each other—Scævola replied that it was, as having been made before marriage (*ante nuptias*).[1] From the above and other passages we may then conclude, that to constitute a truly valid marriage the Roman law, apart from other requirements which I shall presently notice, not only required the free consent of the contracting parties, but also that the woman should be delivered over to the man in such a way as to render consummation of the marriage possible. If these two requisites were fulfilled the parties were thenceforth reckoned as man and wife, although consummation of the marriage may not have actually taken place: *Statim atque ducta est uxor*, says Ulpian, *quamvis nondum in cubiculum mariti venerit. Nuptias enim non concubitus, sed consensus facit.*[2]

Presumption in favour of marriage.

Under the ante-Justinian law a marriage between free-born and respectable persons was always presumed, but between persons of unequal status a contrary presumption prevailed, which could only be rebutted by proof of the existence of *dotalia instrumenta*. Justinian at first completely abolished this distinction and did away with the necessity of marriage settlements in all cases;[3] but by his later Novels he enforced the necessity of

[1] *Ibid.* s. 1.
[2] Fr. 15, D. 35, 1; 30 D. 50, 17.
[3] Const. 22, 23 s. 7, C. 5, 4.

marriage portions in the case of marriages between persons of illustrious rank.[1]

Distinguished from *nuptiæ* were *sponsalia*, which were mere mutual promises to contract a marriage at some future time, and constituted in no way a binding tie. *Sponsalia*, says Florentinus, *sunt mentio et repromissio nuptiarum futuarum*.[2] The man on his part pledged his faith to the woman to marry her, and the woman did the same to the man, and consequently all that was necessary was, that the parties and their respective *patresfamilias* should consent. *Sufficit nudus consensus ad constituenda sponsalia*.[3] But the consent of those persons in whose power the contracting parties were, was assumed in the absence of any express declaration on their part to the contrary. As Julianus says:—*Intelligi tamen semper filiæ patrem consentire, nisi evidenter dissentiat*.[4] No precise age was fixed at which persons could enter into betrothal contracts, but Modestinus thinks that they should at least have attained the age of seven years,[5] at which age the Roman law, as we have seen, considered a child to have *intellectus*, that is, to understand the meaning of the words he used, but not *judicium*, or the faculty of deciding whether it is to his advantage to go through the particular act or not. Either party could renounce the engagement by declaring the wish in such words as these—*conditione tua non utor*[6]—but, unless there was some good ground for the renunciation, if the *sponsus* was the party who withdrew, he lost the *arrha*, or earnest, which was ordinarily given to the woman, and if it was the woman who did so, she was obliged to return the

Sponsalia.

[1] Novel. 74, cap. 4; 78 cap. 3; 117 cap. 4, 6.
[2] Fr. 1, D. 23, 1.
[3] Fr. 4; Fr. 7, s. 1; Fr. 11, *Ibid.*
[4] Fr. 7, s. 1; Fr. 12, *Ibid.*
[5] Fr. 14, *Ibid.* Augustus subsequently limited the age for contracting espousals to ten.
[6] Fr. 2, s. 2, D. 24, 2.

earnest which she had received two-fold.[1] And the party who contracted a second marriage while the first espousals remained in force, was visited with the penalties of infamy.[2] A father was also prohibited from marrying his son's *sponsa*, or betrothed, and a son his father's.[3] So long as a daughter was under *patria potestas* the father could send a message and dissolve the espousals; but if she had been emancipated he no longer retained this right, nor could he withhold her dower.[4]

Necessary conditions of a justum matrimonium

Ulpian[5] indicates three essential conditions to constitute a *justum matrimonium*—1. *Connubium*. 2. Puberty. 3. Consent. Justinian in his Institutes also prescribes the same conditions, and it will be convenient therefore to consider each separately.

1 Connubium

Connubium, is described by Ulpian as the power of contracting a lawful marriage (*connubium est uxoris jure ducendæ facultas*),[6] and this must be understood in an absolute as well as in a relative sense. Thus not only were the parties required to be individually competent to contract marriage, but it was also necessary that they should be competent to marry each other. It is in this relative sense that Ulpian proceeds to state that "Roman citizens "have *connubium* with fellow-citizens, but with Latins "and aliens only in those cases where it has been con-

[1] Fr. 10, D. 23, 1; Const. 3, 5, 6, *et seq.* C. 5, 1. It appears from a passage of Servius Sulpicius quoted by Aulus Gellius, that the ancient law allowed an action to be brought for a breach of promise of marriage when ratified by stipulation (*Noct. Attic.* lib. 4, cap. iv.); but under the emperors, on the principle, as it is expressed in a Constitution of the Emperor Leo (469 A.D.), that marriage should be left as free as possible, the parties were at liberty to annul the contract and were only bound to restore or forfeit, as the case might be, the *arrha*, or earnest, under the circumstances stated in the text.

[2] Fr. 1, 13 s. 1, D. 3, 2.

[3] 9 J. 1, 10.

[4] Fr. 10, D. 23, 1.

[5] *Frag.* tit. 5, s. 2.

[6] *Ibid.* s. 3.

"ceded. With slaves there is no *connubium*."[1] Anciently the Roman law only permitted *connubium* between Roman citizens, and even among them intermarriages were prohibited by the law of the Twelve Tables between the patrician and the plebian orders, and also between *ingenui* (free-born) and *libertini* (freedmen). The *lex Canuleia* (445 B.C.), which was stoutly opposed by the *patres*, as Livy informs us in his lengthy and interesting account of the passing of this law,[2] conferred the *jus connubii* upon the *plebs*; and the *lex Papia Poppæa* permitted all free-born citizens, except senators and their children, to marry freedwomen,[3] provided they were not actresses, prostitutes, or women who had been condemned in a public accusation.[4] Constantine moreover, by a Constitution of the year 336 A.D. threatened to punish senators or præfects with infamy who married freedwomen or their daughters, actresses, daughters of innkeepers, or women belonging to the very humble classes (*humiles abjectæve personæ*), and to deprive them of all participation in the rights of Roman citizens.[5] But Justinian having himself married an actresses, who was the daughter of a rider in the Circus, altered the law and declared that no disgrace should attach to a man, however elevated his rank, who married a woman who had formerly been an actress but had abandoned her profession. "For we should endeavour to imitate," says the devout emperor, "as far as lies in our power, the goodness and "infinite mercy of God, who is ever ready to pardon our "sins, to accept our repentance, and to raise us to a better "condition."[6] By a still later law he even permitted men of the highest rank to marry those women who were

[1] *Ibid.* s. 4, 5; Gaius. *Comment.* 1, 56.

[2] Lib. IV. cap. 1-5. A Governor of a Province might live with a woman of that province as his concubine. Fr. 5, D. 25, 7.

[3] Fr. 23, D. 23, 2.

[4] Ulp. *Frag.* tit. 13, s. 2; Fr. 41, 42, D. 23, 2.

[5] Const. 1, C. 5, 27.

[6] Const. 23, C. 5, 4.

pronounced "abject" by the constitution of Constantine, thus completely sweeping away all the restrictions of the earlier laws.[1] With regard to the *Latini* and *peregrini*, it appears that they did not enjoy the right of *connubium* with Roman citizens unless, as Ulpian says in the passage above quoted, it was specially conceded, which was occasionially done in the case of states that had proved themselves faithful allies of Rome.[2] As I have already shown, the Latin and other allied states were not all simultaneously admitted into full communion with the rights of Roman citizens. Some had greater privileges than others, and it was not until Caracalla by his famous decree had placed all subjects of the empire on an equality, that the restrictions of the old law as to intermarriages between Roman citizens and *peregrini*, other than enemies and barbarians, ceased to have force. Thus we find that the Institutes and the Digest only deal with disqualifications arising from ties of blood or affinity, or in consequence of certain special laws which prohibited marriage between specified persons for particular reasons. For instance a guardian could not marry his ward before she attained the age of twenty-six, unless her father had previously betrothed her to him;[3] an adulterer could not marry his accomplice;[4] nor a ravisher the woman he violated;[5] nor a Jew a Christian, or *vice versa*;[6] nor the governor of a province, so long as he held office, a woman of that province, although he might contract espousals, which the woman could afterwards renounce

[1] Novel. 117, cap. 6.

[2] See several instances recorded by Livy. lib. 38, cap. 36; 43 cap. 3. See also Gaius. *Comment.* 1, 57, from which it appears that under the empire *connubium* was conceded to veterans with those *latinæ* and *peregrinæ* whom they had married immediately after their dismission from the public service.

[3] Fr. 36, 66, D. 23, 2.

[4] Novel. 134, cap. 12

[5] C. 9, 13.

[6] Const. 6, C. 1,

by returning the *arrha* or earnest which had been paid to her.[1] The *lex Papia Poppæa* also prohibited marriage between a man of sixty and a woman of fifty, at least such marriages were not esteemed *matrimonia legitima.*[2] Lastly, ecclesiastics were not permitted to marry under the Christian emperors,[3] nor yet were castrats.[4]

allowed by Roman law

The Roman law did not recognise polygamy, and accordingly an existing marriage was an absolute bar to a second: *Neminem, qui sub ditione sit Romani nominis,* says a Constitution of the Emperors Diocletian and Maximian, *binas uxores habere posse, vulgo patet.*[5] Justinian also enforces the same rule in his Institutes,[6] and a man who committed bigamy was pronounced infamous under the Prætorian Edict.[7] Indeed even in the case of concubinage, the Roman law did not permit a man to have two concubines at the same time, or a wife and a concubine.[8] In fact there was nothing to distinguish mere concubinage from marriage except the intention of

[1] Fr. 38, 57, D. 23, 2. If a marriage was contracted in contravention of this rule it was a mere nullity; though if the parties were still of the same mind, they might go through the ceremony again after the husband's term of office expired. Fr. 63, D. 23, 2; Fr. 65, *Ibid.*

[2] Ulp. *Frag.* 16, s. 1. Gravi. *Orig. Juris Civilis,* 355.

[3] Const. 44, C. 1, 3; Novel. 6, C. 1, s. 7.

[4] Fr. 39, s. 1, D. 23, 3.

[5] Const. 2, C. 5, 5. A law is said to have been drafted, at the instigation of Cæsar, by the Tribune Helius Cæcina to establish polygamy, but it was never promulgated or even formally proposed. (Sueton. *Jul.* 52). Antonius is mentioned by Plutarch as the first Roman who married two wives (*Comp. Demet.* c. *Ant.* 4), and at a later period Valentinian the younger permitted any man to marry two wives, (Socrat. *Hist. Eccl.* IV. 31; Niceph. *Hist. Eecl.* II. 33), but this law, intended to cover his own turpitude, was rejected by posterity, (Brisson, *de Jure Connub.* p. 292).

[6] 6 and 7, J. 1, 10.

[7] Fr. 1, D. 3-2; Const. 2, C. 5, 5.

[8] C. 5, 26; Paul. *Sentent.* 2, 20; Novel. 8, cap 5.

the parties (*soli animi destinatione*);[1] or in other words, as Paulus elsewhere expresses the distinction, "a concubine "is distinguished from a wife by simple choice or affec- "tion (*solo dilectu*)"[2] Thus concubinage could not be formed within the prohibited degrees, and was for the most part subject to the same restrictions as marriage, though it was regarded amongst the respectable classes as a dishonourable state, and only fit for freedwomen, or those of low extraction.[3] A union which was forbidden by morality was termed *stuprum*, and was subject to various punishments according to the gravity of the offence.[4] Thus Ulpian writes: *Puto solas eas in concubinatu habere posse sine metu criminis, in quas stuprum non committatur.*[5] Lawful concubinage, however, was expressly recognised by the *lex Papia Poppæa*, and was therefore not subject to the penalties prescribed for the offence of *stuprum*.[6] The Emperor Aurelian was the first who tried to suppress it, and he prohibited free-born women from becoming concubines,[7] but his ordinance was not much respected, and it was again formally enacted by the Emperor Leo in the ninth century.[8]

Stuprum.

Marriage again was prohibited between persons who stood towards each other in a certain degree of relationship. Thus Justinian says: "Marriage cannot be con-

Marriage impossible between ascendants and decendants.

[1] Fr. 4, D. 25, 7.

[2] *Sentent.* 2, 20.

[3] Fr. 3, D. 25, 7. A freeborn woman who was kept as a concubine was not deemed worthy of the honourable title of a *materfamilias* or *matrona*. Fr. 41, s. 1, D. 23, 2; Fr. 13, D. 48, 5. But it was more reputable for a patron to live in concubinage with his freedwoman than to marry her, fr. 1, D. 25, 7, and her unfaithfulness was treated as adultery, fr. 13, D. 48, 5. I shall point out some other distinctions when I come to treat of the effects of marriage.

[4] Const. 4, C. 5, 5.

[5] Fr. 1, s. 1, D. 25, 7.

[6] Fr. 3, s. 1, *Ibid.*

[7] *Vopisc Aurel.* 49

[8] Novel. *Leo.* 91.

"tracted between persons standing to each other in the "relation of ascendant and descendant, as between a "father and daughter, a grandfather and his grand- "daughter, a mother and her son, a grandmother and her "grandson, *usque ad infinitum.*"[1] So strictly was this law enforced that even adoptive ascendants and descendants were prohibited from intermarriage, nor did the mere dissolution of the adoption remove the prohibition; so that an adoptive daughter or granddaughter could not be espoused even after emancipation.[2] But inasmuch as by emancipation the agnatic bond which bound an adoptive person to the family of his adoptive parents was immediately severed, there no longer remained any relationship between him and the collateral members of that family; and consequently there was no objection to his marriage with any of those persons after his or their emancipation had loosened the tie of civil relationship between them. Hence a marriage was lawful between a man and his sister by adoption, as soon as the adoption was dissolved by the emancipation of one or the other.[3] It was probably only from a sense of propriety that the Roman jurists prohibited the intermarriage of adoptive ascendants and descendants even after the adoption had been legally dissolved. The rule was different, however, in the case of blood relatives, for although a person might be removed from his natural family either by means of adoption into a new family, or by emancipation, the incapacity arising from ties of blood was still maintained in every instance.[4]

Prohibited

But although the Romans appear to have always recognised certain prohibited degrees in marriage, it would seem that they did not always observe them to the same extent. Thus in ancient times, according to the

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[1] 1 J. 1, 10; Gaius. *Comment.* 1, 59; Ulp. *Frag.* 5, s. 6.

[2] *Ibid.*

[3] Gaius. *Comment.* 1, 61; 2 J. 1, 10.

[4] It may be inseresting to notice in passing that the Hindu law also prohibits the marriage of an adopted son with any of his natural relatives within the prohibited degrees

speech of Vitellius when advocating the marriage of the emperor with his niece Agrippina, even second cousins were not allowed to intermarry, although in the reign of Claudius (49 A.D.) such marriages appear to have grown familiar.[1] Ulpian however asserts that the ancient law only precluded marriage between persons related *ex transverso gradu* as far as the fourth degree.[2] In his time the prohibition was confined to the third degree, but with this extraordinary exception that a man might marry the daughter of a brother though not of a sister.[3] This unmeaning distinction was established because the Emperor Claudius himself married his brother's daughter;[4] but the marriage of an uncle and niece was pronounced incestuous under the Christian emperors and was formally repressed. Thus Constantine (339 A.D.) enacted that a man who contracted such a marriage should be liable to capital punishment;[5] and Justinian also expressly prohibited marriage with a brother's or a sister's daughter, or even with a granddaughter; "for," he remarks, "when we may not marry "the daughter of any person, neither may we marry the "granddaughter."[6] But there was no impediment to the marriage of a man with the daughter of a woman whom his father had adopted. The law concerning the intermarriage of first cousins (*consobrini*) also underwent many alterations; and after having been prohibited by various emperors, was sanctioned by a Constitution of the year 405 A.D. of the Emperors Arcadius and Hono-

[1] *Annal.* 12, 6.

[2] *Frag.* tit. 5, 6.

[3] *Ibid.* The English law also confines the prohibition of marriage between collaterals to the third degree, and this irrespective of whether the parties are *affines* or *consanguinei.*

[4] Gaius. *Comment.* 1, 62; Suet. *Claud*, 26.

[5] *Cod. Theod.* lib. 3, tit. 12, Const. 1.

[6] 3 J. 1, 10.

rius,[1] and was finally confirmed by Justinian.[2] Among the other collateral blood-relatives (*consanguinei*) who were prohibited from intermarrying were—brothers and sisters, whether of the whole or half-blood;[3] and paternal or maternal aunts and grandaunts, whether natural or by adoption, because they were regarded in the light of ascendants (*loco parentium*).[4] Affinity (*affinitas*) also created a bar to marriage between certain persons. Thus a man could not marry his deceased wife's daughter,[5] nor the daughter of a divorced wife by a second husband,[6] nor his deceased son's wife,[7] nor his son's betrothed wife,[8] nor his wife's mother, nor his step-mother.[9] The marriage with a deceased brother's wife, or a deceased wife's sister, which is not referred to by Justinian in his Institutes, was prohibited by Constantine (355 A.D.)[10] and again by the Emperors Valentinian, Theodosius, and Arcadius.[11]

2. Puberty.

We now come to the next requisite for a lawful marriage under Roman law, namely, that the parties should have attained the age of puberty. In the ancient law no particular age was fixed at which puberty was to be assumed in the case of males. But as long as a distinctive dress was worn to indicate a capacity for business, the assumption of the *toga virilis*

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[1] Const. 19, C. 5, 4.

[2] 4 J. 1, 10; Fr. 3, D. 23, 2.

[3] Gaius. *Comment.* 1, 61; 2 J. 1, 10.

[4] *Ibid.* 5 J. 1, 10; Fr. 17, s. 2, D. 23, 2. Under the English law, which, as already pointed out in note 3, page 232, only extends the prohibition of intermarriage to collaterals within the third degree, the marriage of a man with his grand-aunt is not illegal.

[5] Gaius. *Comment.* 1, 63; 6 J. 1, 10.

[6] 9 J. 1, 10.

[7] Gaius. *Comment.* 1, 63; 6 J. 1, 10.

[8] 9 J. 1, 10.

[9] Gaius. *Comment.* 1, 63; 7 J. 1, 10.

[10] Const. 2, *Cod. Theod.* lib. III. tit. 12.

[11] Const. 5, C. 5, 5.

in the annual feast of the *Liberalia*, which was held on the 17th of March, afforded sufficient evidence of puberty ;[1] although the exact age at which the purple hemmed *prætexta*, by which as Quintilian observes, "the helplessness of childhood was rendered sacred and venerable," might be put aside for the *toga virilis*, was not definitely settled, and appears to have depended on the will of each head of a family. In the early days of the Republic it would seem that the *toga* was usually assumed on the completion of the seventeenth year,[2] but at a later period, and in the reigns of Augustus and Nero, on the completion of the fifteenth year.[3] Moreover until Justinian finally decided that puberty in the case of males was to be assumed at the age of fourteen,[4] a great controversy was carried on by the followers of the rival schools of the Sabinians (or Cassians), and the Proculeians : the former (of which Gaius was a pupil) contending that the question of puberty depended on physical development, that is, on capacity of generation, while the Proculeians held that it was to be exclusively measured by age, which they fixed at fourteen years.[5] Priscus, another jurist, was of opinion that both age as well as physical capacity, should be considered.[6] In the case of females, however, it seems

[1] Ovid. *Fast.* 3, 771, 788.

[2] Livy. lib. 2, 57.

[3] Augustus himself assumed the *toga virilis* on the completion of his fifteenth year (*Suet.* 8), and Nero at 14, (*Ibid*, 5-7), while Caligula did not do so till his twentieth year, according to some readings, or his nineteenth or twenty-first according to others (*Ibid*, 10). Varro again divides the age of man into five periods. Up to the age of 15, he is only a *puer*, from 15 to 30 an *adolescens*, from 30 to 45 a *juvenis*, from 45 to 60, *seniores*, and above that age, *senex*. Censorin. 14.

[4] Const. 3, C. 5, 60 ; pr. J. 1, 22.

[5] Gaius. *Comment.* 1, 196 ; Ulp. *Frag.* tit. 11, s. 28.

[6] Ulp. *Frag.* 11, s. 28. Pomponius in his fragment on the origin of the law mentions two jurists of this name, one named Priscus

to have been generally recognised that puberty was to be assumed at the age of twelve years, because it was considered indecent to resort to an inspection of the body ;[1] and this is the age required by the *lex Papia Poppœa*,[2] as well as under the legislation of Justinian.[3]

The third and last requisite was consent, which is to be understood not only of the parties themselves, but also of the persons in whose power they were. Thus Paulus says: *Nuptiæ consistere non possunt nisi consentiant omnes: idest qui cœunt, quorumque in potestate sunt.*[4] Justinian also enforces the same rule in his Institutes, and adds "that both natural reason and the law require this consent; so much so that it ought to precede the marriage."[5] The Emperor is here speaking of the consent of parents, but as a father's consent was only necessary while he possessed *patria potestas*, for an emancipated son could marry without his father's consent ;[9] and as a mother's consent was not required except in the single instance of the marriage of a daughter under twenty-five, whose father was dead, and that only under a special constitution of the Emperors Valens and Valentinan ;[7] the provisions of the Roman law on this subject must be referred to the principles of the positive or civil (*civilis ratio*), rather than to those of natural law (*naturalis ratio*). Consent moreover in order to be valid was required to be the

Consent.

Javolenus, and the other Priscus Neratius ; Fr. 2, s. 47, D. 1, 2. It is not clear to which of them Ulpian refers, although Gravinus takes it for granted that it is the former. *Orig. Juris Civilis*, 38.

[1] Pr. J. 1, 22 ; Fr. 4, D. 23, 2 ; Fr. 32, s. 27, D. 24, 1 ; Fr. 11, s. 3-4, D. 27, 6.

[2] *Dion. Cass.* lib. 54. 16.

[3] Pr. J. 1, 22.

[4] Fr. 2, D. 23, 2.

[5] Pr. J. 1, 10.

[6] Fr. 25, D. 23, 2.

[7] Const. 18, 20, C. 5, 4

voluntary and free act of the parties, and consequently a father could not compel a son or a daughter to marry against his or her will, as Terentius Clemens distinctly asserts in his treatise on the *lex Julia et Papia Poppæa* :— *Non cogitur filiusfamilias uxorem ducere.*[1] Indeed even in the case of a freed woman, the law would not allow a patron to marry her against her will ;[2] except perhaps, as in the instance suggested by Ulpian, where she obtained her freedom on the express condition of marrying her patron.[3] If, however, a marriage was once formally contracted, without any manifest objection on the part of the contracting parties, it could not afterwards be asserted that the consent was not voluntary. The law, in fact, very wisely refused to listen to such a plea *ex post facto,* because a man could not be compelled to go through a ceremony such as marriage if he resolutely persisted in withholding his consent; and having once given his consent and allowed the rite to be finally concluded, it was just that he should be bound by it : for if the law had once permitted such an excuse to be urged as a valid ground for annulling a solemn tie like marriage, it would have given rise to endless disputes and encouraged both fraud and falsehood. Accordingly Celsus asserts, *si patre cogente ducit uxorem, quam non duceret si sui arbitrii esset,* CONTRAXIT TAMEN MATRIMONIUM : *quod inter invitos non contrahitur : maluisse hoc videtur.*[4] But no consent could be given by a person who was not capable of forming a rational judgment as to its effect upon his interests ; and consequently a mad man could not contract marriage, because he could not give a rational consent. Subsequent insanity, however, did not invalidate a marriage

[1] Fr. 21, D. 23, 2.
[2] Fr. 28, *Ibid.*
[3] Fr. 29, *Ibid.*
[4] Fr. 22, *Ibid.*

legally contracted at the time: *Furor contrahi matrimonium non sinit,* says Paulus, *quia consensu opus est; sed rectè contractum non impedit.*[1] Indeed this incapacity on the part of a madman to give a rational consent gave rise to a controversy whether the daughter of a madman could be married, or his son marry, a question upon which opinions appear to have been divided, so far at least as the son was concerned. Justinian, however, in a constitution inserted in the Code, the principles of which are embodied in the Institutes, decides that the son as well as the daughter might marry without the intervention of the father, if he was mentally incapable of giving his consent, by submitting the proposed marriage as well as the amount of the wife's dowry, for the approval, at Constantinople, of the *Præfectus urbis,* and in the provinces, of the *præses* or bishop, in the presence of the curator of the madman and his principal relations.[2] The doubt which originally existed in the case of a son probably arose in consequence of the principle enforced by the civil law, that no one could have a *suus heres* forced on him against his will;[3] for of course the son's children would become members of his father's family, and might eventually become his heirs; but this objection could not apply to the daughter, because her children would be members of her husband's and not of her father's family, and consequently she could not increase the number of the latter. It was also in accordance with the principle here referred to, that the law required a son, although in the power of his grandfather, to obtain his father's as well as his grandfather's consent to his marriage, though in the case of a daughter the consent

[1] Fr. 16, s. 2, D. 23, 2.
[2] Const. 25, C. 5, 4; pr. J. 1, 10.
[3] 7 J. 1, 11.

of the grandfather was sufficient.[1] Moreover the consent of the *paterfamilias*, as Justinian points out in the passage above quoted,[2] was ordinarily required to precede the marriage, and no subsequent consent could ratify it with retrospective effect: just as in the case where two persons were married before the age of puberty, the law only recognised the validity of the marriage from the time that the prescribed age was attained.[3] But it was not necessary that the father should expressly give his consent: it was sufficient, if, knowing of the fact of marriage, he did not assert his right of opposing it.[4] The consent of the father might even be dispensed with, or he might be compelled to give it, under certain circumstances:—

1. If the father systematically refused to accord his consent to an unobjectionable marriage, a Constitution of the Emperors Severus and Antoninus empowered the pro-consuls or presidents in the provinces, to compel him to sanction the marriage and to make a settlement upon his child in proportion to his means.[5]

2. If a *paterfamilias* were taken prisoner by the enemy, we have already seen that during his detention his rights in the family and as a citizen were held in abeyance, although if he subsequently obtained his release he was restored to his former position, just as if he had never lost his freedom. The jurists accordingly lay down the principle that during the period of the father's captivity the children could contract a valid marriage, which would not be affected by the want of the father's consent, or even by his subsequent

[1] Fr. 16, s. 1, D. 23, 2.
[2] Pr. J. 1, 10.
[3] Fr. 4, D. 23, 2.
[4] Const. 2 and 5, C. 5, 4.
[5] Fr. 19, D. 23, 2.

disapproval. *Non mirum,* adds the jurist Tryphonius, *quia illius temporis conditio necessitasque faciebat, et publica nuptiarum utilitas exigebat.*[1] But Ulpian, Paulus, and Julianus subjoin the condition that the father's absence must have extended to three years at the time of the marriage.[2]

3. If the father was a *furiosus,* or person of an insane mind, the son or daughter could marry *sine patris interventu,* under the conditions already mentioned.[3]

Effects marriage.

The effects of a *justum matrimonium* were practically the same whether it was solemnised by the form of *confarreatio, co-emptio,* or *usus.* In each of these forms the wife immediately passed into the power of her husband (*in manum conveniebat*).[4] She became a *materfamilias* and occupied the position of a daughter in her husband's family.[5] "There are two kinds of wives," says Cicero, "the one are called *matresfamilias* who pass into the "*manus* of the husband, and the others are simply "*uxores.*"[6] Bœthius upon this remarks that the title of *materfamilias* was strictly speaking restricted to a wife who became subject to *manus* by *co-emptio* (*quæ autem in manum per co-emptionem convenerant, hæ matresfamilias vocabantur*); but Aulus Gellius simply applies the term to a wife in the power of her husband. "Com- "petent interpreters," he remarks, "of the ancient "language say that *materfamilias* was a title only given "to a wife in the hand and mancipation of her husband, or "of the person who held her husband in hand and manci-

[1] Fr. 12, s. 3, D. 49, 15.
[2] Fr. 9, s. 1; Fr. 10; Fr. 11, D. 23, 2.
[3] Const. 25, C. 5, 4; pr. J. 1, 10; *ante,* page 191.
[4] Gaius. *Comment.* 1, 110.
[5] *Ibid.* 115 b.
[6] *Topic.* 4.

"pation, because she was not only a wife, but a member "of the family of the husband, having acquired therein "the status of a self-successor (*in sui heredis locum* Manus. "*venisset.*")[1] The *manus*, or marital power of a husband, closely resembled the *potestas* of a *paterfamilias*. Thus in ancient times the husband himself exercised magisterial jurisdiction in all matters affecting the conduct of his wife, and in his capacity of judge, he possessed the power of life and death over her.[2] He also acquired the whole of the wife's estate.[3] But under the empire most marriages were contracted without the wife passing into the power of her husband, and even when Gaius wrote the only mode in which *manus* was acquired in the case of ordinary marriages was *per co-emptionem*; for of the other ancient modes, that of *usus* had become partly obsolete and partly abolished,[4] and *confarreatio* was only practised in the case of the *flamines majores*, such as the *Diales*, *Martiales*, and

[1] *Noct. Attic.* 18, 6.

[2] Tacitus. *Annal.* 13, 32; Livy, 39, 18.

[3] Gaius. *Comment.* 2, 98. But see *Ante*, page 10, as to the limitations introduced by the later emperors on the husband's power over the *fundus dotalis*. The *lex Julia de adulteriis et de fundo dotali*, passed in the reign of Augustus, was the first law that restricted the husband's power over the immoveable property comprised in the s, which was contributed by the wife for the expenses of the marriage.

donatio ante nuptias was an equivalent gift from the husband to the wife, and could not be alienated by the husband even with the wife's consent. It is first mentioned in a Constitution of the Emperors Theodosius and Valentinian (449 A.D.), and is there referred to as an existing law (Const. 8, s. 4, C. 5, 17). By a constitution of the Emperors Leo and Anthemius (468 A.D.), the wife had, if survivor, an equal portion of the *donatio* with what her husband had of the *dos*. (Const. 9, C. 5, 14); but Justinian substituted an equality of *value* for an equality of *proportion* (Novel. 97, cap. 1). Justinian also changed the term *donatio ante nuptias* into *donatio propter nuptiis*, and allowed such donations to be made before as well as after marriage, 3 J. 2, 7.

[4] Gaius. *Comment*, 1, 111.

Quirinales.[1] In Justinian's time the wife never passed into the husband's power, but continued a member of her father's family. Hence we no longer find any mention of *manus* in his legislation. The other effects attached to a *justum matrimonium* were, that the wife ceased to have the domestic gods and domestic worship of her father's family, and participated instead in the sacred rites of the husband's family;[2] if *sui juris* she suffered a *capitis deminutio*, and was released from all personal liability for debts previously contracted, although a *utilis actio* was given to the creditors against any property which the wife had brought to her husband;[3] she acquired the domicile of her husband,[4] and shared in his honours and dignities;[5] the children born during the existence of the marriage, but not before the hundred and eighty-second day, were presumed to be legitimate in the absence of any express proof to the contrary (*pater est quem nuptiæ demonstrant*),[6] and so was a child who was born within ten months after the marriage was dissolved;[7]

[1] Gaius. *Comment.* 1, 112.

[2] Diony. Hal. II. 25; Fr. 1, D. 23, 2.

[3] Ulp. *Frag.* 11, 13; Gaius, *Comment.* 3, 84.

[4] Fr. 5, D. 23, 2.

[5] Fr. 1, s. 1; Fr. 8, D. 1, 9; Const. 9, C. 10, 39.

[6] Fr. 6, D. 1, 6. With regard to the establishment of parentage the Muhammadan law while generally favouring legitimacy, holds six months to be shortest and two years the longest possible period of pregnancy. Hamilton's *Hedayah*, book IV. ch. XIII. The English law also favours the presumption of legitimacy (*præsumitur pro legitimatione*) 5, Reps. 98. Nor would this presumption be negatived on the ground that the parents were living apart under a voluntary agreement of separation, because the law would still suppose access. *Salk.* 123.

[7] Fr. 3, s. 11, D. 38, 16. The Muhammadan law recognises the legitimacy of a child born within two years of the divorce or death of the husband. Hamilton's *Hedayah, Ibid.* The English law however does not prescribe any exact period as the maximum limit of gestation

and lastly, the children acquired the *status*, and were subject to the *potestas* of the father.[1]

None of the above effects attached to prohibited unions.

The above consequences were only attached to a lawful marriage. If persons united themselves in contravention of the rules laid down by the civil law, there was no marriage, no *dos*, or marriage portion, nor did the children fall into the power of the father. No claim moreover could be made on the dissolution of such a connexion for a marriage portion, and the guilty parties were liable to further penalties set forth in the imperial constitutions.[2]

Dissolution of marriage.

Marriage might be dissolved in four ways:—By death, loss of liberty, captivity, or divorce.[3] The loss of citizenship did not necessarily involve a dissolution of the marriage tie, for the parties might still agree to maintain the marriage in another State. This is expressly asserted in a Constitution of the Emperor Alexander (230 A.D.),[4] and is in accordance with the old law as expounded by Marcellus, in whose opinion Ulpian concurs.[5] But as none but freemen could contract a *justum matrimonium*, so the enjoyment of freedom was an essential condition for the maintenance of the marriage state. Thus in the anti-Justinian law a freeman who was sentenced to work in

although forty-weeks seem to be considered as the *ultimum tempus pariendi* by the old writers. C.L. 1236; Britton, c. 66, p. 166.

[1] Fr. 19, D. 1, 5; Fr. 3, D. 1, 6. Children born of parents who were married by *confarreatio* were styled *patrimi et matrimi*, and enjoyed many religious privileges, Tacit. *Hist.* IV. 53. At least this is the opinion of Servius (*ad Virg. Georg.* 31), which is confirmed by Heineccius (*Antiq. Roman.* lib. 1, tit. X. s. 5), and by most modern writers, although Festus explains the expression as referring to children whose parents were both alive. Sub. *Flamin*, p. 289, *Patrimus*. p. 358.

[2] Gaius. *Comment.* 1, 64; 12 J. 1. 10; Fr. 23, D. 1, 5; Fr. 52, D. 23, 2.

[3] Fr. 1, D. 24, 2.

[4] Const. 1, C. 5, 17.

[5] Fr. 5, s. 1, D. 48, 20.

the mines or to contend with wild beasts, became a slave of punishment, and by thus losing his freedom his marriage was instantly dissolved. Justinian however abrogated the old law and enacted that no one who was originally free (*ab initio bene natorum*) should be sentenced to slavery by way of punishment.[1] Captivity, like loss of freedom, originally involved a dissolution of marriage; but Justinian at first ordained that it was only when the fate of the captive remained doubtful at the end of five years that the wife or husband, as the case might be, could contract a second marriage,[2] and by a later Novel he required some proof of the death of the absent spouse before a second marriage could be legally contracted.[3]

Divorce permitted by Romulus.

The privilege of putting an end to a marriage by means of divorce, existed in all probability from the very foundation of Rome; for Plutarch informs us that Romulus permitted a husband to repudiate his wife for three causes—adultery, preparing poisons, and the falsification of keys. We may also conclude from a passage of Cicero that it was permitted by the law of the Twelve Tables,[4] but what were the exact provisions of that law on the subject, except in allowing a reciprocal right of repudiation to the wife which was not available under the legislation of Romulus, we have no means of ascertaining. In the earliest times the law of divorce was probably but seldom if ever enforced, and this is perhaps all that we can safely conclude from the traditional story related by Valerius Maximus,[5] Aulus Gellius,[6] and others, that Spurius Carvilius Ruga was the first Roman who

[1] Novel. 22, cap. 8.
[2] Novel. 22, cap. 7.
[3] Novel. 117, cap. 11.
[4] *Phill.* 2, 28; *De Orat.* 1, 40.
[5] Lib. II. c. 1, s. 4, cap. 10.
[6] *Noct. Attic.* 4, 3; 17, 21.

divorced his wife. This event is said to have occurred in the year of Rome 520, and the divorce was made on the ground of sterility, with the consent of the wife's family, and under the authority of the censors, who required the truth of Ruga's assertion to be verified by oath. The sanction of the censors was no doubt solicited by Ruga to avoid the forfeiture of his property, half to the goddess Ceres and the other half to the wife, ordained by Romulus as a penalty if a husband divorced his wife for causes other than those expressly mentioned. Towards the close of the Republic the dissolution of marriage by means of divorce became exceedingly common, so much so that even the most illustrious women reckoned their years, not by the number of Consuls, but of husbands,[1] and Juvenal even mentions the case of a woman who had eight husbands in five years.[2]

Sic fiunt octo mariti
Quinque per auctumnos.

Thus the principle elaborated in the later legislation of Justinian — *quid quid ligatur solubile est*[3] — was already well established in practice, so that simple volition was held to be quite sufficient to justify the repudiation of a husband or wife,[4] subject, however, to a pecuniary penalty by the party through whose fault the divorce had originated.[5] It was not, moreover, until the *lex Julia de adulteriis* introduced the necessity, that any particular form was used in pronouncing a divorce;[6] but by virtue of that law no divorce was valid, except in the case of a freedman or a son or grandson who had been manumitted, unless it was made in the presence

[1] Seneca. *De benef.* lib. 3, C. 16.
[2] *Sat.* 6, v. 229, *et seq.*
[3] Novel. 22, C. 3.
[4] Plut. *Æm. Paul.* 5; *Val. Maxi.* 6, 3, 10-12; Cicero, *ad Fam* 8, 7; *Ib, pro Cluent.* 5; Seneca, *de Hen.* 3, 6.
[5] Cic. *Top.* 4; Fr. 22, s. 7, D. 24, 3; Fr. 8, D. 49, 15.
[6] Fr. 1, s. 1, D. 38, 11.

of seven witnesses, who were required to be Roman citizens of full age.[1] This law in conjunction with the *lex Papia Poppæa* also rendered it impossible for a *liberta* to divorce her patron against his will, which was an exception to the general rule of the ancient law, whereby either of the parties could put an end to the marriage by the simple act of volition.[2] If both parties wished for a divorce it was said to be *bona gratia,* and might be effected without the allegation of any specific grounds, because, says Justinian, the parties are free to bind themselves by their own agreements, and no rules need be fixed to meet such cases.[3] Justinian, however, subsequently enacted that marriage could not be dissolved by the mere consent of the parties,[4] but this prohibition was again rescinded by a later Novel which is attributed to Justinian's successor.[5] If only one of the parties wished for the divorce it was called *malâ gratia,* and was only allowed on certain grounds, which are specified for the first time in a constitution of the Emperors Theodosius and Valentinian (449 A.D.).[6] Justinian in one of his later Novels

Bona gratia, or divorce by mutual consent.

Valid grounds for effecting divorce malâ gratia, or indignationem.

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[1] Fr. 9, D. 24, 2.

[2] Fr. 10, D. 24, 2; Fr. 10, *Ibid.*

[3] Novel. 22, cap. 4.

[4] Novel. 117, cap. 10; 134, 11.

[5] Novel. 140.

[6] Const. 8, s. 1-3, C. 5, 17. In ancient times husbands divorced their wives for sterility (Fr. 60, s. 1, D. 24, 1), old age or sickness, (Fr. 62, *Ibid*), incontinency (Plutarch, *in vit. Caton. major.* C. 24, *et Pomp,* 53; Sueton, *vita Claud.* C. 7-26), and in fact whenever it suited them to do so. Thus Cæsar divorced his wife Pompeia on mere suspicion, observing that his wife should be even above the taint of a calumnious whisper (*Sueton. in vit.* c. 74; Plutarch, *in vit.* Cicero), and even the model Cicero felt no compunction in divorcing Terentia after thirty years of married life, ostensibly because she did not show sufficient regard for his comforts and involved him in debt, but really to enable him to marry a beautiful heiress (*Publilia*), whom he also shortly afterwards put away because she did not exhibit, as he thought, sufficient grief

enumerates the following as valid grounds for effecting a divorce:

1. *Against a husband.* Conspiracy against the state, or concealment of conspiracy; attempting the wife's life, or neglecting to protect her against the attacks of others; attempting to prostitute her to others; falsely accusing her of adultery; or keeping up an improper intimacy with other women, notwithstanding the twice repeated remonstrance on the part of the wife or her friends.[1]

2. *Against a wife.* Conspiracy against the state without the husband's knowledge; adultery; either attempting her husband's life herself, or concealing the murderous intentions of others; associating with other men, or bathing with them; taking up her residence elsewhere without the husband's permission, an exception being made if she only went to the house of her parents; attending spectacles at the circus or theatre without her husband's knowledge or against his wish.[2]

Distinction between repudium and divortium.

Upon any of the above grounds the husband or wife, as the case might be, could repudiate the guilty party by sending a message (*repudium mittere*) through a freedman of the family, to be delivered, as above stated, in the presence of seven witnesses, all Roman citizens above the age of puberty.[3] The message was required to be in a particular formula, as *Tuas res tibi habeto*: "Take away thy property": or *Tuas res tibi ageto.* "Manage thy

at the death of his daughter Tullia (Plutarch, *In vit.* 41). Others again openly divorced their wives to make room for some more favoured mistress:—Thus Juvenal writes:—

———————, *Exi*
Ocius, et propera: sicco venit altera naso. Sat. VI. v. 147.

[1] Novel. 117, cap. 9
[2] Novel. 117, cap 8,
[3] *Ibid*; Const. 8, C. 5, 17.

property thyself."[1] "The actress," says Cicero, "was "ordered to pack, deprived of the keys, turned out of the "house."[2] Strictly speaking the word *repudium* was anciently applied, as we learn from Modestinus, to the repudiation of an antenuptial contract, while *divortium* was the proper term for the dissolution of a marriage actually contracted;[3] but in course of time the former term came to signify the act of repudiation by *one* of the married parties of a marriage duly constituted, while the latter expressed the dissolution of a marriage *ex consensu*. In neither case was the intervention of a judge necessary, and a divorce which was pronounced, or a message of repudiation which was sent, in a fit of passion with no real or fixed intention of permanently dissolving the marriage, might be cancelled if the parties agreed to re-unite within a short time afterwards, which was allowed as a *locus pœnitentiæ*.[4] Justinian moreover enacted that the party who sent the repudiation without just grounds for doing so, should be compelled to retire to a cloister for the rest of his or her life, and forfeit the whole of his or her property, of which, if there were no children, a third part was to be given to his or her ascendants, and two-thirds to the cloister: if there were neither descendants nor ascendants, the whole of the property went to the cloister. The repudiating party was allowed, however, to revoke the repudiation at any time before entering a cloister; and if the other party then refused to re-marry, the above punishment fell upon him or her, as the case might be.[5] Again by the ancient law a father who possessed *patria potestas* over either of the married parties,

[1] Fr. 2, s. 1, D. 24, 2.
[2] *Phil.* 2, 28.
[3] Fr. 101, s. 1, D. 50, 16; Fr. 191, *Ibid.*
[4] Fr. 3, D. 24, 2.
[5] Novel. 134, cap. 11.

could send a message of repudiation to the other spouse in the name and even in opposition to the wishes of his child; but this power was first restrained by the Emperors Antoninus Pius and Marcus Aurelius,[1] and subsequently by a Constitution of the Emperors Diocletian and Maximian (293 A.D.), which decided that a father could only exercise this power for very grave reasons (*magna et justa causa interveniente*).[2] If a father detained his married daughter against her wish, the husband could institute a process to compel her production.[3]

Mode of dissolving confarreated marriage.

In the case of a confarreated marriage, dissolution was effected by means of *diffarreatio*, a religious ceremony which probably required the sanction of the Pontifex, and was one which could be very rarely performed owing to the many difficulties and great expense attending it.[4] Indeed, according to Festus, whose opinion is supported by Hermogenianus, the marriage of a *Flaminica*, or wife of the Flamen, could not be dissolved by any means: *Flaminicæ divortium nullo modo facere licebit.*

Marriage per co-emptionem

The mode of dissolving a marriage contracted *per co-emptionem* was by *remancipatio*,[5] in accordance with the general principle that an obligation was to be discharged with the same formalities by which it was formed.[6] Unfortunately the text of Gaius concerning this mode of dissolving marriage has come down to us in an illegible state, but according to Gœschen and Huschke, the commentator meant to

[1] Paul. *Sentent.* lib. 5, tit. 6, s. 15; Fr. 32, s. 19, D. 24, 1.

[2] Const. 5, C. 5, 17.

[3] Fr. 2, D. 43, 30; Const. 11, C. 5, 4.

[4] Plutarch. *Quæst Roman*; Heineccius. *Antiq. Rom.* lib. 1, tit. X. s. 8.

[5] Gaius. *Comment.* 1, 137.

[6] *Nihil tam naturale est*, says Ulpian, *quam eo genere quidque dissolvere, quo colligatum est: ideo verborum obligatio verbis tollitur: nudi consensus obligatio contrario consensu dissolvitur.* Fr. 35, D. 50, 17.

affirm that a wife who came into the *manus* of her husband by *co-emptio* could no more compel him to remancipate her than a daughter could compel a father. But if the husband sent her a message of repudiation, the wife could then force him to dismiss her from *manus*, just as if she had never been married to him.[1] Mühlenbruch following Wächter, is of opinion that marriages contracted by *usus* were also dissolved by *remancipatio*, although Heineccius thinks that the wife could free herself from the obligations of marriage by merely absenting herself for three nights in the year.[2] The *remancipatio* was made to some friend or relation of the wife, who then manumitted her, or the first marriage was dissolved by a *co-emptio* by another husband; and it was probably in this form that Cato transferred his wife Marcia, who was then with child, to Hortensius,[3] and Tiberius Nero his wife Livia, who was also pregnant at the time, to Augustus, as if, says Dion Cassius, "he had been her father and not "her husband."[4]

Marriage by usus.

As I have already spoken[5] of the provisions of the *lex Julia de Maritandis* (A.D. 4) *et Papia Poppæa* (A.D. 9), otherwise known as the *leges caducariæ*, concerning the penalties attached to celibacy and childlessness, it is only necessary to repeat here that these penalties were abolished by a Constitution of Constantine of the year 339 A.D.,[6] and that the *leges caducariæ* themselves were formally and finally abrogated by Justinian. The Emperor Augustus, by whom the above laws were introduced,

Abolition of caducary laws concerning cœlibes and orbi.

[1] Gaius. *Comment.* 1, 137.

[2] *Antiq. Roman. App.* lib. 1, cap. 1, s. 47, and Mühlenbruch's note thereto.

[3] Plutarch. *Cat. Min.* c. 25, 52; *App. de Bell. Civ.* 2, 99.

[4] Tacitus. *Annal.* 5, 1; Dion. Cass. 48, 44.

[5] *Ante.* page 20.

[6] Const. 1, C. 8, 58.

had inherited from Julius Cæsar[1] a taste for encouraging polypaidy, and he considered it incumbent on a good citizen to marry and raise up a family. But Tacitus in more than one passage suggests, what is not at all unlikely, that the emperor's aim was not only to punish celibacy, but to augment the wealth of the empire by increasing the number of his subjects,[2] and also to legalise a system of domestic visitation on the part of the officers of the state who acted as official spies. "To excite and "animate the diligence of those new officers," says Tacitus, "the *lex Papia Poppæa* held forth rewards. By "that law, the people, under the fiction of universal "parent, were declared heirs to the vacant possessions of "such as lived in celibacy, regardless of the privileges "annexed to the paternal character. To enforce this "regulation informers were encouraged."[3]

Re-marriage. As soon as an existing marriage was legally dissolved, the man was at liberty to re-marry,[4] but the woman was obliged, under severe penalties, to keep single for a year.[5]

Annus luctus. This was called the *annus luctus*, and like the old Roman year, was at first limited to ten months, or 304 days. This period of widowhood continued unchanged even after Numa had increased the Roman Calendar to twelve months or 355 days, and it was only assimilated to the Julian year by a constitution of the Emperors Gratian, Valentinian and Theodosius published in the year 381, A.D.[6]

[1] Cæsar, while he held the consulate of Bibulos, divided the province of Campania among citizens who were fathers of three or more children. Sueton. 20; *App. de Bell. Civ.* 2, 10.

[2] "The policy," says Tacitus, "was to enforce, by additional sanctions, the penalties of celibacy and thereby increase the revenue." *Annal.* lib. 3, 25

[3] *Ibid*, 28.

[4] Fr. 9, D. 3, 2.

[5] Fr. 1, *Ibid.*

[6] Const. 2, C. 5, 9.

In thus regulating the period of widowhood the primary object of the Roman jurists was not to enforce respect for the memory of the deceased husband, but to avoid the uncertainty of the parentage of the issue subsequently born : *propter turbatio sanguinis* as Ulpian says.[1] This is proved from the fact that the prohibition existed even when the widow was not required to put on her weeds, as when the husband was condemed to death for a heinous crime, or when he committed suicide, *non tedio vitæ, sed mala conscientia* ;[2] and also from the fact that the prohibition was immediately removed on the birth of a child, although the prescribed period had not expired.[3]

By a special dispensation also from the Emperor, a widow could re-marry before the ordinary period.[4] The old jurists it is to be observed only mention the *annus luctus* in connection with the dissolution of marriage by death of the husband, but considering the object for which that period of widowhood was established, there seems to be no reason why the same rule should not have applied in the case where the first marriage was dissolved by divorce or repudiation. Indeed, second marriages although permitted by the civil law were not approved of in the case of women, and those who forbore to re-marry were particularly respected. They alone for instance could originally take part in the solemn sacrifices in the Temple of Chastity, which stood in the Cattle Market near the round temple of Hercules.[5]

[1] Fr. 11, s. 2, D. 3, 2. The English law has no similar provision, and accordingly if a widow marries soon after her husband's death, and a child is born within such a time, as that by the course of nature it might have been the child of either husband ; the child is at liberty on reaching years of discretion, to claim which of the fathers he pleases, for he is said to be more than ordinarily legitimate! Co. Litt. 8.

[2] *Ibid*, s. 3.

[3] *Ibid*, s. 2.

[4] Fr. 10, D. 3, 2.

[5] Livy. lib. 10, cap. 23. See also Novel 127, cap. 3. The Hindu

Various regulations were passed by the later Emperors on this subject. Thus Constantine enacted (331 A.D.) that a woman who repudiated her husband without grave reasons should be deported to an island, a sentence which would prevent her being able to re-marry; and a husband who unjustly divorced his wife was bound to restore the *dos* and to abstain from re-marriage, on pain of forfeiting the *dos* of his second wife to the divorced one.[1] In a later Constitution of the year 421 the Emperors Honorius, Theodosius and Constantius, prohibited a wife who divorced her husband upon insufficient grounds to re-marry, but if she had grave reasons (*graves causas*) she was permitted to contract a second marriage at the end of five years. In the case of a husband repudiating his wife without just grounds, that is for simple disagreements, and not for any gross misconduct on the part of the wife, the same Constitution enacted that he was to be condemned to perpetual celibacy, while the wife was permitted to re-marry at the end of a year.[2] The Emperors Theodosius and Valentinian subsequently enacted (449 A.D.) that if a woman was justified in divorcing her first husband she could contract a second marriage after one year, in order that there might be no uncertainty as to her offspring (*ne quis de prole dubitet*);[3] and Anastasius, (497 A.D.) extended the operation of this Constitution to

law also reprobates the re-marriage of widows, and deprives them of all property belonging to their deceased husbands to which they may have previously succeeded. The Indian legislature, however, by Act XV. of 1856, has so far abolished the strict doctrines of the Hindu law as to legalise the re-marriage of widows and to pronounce the issue of a second marriage legitimate; but forfeiture of all rights and interests in the deceased husband's property is still the consequence entailed by a Hindu widow who takes to herself a second lord.

[1] Const. 1, *Cod. Theod.* 3, 16.

[2] Const. 2, *Ibid.*

[3] Const. 8, s. 4, C. 5, 17.

cases where the former marriage was dissolved *communi consensu.*[1] Justinian also requires widowhood to be maintained for one year, subject to the penalty of infamy in case this rule was infringed, and of being incapable of inheriting under the testament of a stranger, (either by way of a legacy, a *donatio mortis causa,* or as heir), as well as of succeeding to blood relations beyond the third degree, or of bringing to her second husband more than one-third of her property.[2]

[1] Const. 9, *Ibid.*
[2] Novel. 22, cap. 22.

CHAPTER VIII.

ADOPTION *and* ARROGATION.

Introduction of adoption amongst the Romans.

BEFORE the notion of grouping persons together for political purposes according to local propinquity, was understood and acted upon, society was naturally divided into independent family circles or groups; each member of such a group traced his lineage to a common ancestor, and when in course of time the original members began to die away, and it became necessary to devise some means of extraneous augmentation, the theory of a common descent was still maintained, and the new comers *feigned* to be descended from a common parent. In order moreover to cement and strengthen this bond of union, annual gatherings were celebrated in which the ties of brotherhood were formally acknowledged and consecrated by common sacrifices. The fiction then by which the ranks of the old archaic families were recruited was no other than that of adoption; and as it afforded a simple means of perpetuating the name and the due performance of the *sacra privata*, or religious family rites, to which all heathen nations attached the greatest importance, it soon became a highly favoured institution. It was one for instance of

which the Hindu legislator readily availed himself, and which has continued to exercise a considerable influence in the Hindu system of family rights down to the present time. It was one moreover which the Greeks were not slow to imitate; and lastly, it was one which was in great vogue amongst the Romans, a circumstance which is susceptible of easy explanation. In the first place their laws required that the worship of the domestic gods should be unceasingly preserved: *sacra privata perpetuo manento* is the rule enforced by the law of the Twelve Tables. Hence Cicero strongly condemns Claudius for allowing the sacred rites of his *gens* to perish by giving himself in arrogation to a plebian.[1] Accordingly when a man had no children of his own he adopted a stranger, in order that he might transmit to posterity the name and sacred rites of the family.[2] In the second place it was resorted to with a view to escape, on the one hand, the penalties of childlessness, and on the other, to profit by the advantages held out even in the days of the republic to those who had many children:[3] a practice which at length became so notorious that Publius Scipio, the Censor, in a speech which is mentioned by Aulus Gellius, publicly reprehended it.[4] This abuse continued to exist under the early emperors, for the *lex Papia Poppæa* having in the reign of Augustus secured special privileges and immunities from public burdens to those who had three or more children, adoption was speedily resorted to by those who had not the requisite number in order to evade the provisions of the law. To redress this abuse a *Senatus-consultum* was passed by which it was ordained that no simulated adoption should avail in respect to public burdens (*ne simulata adoptio in ulla parte muneris publici*

[1] *Pro Domo.* 12-13.
[2] Brisson. *de verb. signif.* p. 1814.
[3] Dion. Cass. 56, 10.
[4] *Noct. Attic.* lib. 5, cap. 19.

),[1] and hence Ulpian writes that adopted sons are not reckoned in the number of children who serve to relieve their parents from the discharge of such duties.[2] A third reason was that it enabled persons to become eligible for certain offices to which they could not otherwise aspire. Thus if a patrician wished to offer himself as a candidate for the tribuneship, an office which was restricted to members of the *plebs*, he first got himself adopted by a plebian, by whom he was immediately afterwards emancipated. It was by this means that Claudius contrived to become a tribune of the people, and his motives are vehemently exposed by Cicero in his celebrated speech for his House, which was pulled down by Claudius immediately after he had carried his decree of banishment against the great orator, and the area on which it stood was consecrated to the service of religion in the hope of making the loss irretrievable.[3] Dolabella adopted the same expedient for a similar reason.[4]

Two kinds of adoption.

There were two kinds of adoption included in the generic term *adoptio*, of which the first, or *adoptio* properly so called, related to *filii familias*, or persons *alieni juris*; while the other, which was known as *adrogatio*, appertained to those who were *sui juris*.[5] These forms not only differed from each other with respect to the ceremonies which were required to be observed, but also in the effects which they produced. Commencing with *adrogatio*, which was the more ancient of the two forms, the term was derived as Aulus Gellius observes, from the interrogation of the *populus* assembled in the Comitia Curiata and representing the supreme legislature, whether the transfer of the

Adoptio.

Adrogatio.

[1] Tacitus. *Annal.* lib. 15, cap. 19.
[2] Fr. 2, s. 2, D. 50, 5.
[3] *Pro Domo.* 13.
[4] Dion. Cass. 42, 29.
[5] Fr. 1, s. 1, D. 1, 7.

independent person into a strange family, had its sanction and approval. The formula for this interrogation was as follows :—"Is it your will and command that L. Valerius "shall be as completely by law and statute the son of "L. Titius, as if he were born of L. Titius and his wife, "and that L. Titius shall have power of life and death "over L. Velarius as a father has over his son? "As I have said, so you, Quirites, I ask?"[1] These transfers from one family into another of persons *sui juris* were ratified in the *Comitia Curiata*, because that assembly had exclusive cognisance of all matters relating to inheritances, which is the reason why wills were anciently made in the *Comitia Calata*, and by his entering into another family the chance of the populus, or state, succeeding to the property of the *adrogatus* as *bona vocantia* was materially diminished.[2] Another reason possibly was that arrogation caused the census registers to be altered by diminishing the number of *patresfamiliarum* by a head : because the *adrogatus* suffered a *capitis deminutio* and fell under the power of the *adrogator*, in whose family register he would thenceforward appear ; and it was established by the law of the Twelve Tables that no citizen should be deprived of his caput (which, as already explained, consisted of liberty, citizenship, and family,) unless it was decreed in the great Comitia.[3] Both Gaius[4] and Ulpian[5] speak of arrogation as still effected *per populum*, and only at Rome ;[6] but there can be no doubt that practically the old custom of assembling the people

[1] *Noct. Attic.* 5, 19.
[2] Tacitus. *Annal.* III. 28 ; Const. 1 and 4, C. 10, 10.
[3] Cicero. *de legib.* 3, 19 ; *Pro Sextio*, 30 *et seq.*
[4] *Comment.* 1, s. 99, 100.
[5] *Frag.* tit. 8, s. 3, 4.
[6] This was because the Assemblies of the Comitia were only held in Rome. *vide* Livy. lib. 5, cap. 52.

and taking their votes in the *Comitia* had fallen into desuetude long before their time, although a semblance of this custom may have been maintained by summoning the thirty lictors of the *Curiæ* to act as representatives of the general body.[1] The presence of the pontiffs was also necessary in ancient times, because arrogation involved a change in the *Sacra privata*;[2] and it was the duty of the priests to inquire into the reason of the arrogation, whether the person wishing to arrogate was really seeking by regular and sacerdotal law, that which by the ordinary process of nature he was no longer able to obtain, or whether he was influenced by sinister motives; and lastly, whether the respective ages of the *adrogator* and *adrogatus* were such that the former might well be the father of the latter: so that this fictitious adoption of a son might resemble, as far as possible, the real case of children being born to a man.[3] The intervention of the Pontiffs is not, however, mentioned either by Gaius or Ulpian; and under the later Emperors arrogation by imperial rescript came to be substituted for the old form of arrogation *per populum*. This mode of arrogation (*ex indulgentia principali*) is for the first time distinctly mentioned in a Constitution of the Emperors Diocletian and Maximian published in the year 286 A.D,, and it could be effected in the provinces in the presence of the Præses, or president, whereas, as we have seen, so long as the sanction of the *populus* was required, it could only take place in Rome.[4] The motive leading to the arrogation, and whether it was honourable and expedient, were points which were still inquired into if the person arrogated happened to be

[1] See Cicero's second oration against Rullus, 12.

[2] Aulus Gellius, *Noct. Attic.* 5, 19; Cicero *Pro Domo.*

[3] Aulus Gellius. *Noct. Attic,* 5, 19; Cicero *Pro Domo.* 12-13; Fr. 15; Fr. 17. pr. Fr. 40, D. 1, 7.

[4] Const. 2; Const. 6, C. 8, 48.

impubes.[1] Besides which the arrogation in such cases was always made under certain conditions, namely:—1. That the arrogator should restore all the property of the arrogated son to the natural heirs of the latter if he, the son, happened to die before the age of puberty. 2 That the arrogator should restore the property of the arrogated son if he emancipated or disinherited him for a good reason, and 3. That in addition to the property belonging to the arrogated son, the arrogator should also restore to him a fourth part of his own goods, called the *quarta Antonina* because it was first required by the Emperor Antoninus Pius, if he emancipated or disinherited the son without just cause.[2] We learn from Gāius that at one time the arrogation of children below the age of puberty was not permitted; but the Emperor Antoninus by a rescript addressed to the pontifices, allowed persons of any age to be adopted or arrogated.[3] It remains to mention that no one could arrogate another without that person's expressed consent,[4] "because it "was a principle," says Cicero, "handed down to us "from our ancestors, that no Roman citizen could "be deprived of his liberty, or of his citizenship, unless "he himself had become a consenting party."[5] Hence addressing Claudius, he continues:—"For, although in "that adoption of yours nothing was done in a legal "manner, still I suppose that you were asked, whether "you consented that Publius Fonteius should have the "same power of life and death over you that he would "have over an actual son. I ask, if you had either denied

[1] 3 J. 1, 11.
[2] *Ibid.*
[3] *Comment.* 1, 102.
[4] *Ibid*, s. 99; Fr. 2, pr. D. 1, 7. So Ulpian says: *neque absens, neque dissentiens adrogari potest.* Fr. 24, D. 1, 7.
[5] *Pro Domo.* 29.

"it or had been silent, if nevertheless the thirty Curies "had passed a vote to this effect, would that vote have "had the force of law? Certainly not. Why? Because "our ancestors, who were not feignedly and falsely, "but truly and wisely the people's friends, obtained "for them the right that no Roman citizen should be "deprived of his liberty against his will."

Who could

Since arrogation was anciently required to be made *populi auctoritate*, none but Roman citizens could originally take part in this rite, because they alone were members of the *Comitia*. For a similar reason women were not permitted to arrogate, *quoniam cum feminis nulla comitiorum communio est*.[1] Nor yet were *muti et surdi* (deaf and dumb persons), because they could neither hear what was said at the Comitia nor pronounce the solemn words of the prescribed formula, and were consequently incapacitated from taking part in the proceedings of the *Comitia*. But when arrogation *ex rescripto* succeeded that *per populum*, women as well as persons who did not enjoy the rights of citizenship, acquired a capacity to establish in this mode the legal relation of parent and child.[2] That women were incompetent to arrogate or be arrogated down to the reign of Marcus Aurelius is certain, because both Gaius[3] and Ulpian[4] distinctly refer to this incapacity; and we may therefore conclude that the passage in the Digest, which is attributed to Gaius and in which it is asserted that women might be arrogated *ex rescripto Principis*,[5] is an interpolation of Tribonian, who doubtless wished to clothe this form of arrogation, which

[1] Aul. Gell. *Noct. Attic.* 5, 19.
[2] Const. 5, C. 8, 48.
[3] *Comment.* 1, 101, 104.
[4] *Frag.* tit. VIII. ss. 5 and 8.
[5] Fr. 21, D. 1, 7.

was certainly introduced under the later emperors,[1] with the appearance of antiquity, and in his over zeal unwittingly made Gaius distinctly contradict what he had asserted in his Commentaries. Justinian in his Institutes however, expressly permits the arrogation by imperial rescript of persons of either sex.[2] Pupils who were under the age of puberty were first allowed to be arrogated by the Emperor Antoninus.[3] Thus Aulus Gellius speaking of the old law, says: "A pupil cannot be arrogated "before he has assumed the *toga virilis*, because a "guardian has no authority or power to subject an inde- "pendent person, with whose charge he is entrusted, to "the domination of a stranger."[4] The arrogator on the other hand, was usually required to be at least sixty years of age, because up to that age the ancients thought a man might still hope to have issue, and the fiction of adoption was only intended to meet the case of one who was no longer able to have children himself, and who failed in having them when he was of an age to expect it.[5] Heineccius considers that this rule would also exclude *cœlibes*,[6] but Paulus expressly says that those who have no wives are qualified to adopt;[7] and Ulpian also after stating that persons incapable of procreation, as *spadones*, (or persons naturally impotent), may either arrogate or adopt, adds:—*Idem juris est in persona cœlibis*.[8] The freedman of another was not a fit subject for arrogation,[9] and since adoption in either form simu-

[1] Const. 9, C. 8, 48.
[2] 1 J. 1, 11.
[3] Gaius. *Comment.* 1, 102; Ulpian *Frag.* tit. VIII. s. 5.
[4] *Noct. Attic.* 5, 19.
[5] Cicero *Pro Domo.* 13; Fr. 15, s. 2, D. 1, 7.
[6] *Antiq. Rom.* lib. 1, tit. XI. s. 12.
[7] Fr. 30, D. 1, 7.
[8] *Frag.* tit. VIII. s. 6.
[9] Fr. 15, s. 3, D. 1, 7.

lated natural birth, the general rule was that a younger person could not adopt an older.[1] This latter point, however, was not quite settled when Gaius wrote,[2] but the passage of Ulpian inserted in the Digest leaves no room for doubt that in his time the law was as I have stated it;[3] and Justinian proceeding upon the principle that adoption imitates nature (*adoptio naturam imitatur*), decides that the adopter or arrogator should be the elder by the term of complete puberty (*plena pubertas*), that is, by eighteen years.[4] A tutor or curator could not arrogate his ward,[5] but the Emperor Titus Antoninus allowed an exception to this rule in the case of a *privignus*, or step-son.[6]

What were the effects of arrogation.

The person who was arrogated became assimilated to a son born in lawful marriage;[7] and if he happened to be the father of a family, not only himself but those who were subject to his power, were transferred to the power of the arrogator.[8] This last was the distinguishing

[1] Fr. 16, D. 1, 7; Fr. 40, s. 1, *Ibid.* The Hindu law of adoption, which agrees in many respects with the Roman, and proceeds upon the same principle of simulating nature, has no distinct provision on this point, but as it prescribes that the age of the adopted should not ordinarily exceed five years, and in no case the limit of age ordained for the investiture of the sacred thread, which is 16 years for Brahmins, it practically precludes the adoption of an older by a younger person. Nor am I aware of any case, except perhaps among the servile class of *Sudras*, where such an adoption has been asserted.

[2] *Comment.* 1, 106. Cicero, however, it is to observed challenges the validity of the adoption of Claudius, because the arrogator was only twenty years of age, while Claudius himself was the father of a family and a senator. *Pro Domo.* 13.

[3] Fr. 17, pr. D. 1, 7.

[4] Fr. 32, s. 1, *Ibid*

[5] Fr. 15, s. 3, D. 1, 7.

[6] 4 J. 1. 11.

[7] 8 *Ibid.*

[8] Gaius *Comment.* 1, 107; 11 J. 1, 11.

feature of arrogation; "and it was for this reason," says Justinian, "that Augustus did not adopt Tiberius until "Tiberius had adopted Germanicus; so that directly the "adoption was made, Germanicus became the grandson "of Augustus." In the case of adoption *stricto sensu*, the adopted being himself *alieni juris* had no parental power over his children, and so could not transfer them to the power of the adoptive father. The property of the *adrogatus* was also transferred to the arrogator, who appears to have originally acquired therein the same absolute ownership as he possessed in the estate of his own children:[1] so much so that he took it free from all liability for debts previously contracted by the person arrogated, whose liability was also extinguished by his loss of status. This law naturally operated with extreme hardship upon creditors until the Prætor came to their aid and gave them an *actio rescissoria*, which was based on a feigned restoration of the original status of the debtor; and unless the arrogator had a good defence, the Prætor allowed the creditors to seize and sell the estate of their debtor just as if he had not brought himself under legal subjection to another.[2] But Justinian entirely altered the old law concerning acquisitions by arrogation, which he restrained within the same limits as acquisitions by natural parents; and accordingly arrogation in his legislation ceased to operate a transfer of the *universitas juris*. "Neither natural nor adop-"tive parents," it is said in the Institutes, "now acquire "anything but the *usufruct* of those things which come to "their children from any extraneous source, the children "still retaining the *dominium*."[3] On the death of the *adrogatus* in the adoptive family, the *dominium* also passed to the arrogator; but in the case of certain property, such as that coming to the arrogated person

[1] Gaius. *Comment.* 2, 98.
[2] *Ibid*, 3, 84; 4, 38; Fr. 2, D. 4, 5.
[3] 2 J. 3, 10; Comp. 1, J. 2, 9.

through his mother either by gift *inter vivos* or by testament or *ab intestato,* Justinian (529 A.D.) fixed the order of succession as follows: 1st. The sons and other descendants of the *adrogatus.* 2ndly. His brothers and sisters whether of the whole or half-blood. 3rdly. The adoptive father. In every case, however, the adoptive father during his lifetime retained the *usufructus.*[1] I have already mentioned that if the arrogated person died a minor, or was emancipated, the arrogator was bound by a Constitution of the Emperor Antoninus Pius to restore the property of the *adrogatus* to his natural relatives.[2] Among the other effects produced by arrogation, the most important to be noticed was the acquisition by the *adrogatus* of the *nomen, gens* and *sacra* of the arrogator; with the consequential loss of agnatic rights in his natural family.[3] But although arrogation conferred agnatic rights in the new

[1] Const. 11, C. 6, 59; 2 J. 3, 10.

[2] 3 J. 1, 11; Fr. 18, D. 1, 7; Fr. 13, D. 38, 5.

[3] Cicero *Pro Domo.* 13. Thus a plebian who was adopted by a patrician acquired the rights and privileges of that order, as in the case of Cneius Cornelius Cossius, who was adopted from the Licinian, (a plebian family,) into the Cornelian family (which was one of patrician rank,) and was twice elected military tribune with consular power. Livy. lib. 5, cap. 10, 12. On the other hand Claudius by being adopted into a plebian family became eligible for the office of tribune of the people to which he could not otherwise have aspired. Cicero *Pro Domo.* 12-13. It appears however, that a person by being adopted into a plebian family did not forfeit a dignity, as that of a senator, which he held at the time of adoption, for a man's dignity, says Paulus, is increased rather than diminished by adoption. Fr. 35, D. 1, 7; Fr. 6, D. 1, 9. All that Paulus means by this expression is, that adoption, as a matter of fact, was usually made to better one's natural condition and not to make it worse. Plebians moreover were in later times eligible to senatorial offices, and those who gained such a position, enjoyed the *jus imaginum,* or right of having images of themselves made of wax, which they placed in the courts of their houses (*atria,*) and on which were written titles and inscriptions,

family, it did not confer cognate rights;[1] because the former arose from the civil relationship created by adoption (*jus agnationis*), whereas the latter, or cognate rights, depended upon blood relationship (*jus sanguinis*). On the other hand, while arrogation extinguished agnatic relationship in the natural family, the ties of cognate or blood relationship were still maintained. This will be best understood by the following illustration. So long as the *adrogatus* continued a member of his adoptive family, he stood in the position of a brother to the daughter of his adoptive father; but as soon as the arrogation was put an end to by emancipation or the like, all relationship between him and his sister by adoption ceased to exist,[2] and he could lawfully marry her.[3] As regards his blood relatives, however, he was subject to the same disabilities in the matter of intermarriage as if he were still a member of his natural family. Moreover by assuming the position of a son in the new family the *adrogatus* as we have seen became subject to the *patria potestas* of his adoptive father,[4] who could afterwards transfer him by adoption to another.[5]

It is interesting to notice in passing that the Hindu law

pointing out the honours they had enjoyed, and the exploits they had performed. Juvenal alludes to this practice in the following verses:

Ergo ut miremur te, non tua, primum aliquid da,
Quod possim titulis incidere, præter honores, &c. VIII. 69.

The mere fact then of a man of senatorial dignity being adopted by a plebian would not deprive him of an empty privilege which he might have attained even if he had been born a plebian. But the patrician nobility was a right attaching to a particular *gens*, which would necessarily be lost when the adopted passed from that *gens* into a plebian family.

[1] Fr. 23, D. 1, 7.
[2] Fr. 13, *Ibid.*
[3] 23 *Ibid*; 2 J. 1, 10.
[4] Gaius. *Comment.* 1, 97; pr. J. 1, 11.
[5] *Ibid*, 105; 8 J. 1, 11.

entirely agrees with the principle of the early Roman law, that although adoption operates as a complete change of paternity, causing an entire severance of the adopted from the *sacra* of his natural family, the ties of blood relationship are not wholly swept away; and thus the two systems equally prohibit the marriage of the adopted with a kinswoman within the prohibited degrees. Again the notion developed in the later Roman law under the moulding hand of Justinian, that a son might be so adopted as to retain his connexion in his natural family while securing a right of inheritance in the new, has its appropriate analogy in the Dwyamushyana adoption of Hindus. Indeed in the artificial construction of the Hindu family; in its *sacra*; in its representation by the father or *paterfamilias*, to whom reverence and obedience were due; in its perpetuation through the male line; and in the exclusion of females, especially when married into other families; we find much that resembles the Roman *familia*. But while we trace analogies we should not shut our eyes to those points in which the two systems are at variance. Thus the adopted child in Hindu law acquired the rights of inheritance to the collateral branches of his adoptive father's family, whereas as we have seen, the Roman law created no such right. It is true indeed that it was for a long while contended that the Hindu law did not confer collateral heirship, but the contrary doctrine has been firmly established by the Judicial Committee of the Privy Council, and must therefore be accepted for practical purposes at the present time as beyond all controversy.[1]

Adoptio. Adoption properly so called, was effected by the judicial authority of a magistrate (*imperio magistratûs*),[2] in those

[1] *Sumboochunder Chowdri* v. *Naraini Debia*, Suth. P.C. Judg. 25.

[2] Gaius. *Comment.* 1, 98; 1 J. 1, 11. Whether the Magistrate had any discretionary power in either according or withholding his sanction is doubtful. Demangeat thinks his sanction was purely formal. *Cours Elémentaire de Droit Romain.* Vol. 1, 286.

cases in which the adopted was in the power of an ascendant, whether in the first degree, as a son or daughter, or in an inferior degree, as a grandson or granddaughter.[1] According to the law of the Twelve Tables a father only lost his power over a son by three mancipations or fictitious sales, although a single mancipation sufficed in the case of a daughter or a son's son.[2] Now since adoption anciently involved a complete change of paternity, it became necessary that a son before he could be adopted by another should be first freed from the power of his natural father (*pater naturalis*); and this was originally effected in the following manner. The son was mancipated[3] by his father to a person who was called the *pater fiduciarius*, by whom he was immediately afterwards manumitted; and this ceremony was performed by the father three times, and twice by the *pater fiduciarius*. After the third mancipation the son was either re-mancipated to the father, and then claimed before the Prætor by the proposed adopter by vindication (*vindicta*), which has already been described; or else without remancipation to the *pater naturalis*, the son was directly claimed by the *pater adoptivus* from the person who held him by virtue of the third mancipation—who was bound by a *contracta*

[1] *Ibid.* 99; 1 J. 1, 11.

[2] Ulpian *Frag.* tit. 10, s. 1; Gaius. *Comment.* 1, 134.

[3] As to the mode of effecting mancipation, see Gaius. *Comment.* 1, 119. It was an imaginary sale *per æs et libram* (that is by bronze and the scales,) and was the mode in which Augustus adopted his daughter's sons, Gaius. and Lucius. *Suet.* August. 64. The bronze ingot and scales were used because the ancients had no gold or silver coinage, and the value of the bronze ingots was measured not by number but by actual weight of metal. Thus the *as* was a pound of bronze, the *dipondius* two pounds, and the *semisses* and *quadrantes* had also a fixed weight, being aliquot parts of the *as*. Gaius. *Comment.* 1, 122.

fiducia (hence the term *pater fiduciarius*) either to make default or to admit the adopter's claim in the *vindicatio* before the Prætor at Rome, or before the president in the provinces. The magistrate thereupon pronounced the adopter to be the lawful father of the child, and this concluded the proceedings which were altogether of a fictitious character.[1] Justinian however abolished this cumbrous form of adoption, and substituted instead a simple declaration of the adoption duly executed before a competent magistrate in the presence and with the consent of the several parties concerned—that is, the person giving, the person receiving, and the person given in adoption.[2] The consent of the adopted person was assumed in the absence of express dissent (*non contradicente*), and hence an infant who was still unable to speak might be given in adoption.[3] No absent or dissentient person could be adopted,[4] nor could an absent person adopt through the agency of another.[5]

Adoption by testament.

Towards the close of the Republic and under the early Emperors we meet with a form of testamentary adoption, which only took effect after the death of the adopter, and did not confer *patria postestas*. It was in fact rather a mode of bequeathing one's name and property (*nominis heredis institutio*), than of adoption properly so called; and thus Augustus, although adopted in this form by Cæsar, took the precaution of having his rights confirmed by a *lex Curiata*.[6] This also explains why women, when the

[1] Gaius. *Comment.* 1, 134.

[2] Const. 11, C. 8, 48; 8 J. 1, 12. The Hindu law, except in the *Kritima* form of adoption, peculiar to the Mithila country, does not require the consent of the adopted person.

[3] Fr. 42, D. 1, 7.

[4] Fr. 24, D. 1, 7.

[5] Fr. 25, s. 1, *Ibid.*

[6] *Appian.* Bell. Civil. III. 94.

right to institute heirs without the necessity of a *co-emptio* was conferred upon them by a *senatus-consultum* of the Emperor Hadrian, became entitled to transmit their name and succession by testament, although still unable to adopt in any of the recognised modes.[1] We also learn from Diodorus Siculus that among barbarian nations the wife of the adopter feigned an actual parturition of the adopted child, so as to make the fiction more like reality, and in accordance with the tradition that Juno placing the child Hercules in bed with her pretended to be in labour, and then let him fall from under her clothes.[2] This mode of adoption was termed *ante genialem torum*, but it was never practised amongst the Romans, although Heineccius sees some resemblance to it in the practice of the Jewish Patriarchs, in proof of which he quotes the following verse from Genesis: "And she (Rachel) said, behold my handmaid Billah; go in unto her, and she shall bear upon my knees, that I may also have children by her."[3]

Mode of adoption amongst barbarians.

From what has been stated above it appears that the first distinction to be observed between arrogation and adoption properly so called, is that while the former rite was used in the case of those who were *sui juris*, the latter was employed in the case of those who were *alieni juris*. In the next place as has been seen, they differed in the ceremonies proper for each and in the form of sanction required. *Thirdly*, there were some persons who while they remained *alieni juris* were fit subjects of adoption, who could not be arrogated when they were *sui juris*. Thus a person of any age could be adopted before the Prætor,[4] but under the ancient law a pupil *sui juris* before he assumed the *toga virilis* (that is before the age of puberty) was

In what respects adoption differed from arrogation.

[1] Cicero. *Epist. ad. Attic.* VII. 8; Briss. *de form.* VII. p. 601; Huber. *Digress.* 1, 2, 23, 2.

[2] *Biblioth. Historic.* IV. 39.

[3] Ch. 30, V. 3.

[4] Gaius. *Comment.* 1, 102. So Modestinus observes: *Etiam infantem in adoptionem dare possumus.* Fr. 42, D. 1, 7.

not permitted to arrogate himself,[1] and although the Emperor Antoninus suffered such persons to be arrogated, he coupled this license with certain special conditions, partly in favour of the *adrogatus*, and partly to secure the rights of his natural relatives.[2] Again, women were always capable of being adopted, but it was not till after arrogation *ex rescripto principis* was introduced that they could be arrogated.[3] *Fourthly*. On the other hand there were persons who were capable of arrogation but not of adoption. Thus a freedman could be arrogated by his patron, but not so the freedman of another by a stranger.[4] In the case of adoption, however, it appears that while even in ancient times a master might give his slave in adoption to a stranger, which was the opinion of Sabinus,[5] there is reason to doubt whether he could adopt his own slave.[6] Justinian it is true asserts in his Institutes that Cato was of opinion that slaves when adopted by their masters (*si a domino adoptati sint*), were thereupon made free,[7] but it is difficult to understand how such an adoption could have been effected, and Puchta is of opinion that we should read *a domino in adoptionem dati* instead of *a domino adoptati*. At all events Justinan decides that a slave to whom his master by a solemn deed gives the title of son, although he acquires thereby his freedom, does not acquire the rights of a son;[8] and we learn from Aulus Gellius that persons of servile origin never became

[1] Aul. Gell. *Noct. Attic.* 5, 19.
[2] Gaius. *Comment.* 1, 102; Ulp. *Frag.* tit. VIII. s. 5.
[3] *Ibid.* s. 101; Const. 8, C. 8, 48.
[4] Fr. 15, s. 3, D. 1, 7; Fr. 49, D. 38, 2.
[5] Aul. Gell. *Noct. Attic.* 5, 19.
[6] Demangeat. *Cours Elémentaire de Droit Romain*, 1, 296.
[7] 12 J. 1, 11.
[8] *Ibid.*

ingenui by virtue of adoption, but remained freedmen.[1] *Fifthly.* Before arrogation *ex rescripto Principis* was introduced, no person could be arrogated except at Rome, but from the earliest times adoption was permitted both in the provinces as well as in the imperial city.[2] But the most important distinction of all between the two modes of affiliation was, that while in the case of arrogation the person arrogated as well as those who were subject to his power passed into the power of the *adrogator,*[3] in the case of adoption *stricto sensu* paternal power was only acquired in ancient times over the person given in adoption, and under the legislation of Justinian it was only in the case of an adoption by an ascendant that this power was acquired: in other cases the adopted still retained his position in his natural family, and merely acquired the right of successson to his adoptive father dying intestate.[4] This latter form of adoption has therefore being called by commentators the *adoptio minus plena,* in contradistinction to that by an ascendant which is termed *adoptio plena.* Accordingly the adoptive father if a stranger was not bound to leave the adopted anything if he executed a will,[5] although in the case of a natural son the *lex Falcidia* required that at least one-fourth of the inheritance should remain to him.[6]

Rules common to both forms of adoption.

We have seen in what respects adoption was distinguished from arrogation. Let us next enquire what rules,

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[1] *Noct. Attic.* 5, 19.

[2] Gaius. *Comment.* 1, 100.

[3] Gaius. *Comment.* 1, 107; 11 J. 1, 11.

[4] Const. 10, C. 8, 48; 2 J. 1, 11.

[5] Const. 10, s. 1, C 8, 48.

[6] Gaius. *Comment.* 2, 227; pr. J. 2, 22. The words of the principal clause of this law are thus given by Paulus: "Every Roman citizen who, after this law passes, makes a will, is entitled and empowered to give and bequeath whatever money to whatever citizen of Rome he desires in accordance with the laws of Rome, provided that such bequest leave at least one-fourth of the inheritance to be taken under that will by the heirs." Fr. 1, pr. D. 35, 2.

if any, were common to both. In the first place then adoption like arrogation anciently effected a transfer of family rights, and the adopted took the name of his adoptive father in addition to his own, changing the termination of the latter from *us* unto *anus*. Thus Æmilius when adopted by Scipio called himself Scipio Æmilianus, and C. Octavius after his adoption by Cæsar, C. Julius Cæsar Octavianus.[1] Under Justinian arrogation continued to have the same effect as in the ancient law,[2] but in the case of adoption, as we have seen above, it was only when the adopter was an ascendant that the change of family took place.[3] It was also required, at least in Justinian's time, that the adopter or arrogator should be the elder by at least the term of complete puberty (*plena pubertas*), that is by eighteen years.[4] The arrogator as well as the adopter, if an ascendant, could give the person arrogated or adopted in adoption to another;[5] and in either case it was prohibited to re-adopt the same person.[6] A man could adopt or arrogate another *quasi filium* (as his son) or *quasi nepotem* (as his grandson); or again he could adopt one person as his grandson and another as his son;[7] but in the latter case it was necessary that the son, whether adopted or natural, should consent to the

[1] Dion. Cass. 46, 47.
[2] 11 J. 1, 11.
[3] 2 *Ibid.*
[4] *Ibid* This point was not definitely settled when Gaius wrote, VIDE *ante*, page 206. We have already seen that that the ordinary age of puberty in the case of males was 14, and in that of females 12, *ante*, page 16; but the human body was supposed to be more fully developed, hence the term *plena pubertas*, at eighteen, and this was accordingly the age fixed in certain special cases, as that of adoption in the text and the capacity of *spadones* to execute wills. Paul. *Sentent.* lib. 3, tit. IVa, s. 2. See also Fr. 57, D. 42, 1.
[5] Gaius. *Comment.* 1, 105; 8 J. I, 11.
[6] Fr. 37, s. 1, D. 1, 7.
[7] 6 J. 1, 11.

adoption of the grandson, because it was a principle of the Roman law that no one should have a *suus heres* given him against his will.[1] A grandfather, however, could give his grandson in adoption without the consent of his son.[2] It is also remarkable that although in theory adoption was supposed to imitate nature, the Roman law permitted a man who had no son to adopt a person as his grandson or great-grandson.[3] In such a case the adopter was probably required to be the elder by thirty-six years, that is by twice the term of complete puberty.[4] Bachelors also, as we have seen[5] were competent to adopt or arrogate.[6] Women were not permitted to adopt by either form of adoption according to the strict principles of the civil law, because they had not even their own children in their power;[7] but a constitution of the Emperors Diocletian and Maximian allowed them to establish by *quasi* adoption the same legal relation as existed between a mother and her natural children as a comfort for the loss of their own children,[8] and this is confirmed in general terms by Justinian.[9] But by the words *as a comfort for the loss of their own children* those women were excluded who never had any children, and consequently could not be said to need an adopted child to comfort them for their loss. This restriction was subsequently removed by the Emperor Leo, who permitted women generally, as well as eunuchs, to adopt, but neither one nor the other acquired anything like *patria potestas* over the children they adopted.[10] The

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[1] *Ibid*; Fr. 10, 11, D. 1, 7.
[2] *Ibid.*
[3] 5 *Ibid.*
[4] Ortolan. *Explic. Hist. des Instituts* vol. II. p 116.
[5] *Ante*, page 206.
[6] Fr. 30, D. 1, 7.
[7] Gaius. *Comment.* 1, 104.
[8] Const. 5, C. 8, 48.
[9] 10 J. 1, 11.
[10] Novel. *Leon.* 27.

adopter as well as adopted were required to be present and consent to the adoption just as in the case of arrogation,[1] and in neither form of adoption was it allowable for a paterfamilias who had one or more natural children to introduce another son into the family by adoption.[2] With respect to the *peculium adventitium* of the adopted, the adoptive father, if an ascendant had in the legislation of Justinian, the same right as a natural father, namely the usufruct of the property during his lifetime, and the reversion of the *dominium* in case the son happened to die before him, provided also that the son had left no decendants or brothers.[3] But in the case of *castrense peculium* or *quasi contrense peculium* the son enjoyed both the usufuct and *dominium* during his lifetime.[4] Finally adoption under the old law like arrogation, only created agnatic and not cognatic rights;[5] but in Justinian's time adoption by a stranger merely gave rise to a personal right of succession *ab intestato* to the property of the adoptive father, and neither created any new nor destroyed any old tie of agnation.

[1] Fr. 24, 25, s. 1, D. 1, 7.

[2] Fr. 15, s. 3, 17, s. 3, *Ibid.* This was one of the grounds on which Cicero attacked the adoption of Claudius, because his adoptive father had children of his own. *Pro Domo.* 12-13.

[3] 2 J. 3, 10; Const. 11, C. 6, 59; Const. 6, C. 6, 61.

[4] Const. 6, C. 6, 61; 1 J. 2, 9; Fr. 2, D. 4, 6.

[5] Fr. 23, D. 1, 7.

CHAPTER IX.

GUARDIANSHIP (*de tutoribus et curatoribus*).

UNDER the title *de tutelis* Gaius and Justinian treat of another class of persons, who, although freed from the power of a parent, were still considered to labour under a certain incapacity, and were placed under the care or guardianship of tutors or curators. In the Roman law guardianship was of two kinds, one known as *tutela*, or tutelage, properly so called, and the other as *curatio* or administration by curators. These two species differed materially from each other, and it will therefore be necessary to consider them separately, merely remarking for the present that while a tutor was given to the person, a curator was given to to the property.

Two kinds of guardianship in Roman law

Tutela, or guardianship properly so called is defined by Servius as the "authority and power (*vis ac potestas*) over a free person, (*in capite libero*), given and permitted by the civil law, in order to protect one (*ad tuendum*) whose "tender years prevent him from defending himself." This

Tutela defined.

definition adopted by Paulus [1] and Justinian [2] has given rise to considerable controversy. Thus by the words *vis ac potestas* some of the old commentators were of opinion that Servius meant to indicate two distinct kinds of power or authority; *vis* referring to the tutor's authority over the person, and *potestas* to that over the property of the ward. But this opinion is now generally rejected, and the expression *vis ac potestas* is regarded as one of of those redundant forms which we so frequently meet with in the old jurists. That the persons who were in tutelage were not subject to the *potestas* of their tutors, employing the word in its strict technical sense as referring to parental power, is explicitly declared by Gaius who says, "persons not subject to power (*quæ neque in potestate—sunt*)—may still be subject either to guardian-"ship (*in tutela*) or to administration (*in curatione*)."[3] All that Servius therefore means is that the pupil owed a certain degree of subordination to his tutor, without whose authority he was generally incompetent to act; and the concluding words of the above definition of *tutela* are of themselves sufficient to show that this authority or power of a tutor materially differed from that possessed by a father over his children: because in the latter case the *potestas* was possessed and exercised by the *pater-familias* for his own advantage, whereas a tutor was bound to exercise his power solely in the interest of his ward.[4] Indeed the expression *vis ac potestas* appears to have been a favourite one with Roman lawyers, and the two words are often joined together simply to add greater force to what is said, and without the least intention of using them in apposition with each other, or in any technical sense.

[1] Fr. 1, pr. D. 26, 1.
[2] Pr. J. 1, 13.
[3] *Comment.* 1, 142.
[4] *Ibid*, 1, 192.

Thus the well known passage of Celsus—*scire leges non hoc est, verba earum tenere sed* VIM AC POTESTATEM[1]—affords a ready example of the truth of this remark; and we may also cite a passage from the Commentaries of Gaius where speaking of the ancient bronze coinage it is said: *eorumque nummorum* VIS ET POTESTAS *non in numero erat, &c.*,[2] and yet another from the Institutes where the two words are joined together to show the effect of the interdict *quorum bonorum: ejusque vis et potestas hæc est.*[3] It is probable, however, as Ortolan observes,[4] that the expression *vis ac potestas* was originally restricted to the *tutelæ legitimæ* of patrons and of agnate ascendants, because they alone had some legal effect (*vim aliquam habere intelliguntur*).[5] So with respect to the words *in capite libero*, we must understand a person who is freed from power, that is one who is *sui juris*, although the expression is often used to indicate a man who is not a slave. But the quality of freedom from power is only necessary in the case of the pupil, for it was not necessary that a tutor should be *sui juris*,[6] because a *filiusfamilias* was capable of holding public offices among which that of a tutor was reckoned.[7]

Tutor appointed for protection of pupil.

In the next place it is to be observed that a tutor was given *ad tuendum*, that is, in order to the protection of the person and property of the pupil. As above remarked, the tutor could not exercise anything analagous to *patria potestas*, and although he generally administered the property, and supplied what was wanting to complete the

[1] Fr. 17, D. 1, 3.

[2] *Comment.* 1, 122.

[3] 3 J. 4, 15. This, like so many other passages in the Institutes, is literally transcribed from the Commentaries of Gaius, *vide*, 4, 144.

[4] *Explic. Histor. des Instituts*, vol. 2, 137.

[5] Gaius. *Comment.* 1, 192.

[6] Pr. J. 1, 14.

[7] Fr. 9, D. 1, 6.

legal *persona* of his pupil, his office was simply established to protect persons of tender years from rendering their position worse.[1] Moreover since a tutor was intended to have charge of the person he could not be appointed for a particular thing or business,[2] because it was the tutor's duty to look after the whole interests of the pupil.[3] This was the general rule, but an exception was allowed where the pupil happened to possess property in distinct provinces, far apart from each other, in which case a separate tutor might be appointed to administer the property in each province.[4] Anciently, it is true that other exceptions were allowed in which a prætorian tutor might be appointed for special purposes,[5] but these exceptions are not maintained in the legislation of Justinian, who decided that in those cases in which a pupil is unable to avail himself of the protection and authority of his tutor—for instance in a suit between a tutor and his pupil—a *Curator* should be appointed.[6] A tutor, might, however, be appointed until a certain time, or from a certain time —as in the case of a slave belonging to another *cum liber erit,* "when he shall be free"—or conditionally.[7]

Could not be appointed for a particular thing.

Propter ætatem.

Again the definition speaks of tutelage as devised *propter ætatem, i.e.,* to protect the interests of a person of tender years. The ancient law of Rome placed women in a continual state of pupillage, on the specious allegation that "their weakness exposed them to the danger of

[1] Pr. J. 1, 21.
[2] 4 J. 1, 14; Fr. 12, 14, D. 26, 2.
[3] Fr. 13, D. 26, 2.
[4] Fr. 15, *Ibid.*
[5] Gaius. *Comment.* 1, 176, *et seq.*
[6] 3 J. 1, 21.
[7] 3 J. 1, 14. A testator could institute an heir conditionally but not from or to any certain period, because the maxim was *semel heres semper heres* (Fr. 88, D. 28, 5); and if such a term was added it was considered a superfluity, 9 J. 2, 14.

"being misled." But this pupilage was more nominal than real, for women above the age of puberty were allowed to administer their own property, and the authority (*auctoritas*) of a tutor was only necessary in certain cases, and for the sake of form (*dicis gratia*), so much so that he was often compelled by the Prætor to withdraw his opposition and become an *auctor* even against his will.[1] By the law of the Twelve Tables women had their agnates for tutors, but this was repealed by a *lex Claudia*,[2] and the *lex Papia Poppæa* provided that if a Roman woman had borne three children, or a *liberta* four children, she was to be considered in no need of a tutor.[3] Under the later emperors, however, probably between the time of Diocletian and Valentinian, the tutelage of women of full age appears to have fallen into desuetude together with many other of the rigorous rules of the civil law, and it is not perpetuated in the legislation of Justinian, nor yet in the earlier Codes of Gregory or Theodosius. Lastly, tutelage is said to be "given and permitted by the civil law (*jure civile data ac "permissa*)." A tutor was said to be "given" (*data*) by

Tutelage given and permitted by the civil law. Data.

[1] Gaius *Comment.* 1, 190. This however should only be understood of those tutors who had no personal interest in the succession to the property of their wards—such as *tutores testamentarii*, *tutores dativi* and *tutores fiduciarii*. Such tutors could advise and remonstrate with their pupils against any acts of extravagance, but they could not refuse to exercise their *auctoritas* if needful, and required to do so. Hence Cicero says that the tutors were in the *potestas* of their female pupils, *Pro Murena*, 12. But ascendants and patron tutors could not be compelled to interpose their *auctoritas*, because the *tutela* was regarded as existing as much for the protection of their reversionary rights as for the benefit of the pupil. Gaius. *Comment.* 1, 192. The Vestal Virgins, as already stated (*vide ante*, page 37,) were exempt from tutelage. *Ibid.* 1, 145.

[2] *Ibid*, 157. So that the *legitima tutela* of women was restricted to ascendants and patrons. See also Ulp. *Frag.* tit. XI. s. 8.

[3] Ulp. *Frag.* tit. XXIX. ss. 3 and 7.

the civil law when the law itself determined the person on whom the duties of tutelage should devolve—such tutors were called *tutores legitimi*, and, according to the law of the Twelve Tables, they were to be the nearest *agnati*,[1] because it was a principle of the civil law that "where "there is the benefit of the succession there ought also to "be the burden of the tutelage."[2] It was upon the same principle that the tutelage of freedmen and freedwomen belonged to their patrons, and was called *legitima tutela* or "legal tutelage," because as the law had ordained that patrons and their children should succeed to the inheritance of their freedmen and freedwomen who happened to die intestate, it was inferred that the intent of the law was that the tutelage also belonged to them.[3] Tutelage was said to be permitted by the civil law (*permissa jure civile*) when a *paterfamilias* availing himself of the power allowed him by that law, appointed a testamentary tutor for children subject to his *potestas* and below the age of puberty, for it was only with respect to such persons that the power could be exercised.[4] A "legal" tutor (*tutor*

Permissa.

[1] Gaius. *Comment.* 1, 155; pr. J. 1, 15.

[2] Pr. J. 1, 17. The Roman jurists presumed that the next heir would take the best care of an estate to which he has a prospect of succeeding. Ulpian calls this *summa providentia* (Fr. 1, pr. D. 26, 4). The Athenians, however, proceeded upon a different principle, and considered it unsafe to entrust the care of the pupil to one who would succeed on his death, and who would thus have an object in outliving him. Solon accordingly left it to the Archons to select the fittest person for the office of tutor, *Diog. Lært.* 1, 56. The Common law of England acknowledges the same principle, and requires that the guardian shall be "the next of kin to whom the inheritance cannot "possibly descend." Blackstone, lib. 1, cap. 17; Glanv. *l.* 7, C. II. To do otherwise says Lord Coke, would be like surrendering the lamb to be devoured by the wolf (*quasi agnum committere lupo ad devorandum*), Inst. I. 88.

[3] Gaius. *Comment.* 1, 165; Pr. J. 1, 17.

[4] *Ibid*, 1, 144; 3 J. 1, 13.

legitimus) could therefore only be appointed where a testamentary guardian had not been named, or if named had died in the lifetime of the testator.[1] Justinian, as I have already had occasion to point out,[2] abolished the old distinction between *agnati* and *cognati*, and called the nearest in blood, whether an agnate or cognate, to the legal tutelage.[3] But while the words *jure civile data ac permissa* are capable of the above easy explanation, there still remains the question whether Justinian meant by these words to imply that tutelage was an institution of the *jus civile?* Gaius distinctly asserts that it is agreeable to a dictate of natural reason that a person who is not of mature age should be ruled by the *tutela* of another, and he adds that the guardianship of *impuberes* is prescribed by the law of every state.[4] Justinian also reproduces this text in his Institutes,[5] but it is to be observed that Gaius contrasts the tutelage of persons under the age of puberty, which is clearly intelligible and necessary in all communities, with that of women, which, as he says, is based on no valid reason and is purely the creation of positive law. Hence it is that he ascribes the former to "a dictate of natural reason," but as the tutelage of women had ceased before Justinian's time the contrast was no longer necessary; and since tutelage was regulated by laws, senatorial decrees and customs (*legibus, Senatus-consultis, moribus*),[6] and was within the jurisdiction of the regular magistrates and not of the foreign Prætors,[7] Justinian rightly asserts that "tutelage

[1] Fr. 6, D. 26, 4; 2 J. 1, 15.
[2] *Ante*, page 45.
[3] Novel. 118.
[4] Gaius. *Comment.* 1, 189.
[5] 6 J. 1, 20.
[6] Ulp. *Frag.* XI. s. 2.
[7] 3, 4 J. 1, 20.

"is given and permitted by the civil law," although the principle of placing young persons in guardianship was one based on natural reason, and not peculiar to the Roman law.

Tutelage of four kinds. Testamentaria.

Tutelage was of four kinds: *testamentaria, legitima, fiduciaria* and *dativa*. Of these the first or testamentary guardianship was as old as Roman law itself, and we find its exercise ascribed to the time of the early kings of Rome. Thus Ancus Marcius is stated to have given the guardianship of his sons by testament to L. Tarquinius Priscus.[1] A leading provision of the Law of the Twelve Tables was the following:—*Uti legassit super pecunia tutelave suæ rei, ita jus esto.* "According to the dis-"position which any one has made of his property, or "the tutela of his children, so let it be."[2]

With regard to this form of tutelage, two important points have to be kept in mind. *First* that none but *patresfamilias* could make such an appointment,[3] and

[1] Liv. 1, 46.

[2] Ulp. *Frag.* XI. s. 14. Various readings of this text are given by Roman writers. Thus Paulus has it: *super pecuniæ tulelæve suæ*, (Fr. 53, D. 50, 16), and Modt. understands the last words to refer to the tutelage of him *qui suus testatori heres sit.* But Pomponius (Fr. 120, D. 50, 16) and Justinian (pr. J. 2, 22), quote the words of the law in this form '*Uti legassit suæ rei*,' and in these passages the *suæ rei* undoubtedly refers to property. Cicero referring to this law says: *Paterfamilias uti super familia pecuniaque sua legaverit, ita jus esto.* De Invent. II. 50. The word *pecunia*, it should be remembered, not only included money but the entire property moveable and immoveable of the testator (*August, de doctrin. Christ.* VI. p. 585; Fr. 222, D. 50, 16. So that by the addition of the words *suæ rei* Heineccius understands children to be meant, for by the ancient law they were held in Quiritarian ownership, and were therefore included among *res mancipi*, or those things which could only be disposed of by mancipation. Moreover Justinian expressly says that a tutor is appointed for a person and not for a thing. 4 J. 1, 14.

[3] Fr. 1, pr. D. 26, 2; Fr. 1, s. 1, D. 26, 3.

secondly, that none but citizens or generally those with whom the testator had *testamenti factio*, could be named as tutors.[1] But the Latinus Junianus, although possessing to a certain extent the *testamenti factio* (that is he could act as a witness, or *familiæ emptor*, or *libripens*), was nevertheless incapable of being appointed a testamentary tutor.[2] Since therefore testamentary tutelage was based on the existence of *patria potestas*, women were not qualified to appoint tutors by testament, although under the later law their wishes were usually respected by the magistrate (prætor, pro-consul or consul as the case might be), if no valid objection was alleged against the appointment.[3] Indeed, even a *paterfamilias* could appoint a tutor only for those who, on his death, would become *sui juris*. Thus a grandfather could not appoint a tutor for a son's son, if the son was in his power at the time of his death, because at his decease the grandson would fall under the power of his father.[4] Testamentary tutors might also be appointed for posthumous children, although the general rule of law was that nothing could be given to an uncertain person by testament,[5] because in this, as in many other cases, *postumi* were considered as already born (*pro jam natis habentur*).[6]

[1] Fr. 21, D. 26, 2.

[2] Ulp. *Frag.* tit. XI, s. 16; Fr. 21, D. 26, 2.

[3] Fr. 2, D. 26, 3. The respectability and fitness of tutor appointed by the *paterfamilias* were accepted *sine inquisitione*, even in those cases in which the appointment was not legally valid, Fr. 4, D. 26, 2. As if he gave a tutor to an emancipated son, Fr. 1, ss. 1-2, D. 26, 3; 5 J. 1, 13. Unless indeed some change in the position of the tutor had occurred subsequent to the appointment which rendered him unfit to be entrusted with the tutelage. Fr. 8, 9, *Ibid.*

[4] Gaius. *Comment.* 1, 146; 3 J. 1, 13.

[5] Fr. 20, pr. D. 26, 3.

[6] Gaius. *Comment.* 1, 147; 4 J. 1, 13. Thus the law required that male posthumous children should either be instituted heirs, or disin-

But a tutor could only be appointed for natural children or other persons not subject to the parental power of the testator, when the testator had left them some of his property, and even then the appointment required magisterial confirmation, which was only accorded after due enquiry.[1] A *paterfamilias*, however, could even appoint a tutor for his minor children whom he had disinherited.[2]

A tutor was also required to be validly appointed by law (*recte datus*), that is in accordance with the prescribed forms for executing testaments, and if these forms were neglected the appointment fell though, *i.e.*, it lost its legal force and needed the confirmation of a magistrate. Hence the subdivision of *testamentariæ* into formal (*propriæ*) and informal (*impropriæ*). The Sabinians were moreover, of opinion that since a testament derived its force from the institution of an heir,[3] no tutor could be appointed until after an heir had been nominated;[4] but the Proculians considered that as no part of the inheritance was bequeathed away by the nomination of the tutor, the

herited in this form, "whatever son is hereafter born to me, let him "be disinherited." Posthumous females, however, might be disinherited by name, or by the general term *ceteri*, but in the latter case something was required to be left them as a legacy to show that they were not passed over through forgetfulness. 1 J. 2, 13.

[1] Fr. 4, 7, D. 26-3; Fr. 4, 10, D. 26, 2. A Constitution of the Emperor Alexander (C. 4, C. 5, 28), is thought by some writers to allow a confirmation of an appointment made by a mother without inquiry, and thus to conflict with Fr. 4, D. 26, 2; but in point of fact there is no ground for construing the imperial constitution in the above sense. All that it lays down is that a tutor appointed by a mother should be confirmed by the Præses, but it does not say that this confirmation was a purely formal matter which needed no preliminary enquiry.

[2] Fr. 4, D. 26, 2.

[3] Gaius. *Comment.* 11, 229.

[4] *Ibid.* 231.

appointment might precede the institution of the heir, and this doctrine is confirmed by Justinian.[1] To constitute a valid appointment it was further necessary that the testator had used imperative and not merely precatory words; and that the tutor selected was not an *incerta persona*,[2] "for it was incumbent upon every parent" says Justinian, "to take care that his posterity have a "tutor by a determinate appointment."[3]

Distinction between formal and informal

From what has been said above we may draw the following distinction between formal and informal testamentary tutelage. The former was founded on *patria potestas*; it might be given to minor children although disinherited; it needed no confirmation of the magistrate; it was given to the person, and was required to be made by a testament or a codicil confirmed by a testament (*in testamento aut in Codicillis testamento confirmatis*,[4]) and to be expressed determinately. An informal (*impropria*) tulelage might be given by a person who did not possess *patria potestas*, and even by an *extraneus*, provided the testator left some property to the pupil; it needed the confirmation of a magistrate; no formalities were required, and it was understood to be given to the property (*in rem*) rather than to the person (*in personam*).[5] But neither a testamentary tutor *recte datus*, nor a tutor whose informal appointment was confirmed by a magistrate after inquiry, could be called upon to give security; because in the former case, the fidelity and diligence of the tutor were recognised by the testator himself, and in the latter, the magistrate's enquiry was deemed to furnish sufficient guarantee of the trustworthiness of the person selected for the office.[6]

[1] *Ibid.* 3 J. 1, 14.
[2] Gaius. *Comment*, 1, 240.
[3] 27 J. 2, 20.
[4] Fr. 3, D. 26, 2.
[5] Fr. 4, *Ibid.*
[6] Gaius. *Comment.* 1, 200; Pr. J. 124.

Tutela legitima.

Legal tutelage (*tutela legitima*) was either of agnates, patrons, or parents, and was derived from the law of the Twelve Tables, which enacted that in default of a testamentary tutor having been appointed by the deceased *paterfamilias* for his minor children, the *tutela* would devolve on the nearest agnates, who were hence called *tutores legitimi*.[1] This was upon the principle which I have already alluded to, that "those who have the advan-"tage of succession should bear the burden of guardian-"ship."[2] Hence it was that in default of agnates, as the inheritance devolved on the *gentiles*, the latter also succeeded in the early period of the Roman law, to the tutelage.[3] But there was one exception to this general rule of law, for although a female was permitted to succeed as heir, she could not act as tutor,[4] because the office was confined to the male sex.[5] There is also this important distinction to be observed between the devolution of the inheritance and that of the *tutela* under the ancient law, that whereas in the former case if the nearest *agnatus* refused or died before entering on the inheritance, the succession passed to the *cognati* without first devolving on any of the more remote *agnati*, in the latter the burden of tutelage devolved on the second degree of *agnati*, if there was a failure of the first. But Justinian recognised the anomaly of admitting the principle of

[1] Gaius. *Comment.* 1, 155; Ulp. *Frag.* XI, s. 3; Pr. J. 1, 15. I have already explained the meaning of the term *agnati* in Roman law.

[2] Pr. J. 1, 17; Fr. 1, pr. D. 26, 4.

[3] Cicero, *De Invent.* II. 50; Ulp. *Col. leg. Mosaic*, tit. XVI. ch. IV. ss. 1-2. It is certain that Gaius treated of the tutelage of *gentiles* in the first book of his Commentaries, probably in section 164, which has unfortunately come down to us in a very illegible condition, for in s. 17, of his third book he says "we have explained in the first Commentary who are denoted by the term *gentiles*."

[4] Fr. 1, s. 1, D. 26, 4.

[5] Fr. 16, 18, D. 26, 2.

devolution to impose burdens and not to confer advantages; and he accordingly altered the old law and allowed a devolution of succession to the *agnati*.[1] If there were several agnates in the same degree the *tutela* devolved upon them collectively.[2] Thus Paulus gives the singular instance of a father's brother (paternal uncle) and a brother's son (nephew) acting as co-tutors, because both would stand as agnates in the third degree to the pupil: *Si reliquero filium impuberem, et fratrem, ex nepotem ex alio filio, constat utrosque esse tutores, si perfectæ ætatis sunt: quia eodem gradu sunt.*[3] One of the co-tutors might however undertake to carry on the duties of the office under the title of *Tutor Gerens*, the others, who were called *tutores honorarii*, being merely bound to see that he acted faithfully, and of course continuing responsible for mismanagement.[4] Or the tutors might apportion the tutelage between them, in which case each would only be responsible for his particular portion.[5] By the law of the Twelve Tables females, whether under or above the age of puberty, were subject to the guardianship of their agnates, but the Emperor Claudius abolished the old law and freed females altogether from wardship, without any distinction as to age.[6] Constantine, however, as we learn from a Constitution of the Emperor Leo, passed in 469 A.D., partly repealed the *lex Claudia*, and again restored the tutelage of female pupils to their male agnates.[7] Under the old law also there was this peculiarity in the

[1] 7 J. 3, 2; Gaius. *Comment.* 2, 12, 22, 25, 28; Paul. *Sentent.* 4, 23.
[2] 7 J. 1, 16.
[3] Fr. 8, D. 26, 4.
[4] Fr. 3, ss. 2 and 8, D. 26, 7.
[5] Fr. 3, s. 9, *Ibid.*
[6] Gaius. *Comment.* 1, 157.
[7] Const. 3, C. 5, 30; Const. 2, C. *Th.* 3, 17. Under Justinian females only remained in tutelage till they attained the age of puberty. Pr. J. 1, 22.

tutelage of women, that the *tutor legitimus* could delegate by a *cessio in jure* his office to another, who was called the *Cessicius tutor*, whereas the *tutela* of pupils could not be surrendered.[1] On the death, natural or civil, of the *Cessicius tutor*, the *tutela* reverted to the tutor who ceded it; and if the latter died or suffered a *capitis deminutio* of the greater or lesser kind, the *tutela* immediately departed from the *Cessicius*, and became vested in the person who was next in order to him who had surrendered it.[2] But the *lex Claudia* having abolished the *tutela* of agnates with respect to women, the *Cessicius tutor* ceased to exist.[3]

In what cases there was a tutor legitimus.

The legal tutelage of agnates, as I have said above, only came into operation in the event of the father of the pupil having died *intestatus*. Now a person was said to die intestate, so far as regards the appointment of a tutor, either when he left no testament, or having left one had not named a tutor, or when the tutor whom he had named had died in his own lifetime (*vivo testatore*).[4] So also if the testamentary tutor had been appointed until a certain time (*usque ad diem*), and that time was completed before the pupil attained the age of puberty, the *tutela* was transferred to the nearest agnate. In short, it was only when there was a failure in the appointment of a testamentary tutor, no matter upon what ground, that the tutelage passed to the *agnati*. *Quamdiu testamentaria tutela speratur*, says Ulpian, *legitima cessat*.[5]

Legal tutelage of patrons.

The tutelage of freedmen and freedwomen was vested in their patrons, and was called "legal tutelage," not that the law expressly provided for it, but because it was

[1] Gaius. *Comment.* 1, 168.
[2] *Ibid*, 170.
[3] *Ibid*, 171.
[4] Fr. 6, D. 26, 4; 2 J. 1, 15.
[5] Fr. 11, D. 26, 2.

established by interpretation and analogy.[1] "For," says Justinian, "as the law had ordained that patrons and "their children should succeed to the inheritance of their "freedmen or freedwomen who should die intestate, the "ancients were of opinion that the intent of the law was "that the tutelage also belonged to them."[2] If a common slave below the age of puberty was manumitted the *tutela* belonged to all his patrons who were males,[3] and on the death—natural or civil—of any of them the office devolved on the survivors, to the exclusion of the sons of the deceased patrons.[4] But on the death of all the original patrons the *tutela*, supposing of course that the emancipated slave was still *impubes*, passed to their descendants, with this distinction that the nearest in degree excluded the more remote. Thus, according to Ulpian, if one of two patrons died leaving a son, and the other a grandson by a son, the *tutela* appertained to the son, because he alone would be entitled to the *legitima hereditas*: *Legitima hereditas ad solum filium pertinet: ergo et tutela ad solum filium descendit: post filium, tunc ad nepotem.*[5] Supposing again that one person held a slave *in bonis* while another possessed the *nudum jus Quiritium*; in such a case, as under the old law emancipation only raised a slave to the position of a Latinus according to the principles of the *lex Junia*, the legal or Quiritarian owner would be entitled to the *tutela*, while the equitable owner would have the right of succession to the goods of the the *emancipatus*.[6] But as Justinian abolished the distinction between Quiritarian and equitable or bonitary

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[1] Fr. 3, pr. D. 26, 4.

[2] Pr. J. 1, 17.

[3] Fr. 3, s. 4, D. 26, 4. Females for instance, were excluded. Pr. J. 1, 17; Fr. 1, ss. 1 and 3, D. 26, 4.

[4] Fr. 3, s. 5, *Ibid.*

[5] Fr. 3, s. 7, *Ibid.* See also Gaius. *Comment.* 3, 60.

[6] Gaius. *Comment.* 1, 167 and 213; Ulp. *Frag.* XI. s. 19.

ownership[1] (δεσπότης βονιτάριος, THEOP. T., 5, 4.), such a case as the above could not arise.

Legal tutelage of parents, or ascendants.

We have already seen the mode of emancipation practised in ancient times, and that the operative part of the ceremony was the actual enfranchisement made after the third sale was completed. If this was effected by the father he became the *patronus*, and if the emancipated child was *impubes*, the *tutor legitimus* also. But if the purchaser (*co-emptionator*) or *manumissor extraneus* performed it, he was called a fiduciary guardian (*tutor fiduciarius*), although he acquired the rights of patronage.[2] Justinian, however, having abolished the old forms of emancipation, we no longer hear in his legislation of a *co-emptionator* or a *manumissor extraneus*; and accordingly the Institutes speak of the *tutela* of an emancipated child below the age of puberty as devolving in every instance on the emancipating parent (*parens manumissor.*)[3]

Fiduciary tutelage.

If the *parens manumissor* died intestate before the emancipated child attained puberty, the *tutela* in that case devolved on the brothers if any who were of full age (*perfecta ætas.*)[4] This kind of guardianship was called *fiduciaria*, in contradistinction to the *tutela legitima*, because the unemancipated children were not patrons of those who had been emancipated, and were therefore not entitled to the guardianship by the law of the Twelve Tables. Justinian however gives another reason, *viz.*, that the emancipated child would have become *sui juris* on the death of the father if he had not been emancipated, and would not have fallen under the power of his brother, and consequently not under his guardianship.[5] But this

[1] C. 7, 25.
[2] Gaius. *Comment.* 1, 132, 166, 172, 175; Ulp. *Frag.* XI. s. 5.
[3] Pr. J. 1, 18; 6 J. 1, 12.
[4] Fr. 4, D. 26, 4.
[5] Pr. J. 1, 19.

reason is obviously defective; for supposing a grandfather emancipated his son's son while still retaining *potestas* over the son, the latter would only have been entitled on the grandfather's death to the fiduciary guardianship of the emancipated grandson (being *impubes*), although if the grandson had not been emancipated he would have fallen, on the grandfather's death, under the *patria potestas* of his father.[1] The true explanation why the tutelage of a patron's son was called *legitima* while that of an unemancipated brother was styled *fiduciaria*, is that since the Law of the Twelve Tables gave the right of succession to a freedman's goods to the patron in the first instance and next to his sons, the *tutela* likewise devolved upon them *ex lege* upon the principle already adverted to, that "where the succession is there ought also to be the burden of guardianship." By analogy the emancipating father was regarded in the light of a patron, and having as such a right of succession to his son's goods he was charged with his *tutela*, which was called *legitima*, as being derived from the Law of the Twelve Tables. But there was no analogy between his unemancipated sons and the sons of an ordinary patron; for we find that it was not until a constitution of the Emperor Anastasius, published in the year 498 A.D., that unemancipated brothers were vested with any right of succession to the inheritance of an emancipated brother or *vice versa*: because *Jure Civili* emancipation completely broke the agnatic line, and made the *emancipatus* a complete stranger in his natural family.[2] And even after that constitution had abrogated the ancient law, unemancipated brothers still continued to be called fiduciary tutors, because it was only when the principle of succession was derived

[1] Pr. J. 1, 12.
[2] Const. 4, C. 5, 30.

directly or indirectly, from the Law of the Twelve Tables, that the attendant burden of tutelage was called legal, or *legitima*. The term legal tulelage in fact as understood by Roman Jurists, did not mean simply a guardianship sanctioned by the law generally, for in this sense that of agnates, patrons, and of the manumissor and his children, would undoubtedly be legal, but it pre-eminently denoted the guardianship which was derived expressly or impliedly from the ancient law of the Twelve Tables. Thus Ulpian says: *Legitimi tutores sunt qui ex lege aliqua descendunt*; PER EMINENTIAM AUTEM LEGITIMI DICUNTUR, QUI EX LEGE DUODECIM TABULARUM INTRODUCUNTUR, *seu propalam, quales sunt agnati, seu per consequentiam, quales sunt patroni* (1). And again: *Legitimos tutores nemo dat: sed lex duodecim Tabularum fecit tutores.*[2] It seems doubtful, however, whether the above distinction between legal and fiduciary tutelage, which is maintained in the Institutes, was or was not abolished by the subsequent changes introduced by Justinian. It is no doubt true that by Novel 118, cap. 4, Justinian established a new order of succession, removing all distinction between agnates and cognates; and that by cap. 5 he affirmed the old doctrine that the right of succession and the burden of tutelage should run together, except that females, other than the mother and grandmother, were still declared to be incapable of acting as tutors. But Demangeat following Vangerow thinks that the new law did not affect the *tutela fiduciaria* of the agnate sons, which was of a special character, and this opinion is doubtless correct; for the real object of Justinian's enactment was simply to abolish the old rule that the *agnati* should be called to the *tutela* of the *pupillus* to the exclusion of the *cognati*.[3]

[1] *Frag.* XI. s. 3.
[2] Fr. 5, pr. D. 26, 4.
[3] *Cours Elémeutaire de Droit Romain*, vol. I. page 357-358.

Tutela dativa.

The last form of tutelage was that known as *dativa*, a term which modern writers on Roman law confine to the guardianship of tutors appointed by magistrates, but which the old Roman jurists interpreted as another name for testamentary tutelage. Thus Gaius says: "Those tutors who are given by testament are called "*dativi*."[1] Restricting the term, however, to magisterial appointments, we have to consider—

1. In what cases such tutors could be appointed.
2. Who were the particular magistrates by whom the appointment could be made.

In what cases a tutor dativus could be appointed.

In the first place a *tutor dativus* could only be appointed in default of a testamentary or legal tutor. This was the general rule underlying every instance of such an appointment; and it is said by Gaius that the power to appoint a tutor under the above circumstances was conferred by a *lex Atilia*,[2] the exact date of which is unknown, but which probably existed before the year of the city 567, for Livy referring to the case of the freedwoman Ficennia Hispala says, that after her patron's death, being in nobody's power (*nullius in manu*), she petitioned the tribunes and prætor for a tutor.[3] Heineccius,[4] however, attributes the authorship of this law to L. Atilius Regulus, who is mentioned by Livy as tribune in 443 A.U.C.[5] The tutor thus appointed was called *Atilianus* or *Dativus* from the formula employed by the Prætor in making the appointmeut: *Do te tutorem*.[6] But this law, it should be observed, only affected citizens

Lex Atilia.

[1] Gaius. *Comment.* 1, 154.
[2] *Comment.* 1, 185.
[3] Lib. 39, cap. 9.
[4] *Antiq. Roman.* lib. 1, tit. XIII. s. 9.
[5] Lib. 9, cap. 30.
[6] *Brisson de Form.* V. p. 408.

resident at Rome,[1] and it was not apparently till the year 721-722 A.U.C., that the power of appointing tutors under similar circumstances was for the first time generally vested in provincial magistrates, by a *lex Julia et Titia*, so called from Augustus M. Titius, and M. F. Rufus, the consuls of the year.[2]

Several applications of the above general rule are to be found in the writings of the Roman jurists: for it was understood to embrace not only those cases in which *no* testamentary or legal tutor was forthcoming, but even those other cases in which, for some cause or another, a testamentary or legal tutor was unable to act.

Thus (*a*) where a testamentary tutor was appointed *sub conditione* or *ex die certo*, during the pendency of the condition in the one case and until the arrival of the prescribed day in the other, the magistrate was bound to appoint a tutor, in order to supply the *auctoritas* which was wanting to complete the *persona* of the pupil. Again, since a testament derived its legal force from the institution of the heir, and could not be enforced so long as the heir did not appear; it followed that a *tutor testamentarius* could not enter on his functions until the *heres institutus* had accepted the inheritance. Meanwhile the magistrate assumed jurisdiction and appointed a tutor, whose functions ceased as soon as the testamentary tutor was able to act[3]; for, as we have already seen, a legal tutor was excluded so long as there was a possibility of giving effect to a testamentary appointment (*quamdiu testamentaria tutela speratur, legitima cessat.*)[4] But if the condition altogether failed or was rendered impossible of

[1] Ulp. *Frag.* XI. s. 18; Gaius. *Comment.* 1, 185.

[2] Tacit. *Annal.* III. 25. According to Diodorus Siculus the practice had long previously prevailed in Sicily of the Prætors appointing tutors to pupils and women.

[3] Gaius. *Comment.* 1, 186; 1 J. 1, 20.

[4] Fr. 11, D. 26, 2.

fulfilment; or again if the *heres institutus* declined the inheritance and thus rendered the testament inoperative (*irritum*); in all these and similar cases the possibility of giving effect to the testamentary wishes of the testator being at an end, the *tutor dativus* was replaced by a legal tutor if one was forthcoming and eligible for office.

(*b*). The capture of a testamentary tutor by the enemy was another valid ground for the appointment of a *tutor dativus*;[1] and Ulpian thinks that the appointment could also be made when the tutor was sent as an ambassador to a hostile State, or had fled thither to avoid the loss of liberty in his own city.[2]

(*c*). Again if the testamentary or legal tutor was physically or mentally incapable of acting, by reason of his being deaf, dumb, or insane;[3] or if he claimed exemption on a valid ground,[4] or was removed *quasi suspectus*;[5] the magistrate had to assert his authority and appoint a substitute.

(*d*). So also if a testator appointed two or more tutors and one of them happened to die, or became *capite minutus*, the magistrate could supply his place by the appointment of a *tutor dativus*. But on the natural or civil death of all the testamentary tutors, the guardianship devolved on the agnates.[6]

In short the magistrate was required to appoint a tutor in every case in which the pupil had no other guardian who was willing and qualified to act.[7]

[1] Gaius. *Comment.* 1, 187; 2 J. 1, 20.
[2] Fr. 15, D. 26, 1.
[3] Fr. 17, *Ibid.*
[4] Fr. 11, s. 1-2, D. 26, 2; Fr. 3, s. 8, D. 26, 4.
[5] Gaius. *Comment.* 1, 182.
[6] Fr. 11, s. 4, D. 26, 2; Fr. 3, s. 9, D. 26, 3.
[7] See the instances given by Justinian (5 J. 1, 23); Gaius. (*Comment.* 1, 184); and Ulpian (*Frag.* XI. s. 24.

trates could make the appointment.

The next question concerns the magistrates by whom a *tutor dativus* could be appointed. The first observation that has to be made on this point is, that the *tutoris datio* did not appertain to any one by virtue of a magisterial or executive office, but was an extraordinary jurisdiction which had to be specially conferred by a *lex Senatusconsultum*, or imperial constitution. Thus Ulpian writes: *Tutoris datio neque imperii est neque jurisdictionis; sed ei soli competit cui nominatim hoc dedit vel lex vel Senatusconsultum vel Princeps.*[1] It was conferred at Rome itself upon the Prætor Urbanus and the majority of the tribune of the Plebs by the *lex Atilia* above mentioned, and in the provinces upon the *præsides* by the *lex Julia et Titia.*[2] But these laws were defective in two respects; in the first place they required no security from the tutors for the safety of the pupil's property, and secondly, they contained no provisions to compel the tutors to accept the office.[3] This led to reforms, and the first change was introduced by Augustus, who vested the power of appointing tutors, after due enquiry, in the consuls,[4] which Antoninus Pius subsequently transferred to the prætors.[5] Accordingly long before Justinian's time the Atilian and Julian laws had ceased to regulate the appointment of tutors;[6] and under his system they were appointed at Rome by the *Præfectus Urbi* or the Prætor, according to his jurisdiction,[7] and in the provinces *ex inquisitione* by the

[1] Fr. 6, s. 2, D. 26, 1.

[2] Gaius. *Comment.* 1, 185. There were ten tribunes of the people, so that under the Atilian law a majority of six were required to concur in the selection made by the Prætor.

[3] 3 J. 1, 20.

[4] Suet. *In Claud.* C. 23.

[5] Jul. Capitolinus, *In Auton. vita.* C. 10.

[6] 3 J. 1, 20.

[7] Theophilus considers that the Prætor could only appoint tutors to persons of humble rank or fortune, while the *Præfectus urbi* had

præsides, or if the property was small by a subordinate magistrate at the command of the *præses*. The municipal magistrates also appear to have exercised the *jus dandi tutores* in the time of Ulpian[1] and Paulus,[2] subject, however, to the directions of the *præses* of their province, although originally they probably only possessed the right of submitting a recommendation (termed *nominatio*) for the approval of the president, which of course could only have been of a purely formal character. In later times they undoubtedly exercised this power as a part of their jurisdiction, as appears from a fragment of Celsus, who lived shortly after Domitian,[3] and still more conclusively from the Salpensa Tables discovered by M. Giraud.[4] But Justinian finally enacted that in the provinces where the fortune of the pupil was less than 500 *Solidi*,[5] the tutor should be apointed by a local magistrate called *defensor*, who was chosen from the *decuriones* and held his appointment for two years in conjunction with the bishop of the place, or other functionary, as the magistrate or, in the city of Alexandria, the *Juridicus*.[6] In this case no enquiry had to precede the appointment, but a money security was taken for the protection of the minor and to

jurisdiction in cases where pupils of large fortune or illustrious birth were concerned. This is what he thinks is alluded to by the words *secundum suam jurisdictionem*. See also a constitution of the Emperors Valentinian, Theodosius, and Arcadius, 1 C. 5, 33.

[1] Fr. 3, D. 26, 5.

[2] Fr. 46, s. 6, D. 26, 7.

[3] Fr 7, D. 27, 8.

[4] Chap. 29, page 147, *et seq.*

[5] The value of the *solidus*, which was the name given after the reign of Alexander Severus, to the old *Aureus*, is variously stated. Ortolan gives it as equivalent in French money to 22 francs 5 centimes, (*Explic. Hist. des Inst.* vol. II. page 171), while Demangeat reduced it to 15 francs. *Elément de Droit Romain*, tom. I. p. 363, note.

[6] Const. 30, C. 1, 4; 5 J. 1, 20.

insure the faithful discharge of the tutorial duties.[1] In other cases, however, that is where the appointment was either made at Constantinople, the capital of the Empire, or in the provinces by the *præsides* in those cases where the value of the pupil's estate exceeded 500 *solidi*, the old law was maintained, and the tutor could only be nominated after due enquiry concerning his wealth, rank, character, and ability.[2] He was not, however, required to furnish security, for it was supposed that the magistrate's enquiry had sufficiently ascertained his trustworthiness.[3]

Who could be appointed a tutor.

The office of a tutor was recognised as a public one, and except in very special cases in which the emperor allowed a mother or grandmother to assume the guardianship of her children or grandchildren, it was confined to persons of the male sex (*munus masculorum est*).[4] As *filiifamilias* were capable of holding any public office in regard to which they were regarded as *patresfamilias*—that of a tutor was also open to them,[5] although, as we have seen, none but a *paterfamilias* could legally impose a tutor on another. The following persons could also be appointed tutors, viz., slaves, whose appointment implied a grant of liberty, even when it was not expressed, but the appointment of a slave belonging to another was only valid when made with the condition "when he shall be "free" (*cum liber erit*);[6] madmen (*furiosi*) while labour-

[1] *Ibid.*

[2] Fr. 21, s. 5, D. 26, 5; Theoph. lib. 1, tit. 20.

[3] Pr. J. 1, 24.

[4] Fr. 16, 17, D. 26, 2; Const. 1, C. 5, 35; Novel. 118, cap. 5.

[5] Fr. 9, D. 1, 6; pr. J. 1, 14.

[6] 1 J. 1, 14. In the ancient law enfranchisement was required to be expressly conferred, and was not even implied by the institutions of the slave as heir. Gaius. *Comment.* 1, 123; 2, 186, 187. But Justinian altered the law in 531, and decided that the institution of one's own slave as heir should be held to confer freedom as well. 1

ing under mental aberration were of course incapable of acting as tutors, but their appointment was not absolutely void, for the condition was held to be implied *cum suæ mentis essent*, and the appointment was accordingly held in abeyance till such time as they regained their senses;[1] so also with respect to minors under the age of twenty-five, Justinian decides that the tutelage would only commence when the minor attained his twenty-fifth year.[2] Under the old law, however, it appears that although minors could claim exemption from undertaking the office of a tutor, they were not actually incapable of acting if they were willing to do so. But Justinian in a constitution of the year 529 A.D. made minority a ground of incapacity, and prohibited persons under full age from being called to a legal tutelage,[3] "for it is absurd," adds the emperor, "that persons who "are themselves governed, and are known to need "assistance in the administration of their own affairs, "should become tutors, charged with the care of others."[4]

Persons disqualified to act as tutors.

We have already seen that only those persons who enjoyed the *testamenti factio* (the *Latini Juniani*, however, being excluded), could be nominated testamentary tutors.[5] This was the general qualification, but it was also necessary that the person selected to act as a tutor

J. 2, 14. It is probable therefore that Justinian was also the first to decide that the appointment of a slave as tutor was a tacit manumission, although that this doctrine is said to have been affirmed by Paulus in a fragment which we find inserted in the Digest (Fr. 32, s. 2, lib. 26, 2,) which, however, is supposed by Demangeat to have been manipulated by the compilers. *Cours. Elémentaire de Droit Romain.* vol. 1, 328.

[1] Fr. 11, D. 26; Fr. 10, s. 3, D. 26, 2.

[2] 2 J. 1, 14.

[3] Const. 5, C. 5, 30.

[4] 13 J. 1, 25.

[5] Fr. 21, D. 26, 2.

should have both physical and mental as well as moral capacity of discharging the duties of the office. Thus mutes and deaf persons were incompetent to act, "because," says Paulus, "a tutor should not only be able "to speak but also to hear."[1] So were madmen and minors.[2] Military men were also incapacitated, and women could only act under special authorisation of the emperor.[3]

Office of tutor obligatory, except in special cases.

As a general rule the office of a *tutor* was obligatory and could not be declined unless for some valid reason,[4] which was required to be assigned within fifty days next after the fact of appointment was known, if the tutor was within a hundred miles of the place when he was appointed.[5] But a freedman could never claim exemption when charged with the *tutela* or *curatio* of his patron's children. This was enacted by a *Senatus-consultum* passed in the reign of Marcus Aurelius.[6]

Exemption or *excusatio* might be general or special, the former operating in every case, and the latter only under particular circumstances, or during a certain period.[7] Thus persons above the age of seventy years,[8] or who

[1] Fr. 1, s. 2, and 3, D. 26, 1.

[2] 14 J. 1, 25.

[3] Fr. 18, D. 26, 1.

[4] But this was only true in ancient times of the *tutor legitimus*, for in the case of a tutor appointed under the operation of the *lex Atilia* or the *lex Julia et Titia*, it appears that these laws contained no provisions to compel his acceptance of the office. 3 J. 1, 20. So also a testamentary tutor might decline office, at least when not appointed to an *impubes*. Ulp. *Frag.* XI. s. 17.

[5] Fr. 13, s. D. 27, 1; 16 J. 1, 25. If the tutor was at a greater distance he was allowed a day for every twenty miles, and thirty days besides, provided in no case the period was less than fifty days. *Ibid.*

[6] Const. 5, C. 5, 62.

[7] Fr. 12, pr. D. 27, 1.

[8] 13 J. 1, 25.

were unable to read,[1] were excused in all cases, but a person, for instance, engaged in administering the property of the *fiscus*, was only excused while his administration continued.[2] Commentators again distinguish between grounds of exemption which entitled a person to excuse himself from *undertaking* a *tutela* (*a suscipienda tantum tutela vel cura*), and those which permitted a person to *abandon* a *tutela* already undertaken (*etiam a suscepta tutela vel cura*). Thus a magistrate although he might assert his privilege of claiming exemption when called upon to fill the office of tutor, could not abandon a *tutela* which he had once undertaken.[3] But a blind man, a deaf or dumb person, and a *furiosus* could abandon the office even after accepting it (*post susceptam tutelam.*)[3] The exemption moreover might be *complete* or *partial*, according as it excused a person from discharging all or only a portion of the functions of the office. Thus a person who had his domicile in Italy could not be compelled to administer property in the provinces, although, if not otherwise excused, he would be bound to administer such portion of the estate as was situate within his own province.[4] Senators were also excused from administering property beyond a certain distance from the city.[5] Lastly, the exemption might be absolute or *discretionary*: that is in some cases the magistrate was bound to admit the excuse if substantiated, as that of absence on the service of the state[6] or being engaged in administering

[1] 2 J. 1, 25.

[2] Fr. 6, s. 19, D. 27, 1; 8 J. 1, 25. Illiterate persons were however, at times considered capable of acting as curators. *Ibid.*

[3] Fr. 17, s. 5, D. 27, 1; 3 J. 1, 25. So also the fact of a Roman citizen having three children was a valid excuse for *not* undertaking (*a suscipienda*) but not for *abandoning* a tutelage already undertaken (*non a jam suscepta*); Fr. 2, s. 8, D. 27, 1.

[4] Fr. 40, *Ibid.*

[5] Fr. 19; Fr. 21, s. 2, *Ibid.*

[6] Fr. 21, s. 3, *Ibid.*

the property of the fiscal department;[1] while in others he had a certain discretion, as where poverty or illness was alleged as the ground of excuse.[2]

Grounds of exemption from tutelage.

Having made the above general observation I shall next proceed to deal *seriatim* with the various grounds of exemption sanctioned in the Institutes of Justinian.

1. *Propter liberos,* on account of the number of children. This ground of exemption, which is mentioned by Justinian as most frequently advanced,[3] owes its origin probably to the *lex Julia et Papia Poppæa,* which also freed women from tutelage *jure liberorum.*[4] The prescribed number of children were three at Rome, four in Italy, and five in the Provinces. It is somewhat remarkable that notwithstanding the abolition of all distinctions as to soil by Caracalla, Justinian should still maintain the above distinction which we meet with in a constitution (204 A.D.) of the Emperors Severus and Antoninus.[5] The children were required to be born of a lawful marriage,[6] and to be living, for deceased children were not usually reckoned except those who had perished in battle, "whose glory rendered them immortal."[7] Nor were unborn children (*qui in ventre sunt*) reckoned, although as we have seen, the law in many cases regarded a child *in utero* as already born.[8] It was not necessary however, that the children should all be *in potestate,*

[1] 1 *Ibid.*
[2] 6 and 7 J. 1, 25.
[3] Pr. *Ibid.*
[4] Gaius. *Comment.* 1, s. 145, 194.
[5] Const. 1, C. 5, 66.
[6] Fr. 2, s. 3, D. 27, 1. See also *Frag. Vatic.* s. 168, 194.
[7] Fr. 2, s. 4, D. 27, 1; 18 *Ibid*; pr. J. 1, 25.
[8] Fr. 2, s. 6, *Ibid.*

for those who had been emancipated were included.[1] Butadopted children were excluded,because the object of the Papian law was to increase the population by promoting marriages. Such children might, however, be reckoned in favour of their natural father, notwithstanding the fact oftheir having entered a new family.[2] Grandchildren by a son were reckoned, but not grandchildren by a daughter.[3] It is also to be observed that although a person who had not the requisite number of children might obtain the *jus liberorum* by special grant from the Emperor, and thus escape the penalties imposed by the Julian and Papian laws, this would not entitle him to claim exemption from tutelage or other public burdens (*munera publica*): *jus liberorum a principe impetratum, nec ad hanc causam, nec ad munera prodest.*[4]

2. *Administration of property belonging to the fiscus.* This ground of exemption was introduced by a rescript of the Emperor Marcus Aurelius, but it only continued to operate while the person was actually engaged in the administration, and was therefore of a temporary character.[5]

3 *Absence on the service of the State,* excused a person from undertaking the office of tutor not only while it lasted, but for a year after his return, (*anni vacatio*). But this latter privilege was only allowed when a new tutelage was imposed; in the case of a tutelage which had already been imposed, subsequent absence on public affairs did not exempt a person from the burden, beyond the time he was actually

[1] Fr. 2, s. 3, *Ibid*; pr. J. 1, 25.
[2] Pr. J. 1, 25.
[3] *Ibid.*
[4] *Frag. Vatic.* s. 170.
[5] Fr. 41, Pr. and s. 1, D. 27, 1; 1 J. 1, 25.

absent. Immediately on his return he was bound to resume his duties, a curator being appointed meanwhile to carry on the administration.[1]

4. *Holding a municipal magistracy* (POTESTATEM ALIQUAM) This was a valid reason for refusing to enter on a tutelage, but did not justify the abandonment of the office, if it was once voluntarily undertaken.[2]

5 *Existence of a lawsuit with the pupil.* This only operated as a valid excuse under the old law, when the suit embraced the whole, or at least the major part of the property, or related to an inheritance.[3] But Justinian afterwards decided that no creditor or debtor of the pupil or adult should be eligible to the office of a tutor or curator.[4]

6. *Tria onera tutelæ non adfectatæ.* Three existing tutelage or curatorships, if unsolicited, served as an excuse from filling any other such office. But the tutelage of several pupils, or the curatorship of an undivided property, as where the pupils or adults were brothers, was reckoned as one only.[5]

7. *Propter paupertatem.* Poverty, when it rendered a man incapable of the burden imposed upon him, was regarded as a sufficient excuse, according to a rescript of the Emperors Marcus Aurelius, Antoninus, and Lucius Verus, who are styled in the Digest and Institutes, the *divi fratres*.[6]

[1] Fr. 10, pr. ss. 1-3, D. 27, 1; 2 J. 1, 25.

[2] Fr. 6, s. 16, D. 27, 1; 3 J. 1, 25.

[3] Fr. 20, 21, pr. D. 27, 1; 4 J. 1, 25.

[4] Novel. 72, cap. 1.

[5] Fr. 3; Fr. 15, s. 15, D. 27, 1; 5 J. 1, 25. A tutelage was held to be solicited if it was either expressly desired, or was accepted when it might have been declined: *Affectatam sic accipiemus, si vel appetita videatur, vel, cum posset quis se excusare, ab ea se non excusavit;* FRAG. VATIC. s. 188.

[6] Fr. 7, D. 27, 1; 6 J. 1, 25.

8. *Propter adversam valetudinem.* Illness, if it prevented a man from superintending his own affairs,[1] and inability to read,[2] also afforded grounds of exemption; but in these cases the magistrate had a discretionary power.
9. *Propter inimicitias.* Enmity between the father of the pupil and the appointed tutor, if of a deadly character and not followed by a reconciliation, was a ground of rejection and not simply an excuse from accepting office.[3] And in order to guard against parents imposing the heavy burdens of *tutela* to spite an enemy, the law allowed this circumstance to afford a sufficient excuse.[4] So, too, if the father of the pupil had called in question the *status* of the person appointed tutor, by alleging for instance that he was a slave.[5] But the mere circumstance that the tutor was unknown to the father of the pupil was not of itself admitted, according to a rescript of the *divi fratres,* as a sufficient excuse.[6]
10. *Propter ætatem.* Persons who had completed their seventieth year were not compelled to fill the office of tutor,[7] nor yet were minors under the age of twenty-five according to the old law.[8] But Justinian decided in a Constitution published in the year 529 A.D. that minority should form a ground of incapacity and not of mere exemption.[9] If a person under this age were appointed by testament, we have already

[1] 7 J. 1, 25.
[2] Fr. 6, s. 19, D. 27, 1; 8 J. 1, 25.
[3] Fr. 3, s. 12, D. 26, 10; 11 J. 1, 25.
[4] Fr. 6, s. 17, D. 27, 1; 9 J. 1, 25.
[5] 12 J. 1, 25.
[6] Fr. 15, s. 14, D. 27, 1; 10 J. 1, 25.
[7] Fr. 2, pr. D. 27, 1; 13 J. 1, 25.
[8] Fr. 10, s. 7, D. 27, 1.
[9] Const. 5, C. 5, 30; 13 J. 1, 25.

seen that the appointment would be held in abeyance and the magistrate would authorise another person to act as tutor till such time as the minor reached the age of twenty-five.[1] The same rule was probably observed in the case of a *tutor legitimus*, for the correct opinion appears to be that the minority of the person upon whom the office of tutor devolved according to the Law of the Twelve Tables, did not necessitate the permanent transfer of the *tutela* to the next nearest agnate, but simply justified the appointment of a substitute during minority.

11. *Military service* was a ground of absolute exclusion or incapacity,[2] rather than of mere optional exemption. But veterans who had honourably completed their period of service were competent to act as tutors, although they might claim exemption if appointed by non-military persons, and also within one year of their dismissal, if appointed by those who had served in the army.[3] This exemption could not be claimed by those who had been dismissed with ignominy.[4]

12. Practising the profession of a grammarian, rhetorician, or physician. Persons who exercised such professions at Rome or in their own country, provided they were within the number authorised by the Imperial Constitutions,[5] were also exempted.[6]

The authority of tutors.

It has already been stated that a tutor was appointed for the protection of the person as well as for the administration of the property of the pupil. These two

[1] 2 J. 1, 14.
[2] 14 J. 1, 25.
[3] See the rules on this subject given by Modestinus. Fr. 8, D. 27, 1.
[4] Fr. 8, s. 1, *Ibid.*
[5] See *ante* page 31.
[6] 15 J. 1, 25.

functions were entirely distinct, and thus Ulpian observes: *Pupillorum pupillarumque tutores et negotia gerunt et auctoritatem interponunt.*[1] With respect to the person of the pupil, the tutor was entrusted with his maintenance and education according to his (the pupil's) rank and fortune;[2] but in selecting an establishment for the proper education of the pupil, the tutor was required to act in concert with the magistrate or *præses* of the province.[3] He also intervened with his authority (*interponit auctoritatem*) to supply what was wanting to complete the legal *persona* of his pupil (*ad integrandum pupilli personam*). The word *auctoritas*, it should be observed, comes from the verb *augere*, which signifies to increase or augment, and when used with reference to a tutor it implies that he supplied the judicial aptitude (*animi judicium*) for the transaction of the affairs of civil life which the pupil did not himself possess; and thus the tutor might be said to "increase" or "augment" the capacity of his pupil, which was limited to the repetition of the solemn words prescribed by the civil law, by employing his judgment to guard the pupil against fraud and imposition.[4] Hence it was that the tutor was said to be given to the person and not to the property of the pupil, or for a single transaction: *Personæ, non rei vel causæ datur.* The tutor[5] moreover, could not authorise any act in which he was

[1] *Frag.* XI. s. 25. The tutor of a female above the age of puberty, however, only exercised one of those functions, namely that of supplying his *auctoritas.* Thus Ulpian proceeds to say: *Mulierum tutores auctoritatem duntaxat interponunt,* Ibid. Because females of this age, as I have already stated, were legally competent to administer their own estates, and the tutor merely gave a formal consent (*dicis gratia*). Gaius. *Comment.* 1, 190.

[2] Fr. 12, s. 3; Fr. 13, pr. D. 26, 7.

[3] Const. 1, C. 5, 49.

[4] Gaius. *Comment.* 3, 109, 10 J. 3, 19; Theoph. *Paraph.*

[5] Fr. 14, D. 26 2.

personally or beneficially interested, for the principle of the Roman law was, *in rem suam auctor*[1] *tutor fieri non potest.* And Justinian accordingly decided that when a suit had to be commenced between a tutor and his pupil, a curator (and not a prætorian tutor as formerly) should be appointed to carry it through.[2]

Indeed, so long as the principles of the ancient law, which prescribed certain *formulæ* to be observed in creating legal rights or obligations, were maintained, the pupil was himself required to repeat the solemn words of the particular formula applying to the case; for no one except the interested party was permitted to do so, and hence originated the doctrine stated by Ulpian, that no one can act as an agent for another in a legal transaction (*nemo alieno nomine, lege agere potest.*[3]) Thus an *infans* not having the faculty of speech (*qui fari non potest*).[4] could not repeat the solemn words, and therefore, says Theophilus in his *Paraphrase*, he could not possibly perform any legal act even with the aid of his tutor. The intervention of a tutor was therefore only operative for a pupil who had passed the age of infancy, which as we have seen was limited to the age of seven years.[5] And even in the case of a pupil who was *pubertati proximus*, the *auctoritas* of the tutor, as Justinian observes, was necessary to authorise some acts of the pupil, but not others.[6] Thus, whenever the pupil stipulated for something to be given to him from which he would derive pecuniary advantage, there was no need for the authori-

[1] Gaius. *Comment.* 1, 184; Fr. 1, 5, 7, D. 26, 8.

[2] 3 J. 1, 21; Gaius. *Comment.* 1, 184.

[3] Fr. 123, D. 50, 17. Thus an agent could not be employed in the case of a manumission, adoption, *cessio in jure*, acceptilation, stipulation, or to execute a testament for another *per æs et libram.*

[4] Fr. 1, s. 2, D. 26, 7.

[5] *Ante*, page 15.

[6] Pr. J. 1, 21.

sation of the tutor; but in all cases in which a pupil contracted an obligation, the law refused to enforce it unless it had been approved and sanctioned by the tutor,[1] who was required to be personally present, and to ratify it when made (*in ipso negotio*), for an *ex post facto* confirmation, or one communicated by letter (*per epistolam*) was of no avail (*nihil agit*).[2] Moreover, the authorisation of the tutor should be pure and simple, even when the contract was of a conditional character.[3] Thus then it follows that only when the condition of the pupil was injuriously affected, or likely to be so, that the tutor supplied his *auctoritas*; and accordingly Justinian states the rule to be that pupils may make their condition better but may not make it worse, without the authorisation of their tutor.[4] This seems at first sight to be directly inconsistent with what Justinian lays down in the paragraph immediately following the one in which the above rule is given, that the tutor should only authorise an act which he esteems advantageous to his pupil (*si hoc pupillo prodesse existimaverit*).[5] But a little reflection will show that there is no inconsistency whatever; for it is easily conceivable that it might often be advantageous for a pupil to part with a certain portion of his estate, either in consideration of a higher price than it was intrinsically worth being offered, or because the cost of keeping it would be incommensurate with the means of the pupil. Under such circumstances the tutor would surely consult the real interests of his pupil by selling or otherwise disposing of that portion of the estate; but the Roman law in its anxiety to guard a person of tender years from

[1] Fr. 9, D. 26, 8; pr. J. 1, 21.
[2] Fr. 9, s. 5, D. 26, 8; 2 J. 1, 21.
[3] Fr. 8, *Ibid.*
[4] Pr. J. 1, 21.
[5] 2 *Ibid.*

being inveigled into an unprofitable disposition of his property, and to prevent him from dissipating his wealth to satisfy youthful extravagance, established the principle that every alienation by a pupil was to be viewed as injurious; and consequently no such alienation could be enforced against an *impubes* unless it has been effected with the knowledge and consent of his tutor.[1]

Again there were other acts which although involving no risk, still required the authorisation of a tutor, probably on account of their importance and solemnity. Thus a pupil could neither enter on an inheritance, (*hereditatem ire*), demand possession of goods (*bonorum possessionem petere*) nor accept an inheritance given by a *fidcicommissum*.[2] No doubt the acceptance of an inheritance originally involved the payment of debts due by the estate, and this is the reason suggested by Ulpian why the law should require the authorisation of a tutor, because a pupil as such could not legally bind himself to others.[3] But it is to be observed that both Gaius and Justinian refer to the inability of a pupil to accept an inheritance, even though it be *lucrosa* or advantageous, and without any risk (*nec ullum damnum habeat*). It would seem therefore that Ulpian's explanation is scarcely accurate, and it is more probable that the tutor's authority was needed for the reason I have stated, namely, that the act of accepting an inheritance was considered to be one of a too formal and solemn a character for the capacity of a minor duly to appreciate. Were this not the real reason, there would be another objection to Ulpian's explanation; for as a pupil in all synallagmatical contracts could bind others though not himself, why should he not have been able to accept the inheritance without incurring

[1] 2 J. 2, 8.
[2] Fr. 9, s. 3-4 Fr. 11, D. 26, 8.
[3] Fr. 8, pr. D. 29, 2.

any liability for the debts? In the case of an *infans*, however, who was not able to pronounce the solemn words of the law, the ancient rule was that he could not acquire an inheritance even through the agency of a tutor;[1] but this was modified by a Constitution (426 A.D.) of the Emperors Theodosius and Valentinian, which permitted a a tutor in such a case to accept an inheritance in the name of his pupil.[2]

Tutor negotia gerit.

We have now to consider the second branch of a tutor's functions as the administrator of his ward's estate (*tutor negotia gerit*). In the first place the tutor on assuming office was bound to make an inventory *sub præsentia publicarum personarum*, of all the property of the pupil,[3] and to subscribe an oath for the true and faithful administration of the estate committed to his charge.[4] Legal tutors were also required to furnish security, but this was not exacted, as we have seen, in the case of a tutor *testamentarius* or *dativus*.[5] In the next place the tutor was expected to lose no time in disposing of those things belonging to his pupil which were of a perishable nature (*quæ sunt periculo subjectæ, quæ tempore depereunt*), in which class were included moveables generally and even houses.[6] Indeed, so strictly was this duty enjoined, that the tutor could even disregard the testamentary wishes of the father to the contrary. Thus Ulpian says: *usque adeo licet tutoribus patris præceptum negligere, ut, si pater caverit nequid rei suæ distraheretur, vel ne mancipia distrahantur, vel ne vestis ne domus, ne aliæ res periculo subjectæ, liceat eis contemnere hanc patris voluntatem.*[7] And by neglecting

[1] Fr. 90, D. 29, 2.
[2] Const. 18, s. 2, C. 6, 30.
[3] Const. 24, C. 5, 37.
[4] Novel, 72, cap. 8.
[5] Gaius. *Comment.* 1, 199-200; pr. J. 1, 24.
[6] Const. 22, C. 5, 37.
[7] Fr. 5, s. 9, D. 26, 7.

to turn such things into cash, the tutor became responsible for any loss which might accrue in consequence of his delay: *Si tutor cessaverit in distractione earum rerum quæ tempore depereunt, suum periculum facit: debuit enim confestim officio suo fungi.*[1] But as pupils were frequently losers by such compulsory sales, the old law was subsequently modified by a Constitution of the Emperor Constantine, which prohibited tutors from selling anything without the order of a magistrate (*sine interpositione decreti*), unless such articles were likely to depreciate in value by use.[2] Finally the tutor was bound within six months of assuming office, to collect the debts due to his pupil and to discharge those due by him;[3] to plead on behalf of the pupil in judicial proceedings, especially while he was an *infans* and unable to appear personally;[4] and generally to do all such things as would be conducive to the real interests of the pupil, and to employ the same degree of diligence as an ordinarily careful man would use in the conduct of his own affairs (*quantam in rebus suis diligentiam*). Subject to this rule he was responsible for all losses arising from his own neglect, as well as for actual fraud and deceit (*dolum et culpam præstat*).[5]

How tutelage was concluded.

The tutor, as a general rule, continued to exercise his functions until the pupil attained the age of puberty, which, as already stated, was fixed by Justinian at fourteen years in the case of males, and twelve in that of females.[6] But tutelage might also be determined before the above age under any of the following circumstances.

a. By the pupil suffering *deportatio* or *capitis deminutio*,

[1] Fr. J, s. 1, *Ibid.*
[2] Const. 22, C. 5, 37.
[3] Fr. 9, s. 5, D. 26, 7; Fr. 15, *Ibid.*
[4] Fr. 1, s. 2; Fr. 23, *Ibid.*
[5] Fr. 1, pr. D. 27, 3; Fr. 23, D. 50, 17
[6] Pr. J. 1. 22.

or by his losing his independence by arrogation into a new family, or by becoming a captive, or being reduced to slavery.[1] In any of these cases the functions of the tutor necessarily ceased, because a tutor could only be appointed for a person who was *sui juris*.[2] The same thing of course happened on the death of the pupil or tutor.[3]

b. In like manner as the office of a tutor was one of a public character which none but persons enjoying the rights of liberty and Roman citizenship could fill, it followed that a *capitis deminutio* which either deprived him of his liberty or citizenship, occasioned an immediate cessation of the *tutela*.[4] Of course a change of family which did not affect the civil or political status of the tutor would not destroy the tutelage except in the case of agnates, that is of legal tutors.[5]

c. If a tutor was appointed *ad certam conditionem*[6] or *ad certum tempus*,[7] he ceased to be tutor on the accomplishment of the condition, or on the expiry of the appointed time.

d. Lastly, tutelage might cease by the tutor excusing himself on one of the legal grounds already mentioned, or by his being removed from office on suspicion of *mala fides*.[8]

Right of accusing tutors.

This right of accusing suspected tutors is ascribed to

[1] Fr. 14, D. 26, 1; 1 J. 1, 22.
[2] Pr. 1 J. 1, 13.
[3] Fr. 4, pr. D. 27, 3; 3 J. 1, 22.
[4] Fr. 4, J. 1, 22.
[5] *Ibid*; Fr. 7, D. 4, 5. As to the proper interpretation of the latter passage, of which Paulus is the other, see Savigny, *System*, vol. II. s. 69, note *p*.; and Vangerow's *Lehrbuch*. vol. I. s. 288.
[6] Fr. 14, s 5, D 26, 1; 2 J 1, 22.
[7] Fr. 14, s. 3, *Ibid*; 5 J. 1, 22.
[8] Fr. 14, s. 4, D. 26, 1; 6 J. 1, 22.

the Law of the Twelve Tables,[1] and the power of removing them was vested at Rome in the Prætor, and in the provinces in the *præsides*, or the legate of the pro-consul.[2] It appears to have been customary, however, in the case of a legal tutor, for the magistrate simply to nominate a curator to act in concert with the suspected tutor,[3] unless indeed the conduct of the latter appeared to be too flagrant to be thus leniently dealt with, in which case the magistrate summarily removed him and appointed another in his place.[4] A tutor who was removed on the ground of fraud became infamous, but not one who was only charged with neglect;[5] and a freedman who was proved to be guilty of fraud when acting as tutor to the son or guardian of his patron, was liable to additional punishment at the hands of the præfect of the city.[6] A patron could also be accused, but in his case the magistrate did not announce the grounds of his decision, in order to preserve his reputation *famæ parcendum*.[7]

Who could accuse tutors.

The office of tutor being a public one,[8] the right of accusing him could be exercised by any member of the public, provided he was of full age;[9] and even women although generally incompetent to institute public actions,[10] were permitted by a rescript of the Emperors Severus and Antoninus to become accusers, if they were actuated by feelings of real affection for the pupil.[11]

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[1] Fr. 1, s. 2, D. 26, 10; pr. J. 1, 26.
[2] Fr. 3, s. 4, *Ibid*; 1 J. 1, 26.
[3] Fr. 9, D. 26, 19.
[4] Fr. 3, s. 8, D. 26, 4; 12 J. 1, 26.
[5] Const. 9, C. 5, 40; 6 J. 1, 26.
[6] Fr. 2, D. 26, 10; 11 J. 1, 26.
[7] 2 J. 1, 26.
[8] Fr. 9, D. 1, 6.
[9] Fr. 4, J. 1, 26. According to a receipt of the Emperors Severus and Antoninus, persons who had attained the age of puberty could, under the advice of their near relations, accuse their curators. Fr. 7, D. 26, 10.
[10] Fr. 1, D. 48, 2.
[11] Fr. 1, s. 7, D. 26, 10; 3 J. 1, 26.

Curatio.

We have seen that tutelage terminated on the pupil attaining the age of puberty, but it behoved the tutor before giving up office to use all his influence to urge the pupil to apply for a curator;[1] for although of a legal age to act for himself, it was thought that until the pupil attained the age of twenty-five, he would be unfit to protect his own interests.[2] This leads us then to the consideration of *curatio*, or administration by curators; and it will be remembered that the main distinction between *curatio* and *tutela* was, that the former was only given *rei vel causæ* while the latter was given *personæ*. Accordingly the office of a curator was not regarded in so sacred or honourable a light as that of a tutor. Indeed, among the ancients, as we learn from a passage of Massurius Sabinus, quoted by Aulus Gellius, the relationship between a tutor and his pupil was held to be more sacred and inviolable than that formed by the rites of hospitality or the ties of clientage, blood or marriage.[3] In general, however, the same rules were to be observed in the administration of the ward's estate by the curator and the tutor; the grounds of exemption from assuming office were moreover the same for both, and thus Modestinus observes *in paucissimis enim distant curatores a tutoribus*.[4] Indeed this same jurist speaks of the *auctoritas* of a curator,[5] which is clearly a misuse of the term, for it was strictly speaking confined to a tutor, as I have already explained; and Ulpian again uses the word *tutela* when he undoubtedly refers to *curatio*.[6]

Ulpian classifies curators into two classes—legal and

of tutors.

[1] Fr. 5, s. 5, D. 26, 7.
[2] Gaius. *Comment.* 1, 197; pr. J. 1, 23.
[3] *Noct. Attic.* V. 13.
[4] Fr. 13, pr. D. 27, 1.
[5] Fr. 8, D. 1, 7.
[6] *Prætor tutelam minorum suscepit*; Fr. 1, pr. D. 4, 4.

honorary.[1] The former derived their authority from the Law of the Twelve Tables, which enacted that madmen (*furiosi*) and prodigals (*prodigi*,) although past the age of minority, were to be placed under the curatorship of their *agnati*.[2] Cicero has preserved the text of this law so far as it referred to madmen; *Si furiosus est, adgnatorum gentiliumque in eo pecuniaque ejus potestas esto*.[3] And Gaius also informs us that under this law an agnate acting as curator was empowered to alienate the property of the *furiosus* under his charge.[4] With respect, however, to prodigals (*prodigi*) it was necessary in the first place that the magistrate had formally interdicted them from the management of their property before the *agnati* could assume the administration. Thus Ulpian observes: *Lege XII. Talubarum prodigo interdicitur bonorum suorum administratio; quod moribus quidem ab initio introductum est*.[5] Moreover, according to the strict Law of the Twelve Tables, the curatorship only devolved on the *agnati* if the *prodigus* had succeeded to his father's or grandfather's property *ab intestato*; for it appears that if the person desirous of a curator was instituted heir under his father's testament the curator was appointed by the magistrate and not *ex lege*.[6] The same thing happened if the *prodigus* was simply in possession of property acquired from other sources. Thus in the formula of the interdict which had to be pronounced before a man of prodigal habits could be legally restrained in the disposition of his estate, mention

[1] *Frag.* 12, s. 1.

[2] Fr. 1, D. 27, 10; Ulp. *Frag.* 12, s. 2; 3 J. 1, 23.

[3] *De Invent.* II. 50. As to the meaning of the term *furiosus* in Roman law, see *ante*, p

[4] *Comment.* 2, 64. See also Fr. 56, D. 47, 2; Fr. 1, pr. *infine* D. 27, 10.

[5] Fr. 1, D. 27, 10.

[6] Ulp. *Frag.* 12, s. 3.

was only made of such property as had devolved upon him through his paternal ascendants.[1] The prætor, however, interfered in every case in which it transpired that the reckless extravagance of a man was likely to involve him in ruin, irrespective of whether his property was acquired *ab intestato* from his paternal ascendants, or because such a person was considered to be no more fit to manage for himself than a madman.[2] So that a curator might even be appointed for a freedman, who of course was incapable of inheriting *ab intestato* the *bona paterna avitaque* from which alone an *ingenuus* could legally interdicted.[3]

Curatores honorarii

Curators appointed by the Prætor were accordingly styled *honorarii* to distinguish them from those who were called to the *curatio* by the Law of the Twelve Tables, and they might be given to persons of full age who were *mente capti, surdi, muti,* or who were labouring under some incurable malady which unfitted them for the conduct of their own affairs.[4] Again it might happen the person who was called *ex lege* to the curatorship of a *furiosus,* that is the nearest agnate, was incapable of performing the duties of the office (*inhabilis ad eam rem videatur*); in this case also, as in the corresponding case of a legal tutor becoming incapacited, the prætor assumed jurisdiction and appointed an honorary curator to see to the proper administration of the estate:[5] for guardianship or administration did not descend like an inheritance, on the death of the immediate tutor or curator, to the next nearest agnate. So also if a curator had been appointed for a *furiosus prodigus* by the testa-

[1] Paul. *Sentent,* lib. III. tit. IVa, s. 7.
[2] Fr. 1, pr. D. 27, 10.
[3] Ulp. *Frag.* 12, s. 3.
[4] 4 J. 1, 23. These terms have been sufficiently explained in chapter I. page 17, *et seq.*
[5] Fr. 13, D. 27, 10.

ment of the father, the formal confirmation of the magistrate was still needed;[1] and indeed it would seem that the nomination of curators was generally in the hands of the Præfect or Prætor of the city at Rome, and of the *Præsides* in the provinces.[2]

Curators, how appointed for pubal minors.

What has been said in the last paragraph has reference to persons of unsound mind or to those who, although of full age, were judicially interdicted from the administration of their property; but curators might also be given by the magistrate to minors who were neither mentally nor physically incapable of acting for themselves. Now it has already been explained that full age in Roman jurisprudence was fixed at twenty-five years by a law which appears to have existed in the time of Paulus,[3] and which is sometimes called the *lex Lætoria,*[4] although it is more generally known as the *lex Plætoria.* On the subject of age by this law it was enacted that a person who took advantage of a minor's youth and experience to defraud him, should be liable to *judicium publicum,* a condemnation which not only inflicted a pecuniary penalty on the guilty person but also involved the consequences of *infamia.* It was not intended, however, that this law should actually incapacitate a pubal minor from entering into contracts, but it is easily to be seen how this result would be indirectly produced by the facility which it allowed a minor to challenge contracts made with him; for few persons would like to enter into agreements which might at any time be disputed on the ground of imposition and fraud. The natural consequence therefore was that no one would deal with a minor, and the young spendthrift in the *Pseudolus* of Plautus no doubt gives expression to a very

[1] Fr. 6; Fr. 16, D. 27, 10; 1 J. 1, 23.
[2] P. J. 1, 23.
[3] Pseud. Act 1, sc. 3.
[4] Const. 2, C. Th. 8, 12.

general feeling amongst youths of his own age at Rome when he bitterly exclaims: *lex me perdit quinavicennaria! metuunt credere omnes.* To remedy this inconvenience, and at the same time to give the creditor a substantial assurance that he would not be afterwards prejudiced, the minor had to apply for a curator whose presence at once gave validity to the transaction and afforded sufficient proof that the minor had not been *circumscriptus.* This privilege of applying for the assistance of a curator was allowed by Marcus Aurelius to all minors, without requiring them to state the grounds upon which they based the application (*non redditis causis*); whereas formerly it appears that curators could only be appointed by the magistrate in three cases, *e.g.* (*a*) under the provisions of the *lex Plætoria* as above explained, (*b*) on the ground of extravagance, or (*c*) by reason of insanity.[1] Of course in the two last cases the magistrate himself took the initiative on the representation of some interested friend of the minor's, although, as Ulpian says, the curator was really appointed during minority *non ut furioso, sed ut adolescenti.*[2] But where a minor was neither insane nor was suffering from any physical defect, such as deafness or dumbness, the magistrate had no power to force a curator upon him against his wish, for the rule as stated by Justinian was, *inviti adolescentes curatores non accipiunt.*[3] A minor might however at times find himself under the necessity of having a curator; for instance if he had to appear in a judicial proceeding as plaintiff or defendant: because otherwise he would not be bound by the judgment, and might afterwards succeed in setting it aside or obtaining *restitutio in integrum* from the Prætor.[4] A curator had

[1] *Julius Capitolinus in vit, Marc. Aurel.*
[2] Fr. 3, pr. s. 1, D. 26, 1.
[3] Q J. 1, 23.
[4] *Ibid* Const. 1, C. 5, 31.

also to be appointed under the old law for the purpose of receiving monies due to the minor,[1] or of taking accounts from a tutor on the termination of the tutorship. Moreover, since it was the duty of a tutor, before giving up office to urge his pupil to apply for a curator,[2] a request with which the pupil was in a manner forced to comply;[3] it practically followed that the only persons under full age who had the option of having a curator or not, were those who had attained puberty in the lifetime of their father: for having already passed the age at which tutorship naturally ceased, they would be thrown on his death, entirely on their own resources, and would thus have no one to whose authority they would be bound to submit, or who could indirectly compel them to seek a curator.

Position of persons under curatorship.

During the continuance of the curatorship, which when once begun did not ordinarily cease until the minor attained majority,[4] the condition of the minor closely resembled that of a pupil in tutelage or of an interdicted prodigal. He could neither alienate his property, nor contract binding obligations without the consent of his

[1] Fr. 7, s. 2, D. 4, 4. Justinian however, on the suggestion of Triboinian, ruled that a debtor should not make a payment even to the tutor or curator of his minor creditor, unless authorised by the decree of a magistrate (*ex judiciali sententia.*) 2 J. 2, 8.

[2] Fr. 5, s. 5, D. 26, 7.

[3] Fr. 1, s. 3, D. 4, 4.

[4] Fr. 3, s. 1, D. 26, 1. Of course if the minor obtained from the Emperor a *venia ætatis* (see page 16,) curatorship at once ceased, although the minor would still be incapable of alienating *prædia rustica vel suburbana* without the decree of a magistrate; (c. 2, 45; Fr. 1, D. 27, 9.) In the case of prodigals curatorship ceased when it appeared that they had overcome their extravagant habits, and in case of persons suffering from mental or physical defects, when they were cured of the same. Fr. 1, D. 27, 10. But a fresh curator might afterwards be appointed if the necessity for one arose. Fr. 25, D. 26, 5; Fr. 3, s. 1, D. 26, 1.

curator (*consensus curatoris*).[1] Nor again could he transfer himself by arrogation into the power of another without a similar consent.[2] But the functions of a curator were strictly restrained to the administration of the ward's property; he possessed no power over the person of the minor; and although we have seen that an agnate acting as the curator of a *furiosus* could effect a valid alienation of property belonging to the latter,[3] a *senatus consultum* passed in the reign of Septimius Severus prohibited a curator from either alienating absolutely or by way of hypothecation, the *prædia rustica vel suburbana*, unless authorised to do so by a magisterial degree.[4] Indeed by a still later Constitution of Constantine it was enacted that nothing belonging to a minor could be sold by his guardian without the order of a magistrate.[5]

Rules common to curators and tutors.

With regard to the responsibilities of curators; the particular magistrates by whom they could be appointed, the grounds on which they could claim exemption from accepting the administration, or on which they might be removed, and in what cases they were bound to furnish security, the rules were the same as in the case of tutors, and these have been already discussed.

Here I bring this treatise on the Law of Persons to a close. I have shown who were regarded in Roman

[1] Const. 3, C. 2, 22. It seems impossible to reconcile the terms of this constitution with a fragment of Modestinus inserted in the Digest. in which it is said: *Puberes sine curatoribus suis possunt ex stipulatu obligari.* Fr. 101, D. 45, 1. Many conjectural explanations have indeed been suggested with the views of reconciling the two passages, but unless the fragment of Modestinus has come down to us in a mutilated form, it is more probable that the Imperial constitution of the Emperors Diocletian and Maximian laid down a new rather than enforced the old law, which is mentioned by Modestinus.

[2] Fr. 8, D. 1, 7; Const. 5, *in fine* C. 5, 59.

[3] Gaius. *Comment.* 2, 64.

[4] Fr. 1, D. 27, 9.

[5] Const. 2, C. 5, 57. See *ante* page 312.

law as persons, and who were excluded from that title; I have endeavoured to explain the disabilities arising from age, sex, birth, or from mental or physical defects; what constituted civil capacity for rights, and how it might be destroyed or diminished; how the Roman citizen was distinguished from the Latin or foreigner; and what were the rules of the Roman law concerning *patria potestas, dominica potestas,* marriage, adoption, and guardianship. I have also devoted a chapter to "Judicial" persons, in which I have considered the position and constitution of Roman corporate bodies; and while compressing the size of the work in as narrow limits as was compatible with perspicuity and usefulness, I have occasionally drawn attention to analogous rules observed in other systems of jurisprudence, and particularly to the analogies presented by Hindu law, which, in regard especially to adoption and the constitution of the family, are remarkable and interesting.

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