

Section 1. THE ROMAN INSTITUTIONAL TREATISES

A. GAIUS, *INSTITUTES*

1. BOOK I [introduction]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book I, §§ 1–7, pp. [odd nos.] 2–5 [footnotes omitted][†]

BOOK I

1. Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. That law which a people establishes for itself is peculiar to it, and is called *ius ciuile* (civil law) as being the special law of that *ciuitas* (State), while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* (law of nations, or law of the world) as being the law observed by all mankind. Thus the Roman people observes partly its own peculiar law and partly the common law of mankind. This distinction we shall apply in detail at the proper places.

2. The laws of the Roman people consist of *leges* (comitial enactments), plebiscites, senatusconsults, imperial constitutions, edicts of those possessing the right to issue them, and answers of the learned. 3. A *lex* is a command and ordinance of the *populus*. A plebiscite is a command or ordinance of the *plebs*. The *plebs* differs from the *populus* in that the term *populus* designates all citizens including patricians, while the term *plebs* designates all citizens excepting patricians. Hence in former times the patricians used to maintain that they were not bound by plebiscites, these having been made without their authorization. But later a *L. Hortensia* was passed, which provided that plebiscites should bind the entire *populus*. Thereby plebiscites were equated to *leges*. 4. A senatusconsult is a command and ordinance of the senate; it has the force of *lex*, though this has been questioned. 5. An imperial constitution is what the emperor by decree, edict, or letter ordains; it has never been doubted that this has the force of *lex*, seeing that the emperor himself receives his *imperium* (sovereign power) through a *lex*. 6. The right of issuing edicts is possessed by magistrates of the Roman people. Very extensive law is contained in the edicts of the two praetors, the urban and the peregrine, whose jurisdiction is possessed in the provinces by the provincial governors; also in the edicts of the curule aediles, whose jurisdiction is possessed in the provinces of the Roman people by quaestors; no quaestors are sent to the provinces of Caesar, and consequently the aedilician edict is not published there. 7. The answers of the learned are the decisions and opinions of those who are authorized to lay down the law. If the decisions of all of them agree, what they so hold has the force of *lex*, but if they disagree, the judge is at liberty to follow whichever decision he pleases. This is declared by a rescript of the late emperor Hadrian.

[†] Such footnotes as are there are by CD and explain omissions in the text.

2. BOOK I [of persons: slave and free]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book I, §§ 8–47, pp. [odd nos.] 5–15 [footnotes omitted]

8. The whole of the law observed by us relates either to persons or to things or to actions. Let us first consider persons.

9. The primary distinction in the law of persons is this, that all men are either free or slaves. 10. Next, free men are either *ingenui* (freeborn) or *libertini* (freedmen). 11. *Ingenui* are those born free, *libertini* those manumitted from lawful slavery. 12. Next, of freedmen there are three classes: they are either Roman citizens or Latins or in the category of *dediticii*. Let us consider each class separately, and first *dediticii*.

13. By the *L. Aelia Sentia* it is provided that slaves who by way of punishment have been put in bonds by their masters or have been branded, or have been questioned under torture on account of some wrongdoing and have been found guilty of the same, also those who have been handed over to fight (in the arena) with men or beasts or who have been cast into a gladiatorial school or into prison—that such slaves, if afterwards manumitted whether by the same or another master, shall become free men of the same status as *peregrini dediticii*. **14.** Are called *peregrini dediticii* those who in the past have taken up arms and fought against the Roman people and being defeated have surrendered (at discretion). **15.** Slaves disgraced in the manner mentioned, by whatever method and at whatever age they are manumitted, and though they were in the full ownership of their masters, never become either Roman citizens or Latins, but are always ranked as *dediticii*.

16. On the other hand, a slave not so disgraced becomes on manumission sometimes a Roman citizen and sometimes a Latin. **17.** A slave in whom these three conditions are united—that he be over 30 years of age, that he be the Quiritary property of his master, and that he be set free by lawful and statutory manumission (that is *uindicta* or by the census or by will), becomes a Roman citizen; but if any of these conditions is lacking, he will be a Latin.

18. The requirement as to the age of the slave was introduced by the *L. Aelia Sentia*, which provided that slaves manumitted below 30 should not become Roman citizens except if freed *uindicta* after proof of adequate motive for the manumission before a *consilium* (council). **19.** There is adequate motive where, for instance, a man manumits before a *consilium* his natural son or daughter, or his natural brother or sister, or his foster-child, or his children's teacher, or a slave whom he wants as *procurator* (business agent), or a female slave whom he intends to marry.

20. The *consilium* is composed in the city of Rome of 5 senators and 5 Roman *equites* (knights); in the provinces of 20 *recuperatores* being Roman citizens. (In the provinces) it sits on the last day of the assizes, but at Rome manumissions before the *consilium* take place on fixed days. On the other hand, slaves above 30 can be manumitted at any time; indeed, manumissions may take place even in the street, for instance when the praetor or proconsul is on his way to the baths or the theatre. **21.** Furthermore, a slave under 30 can become a Roman citizen by manumission where he has been declared free and left heir by the will of an insolvent master, provided that he is not excluded by another heir. ...¹

22. ... Such persons are called Junian Latins, Latins because they are assimilated to colonial Latins, Junian because they owe their freedom to the *L. Iunia*, whereas previously they were ranked as slaves. **23.** The *L. Iunia* does, however, not enable them either to make a will themselves or to take under, or be appointed tutors by, another's will. **24.** Our statement, that they are incapable of taking under a will, is, however, to be understood as meaning that they cannot take directly, by way of inheritance or legacy; for indirectly, by means of a *fideicommissum* (trust), they can take.

25. But by no method can those in the class of *dediticii* take by will any more than any other *peregrinus*, nor, according to the prevailing doctrine, can they make a will themselves. **26.** Thus the freedom of those classed as *dediticii* is the lowest; nor are they allowed admission to Roman citizenship by any *lex*, senatusconsult, or imperial constitution. **27.** Moreover, they are forbidden to reside in the city of Rome or within the hundredth milestone from Rome, and any who contravene this prohibition are ordered to be sold by the State with all their property, subject to the proviso that their servitude is not to be in the city of Rome or within the hundredth milestone, and that they are never to be manumitted; if they are manumitted, they are to be slaves of the Roman people. These provisions are contained in the *L. Aelia Sentia*.

28. Latins, however, attain to Roman citizenship by many methods. **29.** To begin with, under the *L. Aelia Sentia*, if a slave who has been manumitted under 30 and so becomes a Latin takes to wife either a Roman citizen or a colonial Latin or a woman of the same status as his own and has the fact attested by not less than 7 witnesses (Roman citizens, above puberty), then, if he begets a son, he is empowered by the statute, on the son becoming one year old, to go before the praetor, or in a provinces before its governor, and prove that he took a wife under the *L. Aelia Sentia* and has a year-old son by her. And if the magistrate before whom the case is proved finds that the case is as stated, then both the Latin himself and his wife, if she too be of the same status, and likewise the son, if he too be of the same status, are by

¹ A page is illegible in the Veronese ms. Presumably it dealt with the other two requirements of § 17, Quiritary title and solemnity of form.

the statute ordained to be Roman citizens. **30.** The reason why in referring to the son we have added ‘if he too be of the same status’ is that if the Latin’s wife is a Roman citizen, the son born of her is, under a recent senatusconsult made on the authority of the late emperor Hadrian, a Roman citizen from birth. **31.** This right of obtaining Roman citizenship, though by the *L. Aelia Sentia* it was conferred only on those who became Latins on manumission owing to being under 30, was later, by a senatusconsult passed in the consulship of Pegasus and Pusio, granted to persons becoming Latins on manumission over 30. **32.** Even if the Latin dies before having proved the case of a year-old son, the mother can prove it, and thereby she will both become a Roman citizen herself, if she was previously a Latin, *and so will the son ...*² and even though the son himself be already a Roman citizen, because born of a Roman mother, she ought still to prove his case, in order that he may become *suus heres* to his father. **32a.** What we have said of a year-old son is to be taken to apply equally to a year-old daughter. **32b.** Further, under the *L. Visellia*, persons becoming Latins by manumission, whether above or below 30, acquire Quiritary status, i.e. become Roman citizens, by 6 years’ service in the police at Rome. A senatusconsult is said to have been passed later giving them citizenship on completion of 3 years’ service. **32c.** Also, by an edict of Claudius, Latins obtain Quiritary status if they have built a sea-going ship of a capacity of not less than 10,000 measures of corn, which ship, or one substituted for it, has carried corn to Rome for 6 years. **33.** Further, it has been enacted by Nero that a Latin having a fortune of 200,000 sesterces or more, who builds a house in the city of Rome on which he spends not less than half his fortune, is to obtain Quiritary status. **34.** Lastly, Trajan has enacted that a Latin who for 3 years has worked a mill in the city which grinds not less than 100 measures of corn daily is to attain Quiritary status. ...³ **35.** Furthermore, persons manumitted above 30 and having become Latins can obtain Quiritary status *by repetition of the manumission, as can those manumitted under 30 on their reaching the age of 30. In every case a Junian Latin above 30, whose manumission is repeated by his Quiritary owner*⁴ by means of *uindicta*, the census, or will, becomes a Roman citizen and the freedman of him who has performed the second manumission. Thus, if a slave is yours by bonitary title, but mine by Quiritary, he can be made a Latin by your sole act, but the second manumission can be performed only by me, not by you, and by it he becomes my freedman. Indeed, if he obtains Quiritary status in any of the other ways, he becomes my freedman. But possession of the property left by him at death is granted to you, whatever be the way in which he had obtained Quiritary status. If, however, he belongs by both bonitary and Quiritary title to the same owner, he can both become a Latin and attain Quiritary status by being manumitted by that owner.

36. Not everyone who wishes to manumit is allowed to do so. **37.** For if a man manumits in order to defraud his creditors or his patron, his act is void, because the *L. Aelia Sentia* prevents the liberation. **38.** By the same *lex* also a master under 20 is not permitted to manumit except *uindicta* and with adequate motive for manumission shown before a council. **38.** There is adequate motive for manumission where, for instance, a master manumits his father or mother, or his teacher or foster-brother. Moreover, the motives we mentioned above in the case of a slave manumitted under 30 may be adduced in the present case, just as, conversely, those we have specified for the case of a master under 20 may be applied also to that of a slave under 30. **40.** A limitation being thus imposed by the *L. Aelia Sentia* on manumissions by masters under 20, the result is that, though a master who has reached the age of 14 can make a will and therein institute an heir and leave legacies, he cannot (therein) grant freedom to a slave. **41.** And though the master under 20 is seeking to make his slave a Latin, he must nevertheless show adequate motive before a council, and only then manumit before friends (informally).

42. Furthermore, a limitation has been set on the manumission of slaves by will by the *L. Fufia Caninia*. **43.** For a master who has more than 2 and not more than 10 slaves is allowed to manumit up to half their number; one who has more than 10 and not more than 30 is allowed to manumit up to a third; one who has more than 30 and not more than 100 is allowed to manumit up to a quarter; lastly, one who has more than 100 and not more than 500 is allowed to manumit not more than a fifth; nor is he allowed, even if he has more than 500, to manumit any more, the *lex* enacting that no one may manumit more than 100. On the other hand, a master who has only one or two slaves is not affected by this *lex*, and consequently has unrestricted power of manumission. **44.** Nor has the *lex* any application to masters manumitting otherwise than by will. Hence a master manumitting *uindicta* or by the census or before

² About two lines are illegible, and the translation in italics is a partial conjectural restoration.

³ Two lines illegible in the Veronese ms.

⁴ The translation given in italics is from a conjectural restoration of the text.

friends (informally) is allowed to free his whole household, provided of course that there be no other impediment to their freedom. **45.** The rules we have stated with regard to the number of slaves who may be manumitted by will must be taken with the qualification that, where only half or a third or a fourth or a fifth of the actual number may be manumitted, it is always permissible to manumit not fewer than could have been manumitted under the preceding scale. This is laid down by the *lex* itself, for it would indeed have been absurd that a master of 10 slaves should be allowed to manumit 5, as being allowed to manumit up to half, whereas a master of 12 should not be allowed to manumit more than 4; on the contrary, one who has more than 10, *but less than 15, may manumit 5, though this exceeds a third of his actual number...*⁵ **46.** Similarly, if the names of the slaves manumitted by the will are written in a circle, none of them will be freed, since no order of manumission is discoverable. For the *L. Fufia Caninia* and also certain special *senatusconsults* nullify anything contrived to evade the *lex*.

47. Finally it is to be noted that the provision of the *L. Aelia Sentia* nullifying manumissions in fraud of creditors applies also to *peregrini* (so ruled by the senate on the authority of Hadrian), but that its other provisions do not apply to them.

⁵ An entire page, which probably gave more details about the *L. Fufia Caninia*, is illegible. Cf. Epit. 1.2.2–3. The translation in italics is a conjectural restoration.

3. BOOK I [of persons: *sui iuris* and *alieni iuris*]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)

Book I, §§ 48–141, pp. [odd nos.] 17–47 [footnotes omitted]

48. Next comes another division in the law of persons. For some persons are *sui iuris* (independent) and others are *alieni iuris* (dependant on another). **49.** Again, of those *alieni iuris* some are in *potestas*, others in *manus*, and others in *mancipium*. **50.** Let us consider first persons *alieni iuris*; for, knowing those, we shall at the same time know who are *sui iuris*. **51.** And first let us consider persons in another's *potestas*.

52. Slaves are in the *potestas* of their masters. This *potestas* is *iuris gentium*, for it is observable that among all nations alike masters have power of life and death over their slaves, and whatever is acquired through a slave is acquired for his master. **53.** But at the present day neither Roman citizens nor any other persons subject to the rule of the Roman people are allowed to treat their slaves with excessive and causeless harshness. For by a constitution of the late emperor Antoninus it is laid down that one who without cause kills his own slave is as much amenable to justice as one who kills another's. And even excessive severity on the part of masters is restrained by a constitution of the same emperor; for, on being consulted by certain provincial governors as to slaves who take refuge at the temples of the gods or the statues of the emperors, he ordained that masters whose harshness is found to be unbearable are to be forced to sell their slaves. Both enactments are just, for we ought not to abuse our lawful right—the principle under which prodigals are interdicted from administering their own property. **54.** But whereas among Roman citizens there is double ownership (for a slave may belong to a master by bonitary or by Quiritary title, or by both), a slave is held to be in the *potestas* of the master who has the bonitary title to him, even though he have not also the Quiritary. For one who has the bare Quiritary title to a slave is not considered to have *potestas* over him.

55. Also in our *potestas* are the children whom we beget in *iustae nuptiae* (civil marriage). This right is peculiar to Roman citizens; for scarcely any other men have over their sons a power such as we have. The late emperor Hadrian declared as much in the edict he issued concerning those who petitioned him for citizenship for themselves and their children. I am not forgetting that the Galatians regard children as being in the *potestas* of their parents.

56. Thus Roman citizens have their children in their *potestas* if they take to wife Roman women, or even Latin or peregrine women with whom they have *conubium* (power to contract civil marriage). For, as the effect of *conubium* is that the children take the same status as their father, the result is that the children are not only Roman citizens, but are also in their father's *potestas*. **57.** Hence it is the practice by imperial constitution to grant to certain veterans *conubium* with the first Latin or peregrine women whom they take to wife after their discharge; children born of such a marriage become Roman citizens and in the *potestas* of their parents.

58. It is not, however, every woman whom we may take to wife, but there are some whom we must abstain from marrying. **59.** For no marriage can be contracted, and there is no *conubium*, between persons standing to each other in the relation of ascendant and descendant, for instance between father and daughter, mother and son, grandfather and granddaughter, grandmother and grandson. Persons so related who form a union are considered to have contracted a wicked and incestuous marriage. This principle is so strict that, though the relation of ascendant and descendant have come about only through adoption, they cannot be joined in matrimony; nay, even if the adoption has been dissolved, the legal position remains unaltered. Hence I cannot take to wife a woman who has come into the position of a daughter or granddaughter to me by adoption, even though I have subsequently emancipated her. **60.** Between persons collaterally related similar, but less stringent, rules obtain. **61.** Between brother and sister, whether born of the same two parents or having only one parent in common, marriage is of course forbidden. But where a woman has become my sister by adoption, though, so long as the adoption stands, there can clearly be no marriage between me and her, yet after the adoption has been dissolved by her emancipation I may take her to wife; or again, if I myself have been emancipated, there will be no impediment to our marriage. **62.** A man may lawfully marry his brother's daughter, a practice first introduced after the late emperor Claudius married Agrippina, his brother's daughter. But to marry one's sister's daughter is unlawful. These rules are declared by imperial constitutions. **63.** Also, I may not marry my aunt, paternal or maternal, nor yet a woman who has been my mother-in-law or daughter-in-law, or my stepdaughter or stepmother. We say 'has been' because, if the marriage through which the affinity has arisen still subsists, there is another reason why she cannot become my wife, namely that a woman cannot have two husbands at the same time nor a man two wives. **64.** Accordingly, one who has contracted a wicked and incestuous marriage is considered to have neither wife nor children. Hence the offspring of such a union are considered to have a mother, but no father; consequently they are not in his *potestas*, but are in the position of children whom their mother has conceived in promiscuous intercourse, these likewise being considered to have no father, since even his identity is uncertain. Hence they are termed spurious children, a word derived either from the Greek word *σποράδην* describing the nature of their conception, or from *sine patre* owing to their being fatherless.

65. It happens sometimes that children who do not come under the paternal *potestas* at birth are subsequently brought under it. **66.** For instance, a Latin who marries under the *L. Aelia Sentia* and begets a Latin or a citizen son, according as the mother is the one or the other, will not hold him in *potestas*, but if afterwards he proves the case and obtains Quiritary status, he thereupon begins to hold him in *potestas*. **67.** Again, if a Roman citizen takes a Latin or a peregrine wife in a mistaken belief that she is a Roman citizen and begets a son, that son is not in his *potestas*: for he is not even a citizen, but either a Latin or a peregrine according to his mother's status, because, except if there be *conubium* between the father and the mother, a child does not take its father's status. But by a senatusconsult the father is allowed to prove a case of mistake, and thereupon both the wife and the son attain to Roman citizenship, and thenceforth the son is subject to his father's *potestas*. The law is the same if by mistake he marries a wife who is in the class of *dediticii*, except that the wife does not become a Roman citizen. **68.** Again, if a Roman woman marries a peregrine in the mistaken belief that he is a Roman citizen, she is allowed to prove a case of mistake, and in this way both her son and her husband attain to Roman citizenship, and at the same time the son becomes subject to his father's *potestas*. The law is the same if under the *L. Aelia Sentia* she marries a peregrine in the belief that he is a Latin; for this contingency also is expressly provided for by the senatusconsult. Up to a certain point the law is the same where she marries one who is in the class of *dediticii* in the belief that he is a Roman citizen, or a Latin under the *L. Aelia Sentia*, except, of course, that the husband remains in his class of *dediticii*, and consequently the son, though he becomes a Roman citizen, is not brought under his father's *potestas*. **69.** Again, if under the *L. Aelia Sentia* a Latin woman marries a peregrine in the belief that he is a Latin, she can under the senatusconsult, on birth of a son, prove a case of mistake, whereupon they all become Roman citizens and the son comes under his father's *potestas*. **70.** The same has been laid down also for the case of a Latin marrying a peregrine woman under the *L. Aelia Sentia* in the belief that she is a Latin or a Roman citizen. Furthermore, if a Roman citizen, believing himself to be a Latin, for that reason marries a Latin woman, he is allowed, on birth of a son, to prove a case of mistake, as though his marriage had fallen under the *L. Aelia Sentia*. Also those who, being Roman citizens, but believing themselves to be peregrines, take peregrine wives, are allowed under the senatusconsult, on birth of a son, to prove a case of mistake, with the result that the wife will become a Roman citizen, whilst the son not only attains to Roman citizenship, but is also brought under his father's *potestas*. **72.** All the above statements with regard to a son are to be

taken to apply equally to a daughter. **73.** So far as showing a case of mistake is concerned, the age of the son or daughter is immaterial, *except where the proof is offered by one who thought he was contracting a marriage under the L. Aelia Sentia; such a person cannot prove a case if the son or daughter be less than one year old.* I do not forget that a rescript of the late emperor Hadrian is expressed as though, *wherever it is a case of proving mistake, the son must be one year old.*

74. Whether a peregrine who has married a Roman wife can show a case under the senatusconsult has been disputed. ...¹ But where a peregrine had married a Roman wife and, after the birth of a son, had acquired Roman citizenship by some other means, on the question arising whether he could show a case, the emperor Antoninus declared by rescript that he could do so just as well as if he had remained a peregrine: from which we infer that even a peregrine can show a case. **75.** From what we have said it appears that whether a Roman citizen takes a peregrine wife or a peregrine a Roman wife, their child is a peregrine, but that if such a marriage has been contracted in mistake, its defect is cured under the senatusconsult as explained above. But if there was no mistake, but they contracted the union with knowledge of their status, then in no case is the defect of such a marriage cured.

76. We are referring, of course, to persons between whom *conubium* does not exist. For otherwise, if a Roman citizen takes to wife a peregrine with whom he has *conubium*, a full civil marriage is contracted, as we have previously stated, and in that case their son is a Roman citizen and will be in his father's *potestas*. **77.** Also, if a Roman woman marries a peregrine with whom she has *conubium*, their child will be a peregrine and the lawful son of his father, just as if he had been begotten of a peregrine woman. But at the present day, in virtue of a senatusconsult passed on the authority of the late emperor Hadrian, the offspring of a Roman woman and a peregrine is the lawful son of his father even where *conubium* did not exist between the parents. **78.** Our proposition, that the offspring of a Roman woman and a peregrine is, in the absence of *conubium*, a peregrine, is laid down by the *L. Minicia*, which enacts that the child is to follow the status of the peregrine parent. In the reverse case, where a Roman citizen takes a peregrine wife with whom he has not *conubium*, the same *lex* provides that the offspring of their union shall be a peregrine. But it was in the case we are considering that the *L. Minicia* was really necessary; for apart from it the child would properly have taken the other status, seeing that the child of persons between whom *conubium* does not exist takes his mother's status under the rule of the *ius gentium*. But the provision of the *lex* that the offspring of a Roman citizen and a peregrine wife is a peregrine seems superfluous, seeing that even apart from the *lex* the same result would follow from the rule of the *ius gentium* in any case. **79.** This rule extends so far that the offspring of a Roman citizen and a Latin wife will be born a Latin, in spite of the fact that the *L. Minicia* does not apply to those who at the present day are called Latins. For though not only foreign races, but also those called Latins, are covered by the term peregrine in that *lex*, the reference is to Latins of another kind, namely those who then possessed communities and States of their own and ranked as peregrines. **80.** On the same principle, contrariwise, the offspring of a Latin husband and a Roman wife is born a Roman citizen, whether the marriage was contracted under the *L. Aelia Sentia* or otherwise. The opinion has indeed been held by some that where the marriage is contracted under the *L. Aelia Sentia* the child is born a Latin, because in this case *conubium* between the parties appears to be granted by that *lex* and the *L. Iunia*, and the invariable effect of *conubium* is that the child takes the father's status; but that if the marriage is contracted otherwise, the child follows the mother's status under the rule of the *ius gentium*, and is consequently a Roman citizen. But the law actually in force is as laid down by a senatusconsult with the authority of the late emperor Hadrian, namely, that in all cases the child of a Latin man and a Roman woman is born a Roman citizen. **81.** Consistently, the same senatusconsult, with the authority of the late emperor Hadrian, has also declared that the child of a Latin man and a peregrine woman, and conversely the child of a peregrine man and a Latin woman, shall follow the mother's status. **82.** From the same principles it also results that the child of a slave-woman and a free man is born a slave by the rule of the *ius gentium*, while on the other hand the child of a free woman and a slave is born free. **83.** But we must be careful to observe whether the rule of the *ius gentium* has not, in any particular case, been varied by some *lex* or by some equivalent of a *lex*. **84.** Thus under the *SC. Claudianum* it was possible for a Roman woman who cohabited with another person's slave with that person's consent, while remaining free herself in virtue of the agreement, to give birth to a slave; for the senatusconsult ordains that what has been agreed between the woman and the slave's owner shall hold good. But subsequently the late emperor Hadrian was moved

¹ One and half lines illegible in the Veronese ms.

by the hardship of the case and the legal anomaly to restore the rule of the *ius gentium*, so that the woman, where she remains free herself, gives birth to a free child. **85.** Again, under a *lex* ..., ² it was possible for the children of a slave-woman and a free man to be born free; for by this *lex* it is provided that, where a man has cohabited with another person's slave believing her to be free, their children, if male, shall be born free, but if female, shall belong to the mother's owner. But in this case also the late emperor Vespasian was moved by the legal anomaly to restore the rule of the *ius gentium*, so that the children in every case, even if male, are the slaves of the mother's owner. **86.** But that part of the same *lex* is unrepealed which enacts that the children of a free woman and a man known by her to be another person's slave are born slaves. Thus it is only among people among whom such a *lex*, does not exist that the children follow the mother's status in accordance with the *ius gentium* and are consequently free.

87. It is abundantly clear that in those cases in which a child takes its mother's status and not its father's, the child is not in its father's *potestas* even if the father be a Roman citizen. This is why, as we explained above, in certain cases where, owing to some mistake, a civil marriage fails to be contracted, the senate intervenes to cure the defect in the marriage and in most cases by so doing causes the son to be brought into his father's *potestas*. **88.** But where a slave-woman after having conceived by a Roman citizen is manumitted and becomes a Roman citizen and then gives birth, her child, though a Roman citizen like its father, is nevertheless not in the father's *potestas*, because it was not begotten in civil marriage, and there is no *senatusconsult* which enables such intercourse to be regularized.

89. The ruling that where a slave-woman conceives by a Roman citizen and then after being manumitted gives birth the child is born free, rests on natural reason. For children conceived outside civil marriage take their status from the moment of their birth; thus if born of a free mother they are born free, and it is immaterial by whom she conceived them whilst she was a slave. On the other hand, those conceived in civil marriage take their status from the moment of their conception. **90.** Hence if a Roman woman, being with child, is interdicted from fire and water, and having thus become a peregrine, gives birth, many draw a distinction, holding that if she conceived in civil marriage, her child is born a Roman citizen, but if in promiscuous intercourse, a peregrine. **91.** Again, if a Roman woman, being with child, becomes a slave under the *SC. Claudianum* because of her having had intercourse with another person's slave against the will and warning of his master, many draw a distinction, holding that if she conceived in civil marriage, her child is born a Roman citizen, but if in promiscuous intercourse, the slave of the person whose slave its mother has become. **92.** Again, if a peregrine woman conceives in promiscuous intercourse and then, having become a Roman citizen, gives birth, the child is a Roman citizen; but if she conceives by a peregrine in accordance with the laws and customs of peregrines, then, under a *senatusconsult* passed on the authority of the late emperor Hadrian, the child is a Roman citizen only if citizenship is conferred on the father as well.

93. If a peregrine petitions for Roman citizenship for himself and his children, the children will not come under his *potestas* unless the emperor subjects them to it. This he does only if, after examining the case, he judges it to be for the children's benefit. He examines with special care and particularity the case of children who are below puberty or are not before him. These rules are laid down by an edict of the late emperor Hadrian. **94.** Again, if Roman citizenship is conferred on a man along with his wife who is with child, although, as we have said above, the child is born a Roman citizen, it does not come under its father's *potestas*; this is laid down by a *subscriptio* of the late emperor Hadrian. For this reason one who is aware that his wife is with child ought, when petitioning the emperor for citizenship for himself and his wife, to petition at the same time that he may have the expected child in his *potestas*. **95.** Those who attain to Roman citizenship along with their children in virtue of Latin right are in a different case; for their children do come under their *potestas*. **96.** This right is one that has been granted by the Roman people, the senate, or Caesar to various peregrine States. Two grades of it must be distinguished; for there is greater and lesser Latin right. The greater right is where both those who are elected decurions and those who hold some high office or a magistracy obtain Roman citizenship. The lesser right is where only those who hold some magistracy or high office attain to Roman citizenship. This is laid down in a number of imperial epistles.

97. Not only are the children of our bodies in our *potestas* according as we have stated, but also those whom we adopt. **98.** Adoption takes place in two ways, either by authority of the people or by the

² No gap in the ms. but the name of some *lex* must have dropped out.

imperium of a magistrate, such as a praetor. **99.** By authority of the people we adopt those who are *sui iuris*. This kind of adoption is called adrogation because both the adopter is asked, that is interrogated, whether he wishes to have the person whom he is about to adopt as his lawful son, and he who is being adopted is asked whether he suffers this to take place, and the people are asked whether they sanction its taking place. By the *imperium* of a magistrate we adopt those who are in the *potestas* of their parents, whether they stand in the first degree of descent, as a son or daughter, or in a remoter degree, as a grandson or granddaughter, great-grandson or great-granddaughter. **100.** The former kind of adoption, that by authority of the people, can be performed nowhere but at Rome, whereas the latter kind is regularly performed in the provinces before the provincial governors. **101.** Further, females cannot be adopted by authority of the people, for this opinion has prevailed; but before a praetor or, in the provinces, before the proconsul or legate, females are regularly adopted. **102.** Also, adoption by authority of the people of a person below puberty has at one time been forbidden and at another time been allowed. At the present day, under an epistle addressed by the excellent emperor Antoninus to the pontiffs, it is allowed, if an adequate motive for it appears, subject to certain conditions. But before a praetor or, in a province, before the proconsul or legate, we can adopt a person of any age. **103.** On the other hand, it is common to both kinds of adoption that those who are incapable of procreation, such as the naturally impotent, can adopt. **104.** But women cannot adopt by any method, for they do not hold even the children of their bodies in their *potestas*. **105.** Also, whether the adoption has been by authority of the people or before a praetor or a provincial governor, the adopter may give the person adopted in adoption to another. **106.** Also common to both kinds of adoption is the dispute whether a younger can adopt an older person. **107.** Peculiar to adoption by authority of the people is that, if a person having children in his *potestas* gives himself in adrogation, not only is he himself subjected to the adrogator's *potestas*, but his children also come under the same *potestas*, as grandchildren.

108. Let us proceed to consider persons who are in *manu* (hand, marital power), which is another right peculiar to Roman citizens. **109.** Now, while both males and females are found in *potestas*, only females can come under *manus*. **110.** Of old, women passed into *manus* in three ways, by *usus*, *confarreatio*, and *coemptio*. **111.** A woman used to pass into *manus* by *usus* if she cohabited with her husband for a year without interruption, being as it were acquired by a usucapion of one year and so passing into her husband's family and ranking as a daughter. Hence it was provided by the Twelve Tables that any woman wishing not to come under her husband's *manus* in this way should stay away from him for three nights in each year and thus interrupt the *usus* of each year. But the whole of this institution has been in part abolished by statutes and in part obliterated by simple disuse. **112.** Entry of a woman into *manus* by *confarreatio* is effected by a kind of sacrifice offered to Jupiter Farreus, in which a spelt cake is employed, whence the name *confarreatio*. In the performance of this ceremony a number of acts and things are done, accompanied by special formal words, in the presence of 10 witnesses. This institution still exists at the present day. For the higher flamens, that is those of Jupiter, Mars, and Quirinus, and also the *rex sacrorum*, can only be chosen from those born of parents married by *confarreatio*; indeed, no person can hold the priesthood without being himself so married. **113.** Entry of a woman into *manus* by *coemptio* takes the form of a mancipation, that is a sort of imaginary sale: in the presence of not less than 5 witnesses, being Roman citizens above puberty, and of a scale-holder, the woman is bought by him into whose *manus* she is passing. **114.** It is, however, possible for a woman to make *coemptio* not only with her husband, but also with a stranger; in other words, *coemptio* may be performed for either matrimonial or fiduciary purposes. A woman who makes a *coemptio* with her husband with the object of ranking as a daughter in his household is said to have made a *coemptio* for matrimonial purposes, whilst one who makes, whether with her husband or a stranger, a *coemptio* for some other object, such as that of evading a tutorship, is said to have done so for fiduciary purposes. **115.** What happens is as follows: a woman wishing to get rid of her existing tutors and to get another makes a *coemptio* with the *auctoritas* of her existing tutors; after that she is remancipated by her *coemptionator* to the person of her own choice and, having been manumitted *uindicta* by him, comes to have as her tutor the man by whom she has been manumitted. This person is called a fiduciary tutor, as will appear below. **115a.** Formerly too fiduciary *coemptio* used to be performed for the purpose of making a will. This was at a time when women, with certain exceptions, had not the right to make a will unless they had made a *coemptio* and had been remancipated and manumitted. But the senate on the authority of the late emperor Hadrian has dispensed from this requirement of a *coemptio*. **115b.** ...³ but if a woman makes a fiduciary *coemptio* with her

³ The reading of §§ 115a–115b is uncertain, and something is missing here.

husband, she nevertheless acquires the position of his daughter. For it is the accepted view that, if for any reason whatever a wife be in her husband's *manus*, she acquires a daughter's rights.

116. We have still to explain what persons are in *mancipio* (bondage). **117.** All children, male or female, who are in a parent's *potestas* can be mancipated by him in just the same manner as slaves. **118.** The same holds good of persons in *manus*: women can be mancipated in the same manner by their *coemptionatores*; indeed, although only a woman married to her *coemptionator* ranks as a daughter in his household, nevertheless a woman not married to him, and consequently not ranking as his daughter, can be mancipated by him. **118a.** For the most part women are mancipated by their parents or *coemptionatores* only when the latter desire to release them from their power, as will appear more clearly below. **119.** Now mancipation, as we have already said, is a sort of imaginary sale, and it too is an institution peculiar to Roman citizens. It is performed as follows: in the presence of not less than 5 Roman citizens of full age and also of a sixth person, having the same qualifications, known as the *libripens* (scale-holder), to hold a bronze scale, the party who is taking by the mancipation, holding a bronze ingot, says: 'I declare that this slave is mine by Quiritary right, and he be purchased to me with this bronze ingot and bronze scale.' He then strikes the scale with the ingot and gives it as a symbolic price to him from whom he is receiving by the mancipation. **120.** It is thus that both servile and free persons are mancipated, as also such animals as are *mancipi* (mancipable), namely oxen, horses, mules, and asses; lands also, whether built or unbuilt on, are mancipated in the same way, if they are *mancipi*, as are Italic lands. **121.** The mancipation of lands differs from that of other things in this point only, that persons, servile and free, and animals that are *mancipi* cannot be mancipated unless they are present—indeed, the taker by the mancipation must grasp the thing which is being mancipated to him, which is why the ceremony is called *mancipatio*, the thing being taken with the hand—whereas lands are regularly mancipated at a distance. **122.** The bronze ingot and scale are used because formerly only bronze money was in use; thus there were *asses*, double-*asses*, half- and; quarter-*asses*, but neither gold nor silver money was current, as we may gather from the law of the Twelve Tables. The value of these pieces was reckoned not by counting but by weighing. Thus for the ancients the *as* was a pound and the double-*as* two pounds (the word *dupondius*, which is still in use, means *duo pondo*), and the half- and quarter-*as* meant a proportionate fraction of a pound's weight. Consequently in early times a man paying, money did not count, but weighed it out, and hence slaves entrusted with the administration of cash were, as they still are, called dispensers. **123.** If it be asked why a woman who has made a *coemptio* differs in status from persons who have been mancipated, the answer is that by making a *coemptio*, she is not reduced to a servile status, whereas persons, male or female, who have been mancipated by their parents or their *coemptionatores* are placed in the position of slaves, and so much so that they can receive an inheritance or a legacy from their holder in *mancipio* only if by the same will they are at the same time declared free, as is the law in the case of slaves. The reason of the difference is plain: the same words are used by the persons who receive them by mancipation from their parents or *coemptionatores* as in the case of slaves, whereas in *coemptio* it is otherwise.

124. Let us now consider how persons subject to another's power are freed therefrom.

125. First let us treat of those who are in *potestas*. **126.** How slaves are freed from *potestas* can be learnt from our previous exposition of their manumission. **127.** Persons in a parent's *potestas* become *sui iuris* on his death. But here we must distinguish: when a father dies, his sons and daughters; always become *sui iuris*, but when a grandfather dies, the grandsons and granddaughters do not always become *sui iuris*, but only if after their grandfather's death they will not relapse into their father's *potestas*. Thus, if at their grandfather's death their father is both alive and in the *potestas* of his father, they fall on the grandfather's death under their father's *potestas*; but if at that moment their father either is dead or has left his father's *potestas*, then, since they cannot fall under their father's *potestas*, they become *sui iuris*. **128.** Again, since one who for some crime has been interdicted from fire and water under the *L. Cornelia* loses Roman citizenship, it follows that, he being thus removed from the category of Roman citizens, his children cease to be in his *potestas* exactly as if he had died; for it is against principle that a man of peregrine status should have a Roman citizen in his *potestas*. For the like reason, if one who is in parental *potestas* is interdicted from fire and water, he ceases to be in his parent's *potestas*, because it is equally against principle that a man of peregrine status should be in the parental *potestas* of a Roman citizen. **129.** But where a parent has been taken prisoner by the enemy, though he becomes the slave of the enemy, his children's status is nevertheless in suspense owing to the *ius postliminii*, whereby those captured by the enemy, if they come back, recover all their anterior rights. Thus, if the parent returns, he

will have his children in *potestas*; if, however, he dies in captivity, the children will be *sui iuris*, though whether as from the time of his death or from that of his capture is a doubtful point. Also, if a son or grandson is himself captured by the enemy, his parent's *potestas* must similarly in virtue of the *ius postliminii* be said to be in suspense. **130.** Furthermore, a male child passes out of parental *potestas* on being inaugurated *flamen* of Jupiter, and a female child on being taken as a Vestal virgin. **131.** In former times also, when the Roman people used to plant colonies in Latin districts, one who with his parent's sanction had enrolled himself in a Latin colony ceased to be in his parent's *potestas*, because he became a citizen of another State.

132. Further, children cease to be in parental *potestas* by emancipation. Now a son passes out of parental *potestas* by three mancipation, but all other children, male or female, leave it by a single mancipation. For the law of the Twelve Tables speaks of three mancipation only in the case of a son, its terms being these: 'if a father sells his son three times, the son shall be free of the father'. The procedure is as follows: the father mancipates the son to a third party; the latter manumits the son *uindicta*; thereupon he reverts to his father's *potestas*; the father mancipates him again, it may be to the same person or to another (the practice is to mancipate him to the same person), and that person then manumits him *uindicta* as before; thereby he returns once more into his father's *potestas*; the father mancipates him for the third time to the same or to another person (the practice is that he be mancipated to the same person), and by this mancipation he ceases to be in his father's *potestas*, even though he has not as yet been manumitted, but is still in *mancipii causa*. ...⁴ **133.** Note that one who holds in his *potestas* a son and a grandson by that son has full discretion either to release the son from *potestas* while retaining the grandson in *potestas*, or to keep the son in *potestas* while releasing the grandson, or to make them both *sui iuris*. The same is to be taken to apply to a great-grandson.

134. Further, parents cease to hold in their *potestas* those children whom they have given in adoption to others. In the case of son three mancipation are performed, with two intervening manumissions, exactly as is the practice when a father is releasing his son from *potestas* in order that he may become *sui iuris*; next, either he is remancipated to his father and it is from the father that the adopter claims him as his son before the praetor, who, if the father makes no counterclaim, adjudges the son to the claimant, or else he is not remancipated to his father, but the adopter claims him from the person with whom he is under the third mancipation. Remancipation to the father is, however, more convenient. In the case of all other children, male or female, a single mancipation suffices, and they may or may not be remancipated to the parent. In the provinces the same proceedings are gone through before the provincial governor. **135.** A child begotten by a son after that son has been mancipated once or twice is nevertheless, even if born after its father's third mancipation, in the grandfather's *potestas*, and consequently can be emancipated or given in adoption by the grandfather. But a child begotten by a son who is under his third mancipation is not born in the grandfather's *potestas*. According to Labeo he is *in mancipio* to the same person as his father; but the rule now observed is that, so long as the father remains *in mancipio*, the child's status is in suspense, and that, if the father is manumitted from *mancipium*, the child falls into the father's *potestas*, but if the father dies whilst *in mancipio*, he becomes *sui iuris*. **135a.** The same naturally holds of a child begotten by a grandson who has been mancipated once, but has not yet been manumitted. For, as we said above, in the case of a grandson a single mancipation has the same effect as three mancipation in the case of a son.

136. Also, women cease to be in their father's *potestas* by passing into *manus*. But in the case of the confarreate marriage of the wife of a *flamen* of Jupiter a senatusconsult passed on the proposal of Maximus and Tubero has provided that she is to be considered to be in *manus* only for sacral purposes, while for all other purposes she is to be treated as though she had not entered *manus*. On the other hand, a woman who enters *manus* by *coemptio* is freed from her father's *potestas*, and it makes no difference whether she be in her husband's or a stranger's *manus*, although only women who are in their husband's *manus* rank as daughters.

137. Women cease to be in *manus* in the same ways as those by which daughters are freed from their father's *potestas*. Thus, just as daughters pass out of their father's *potestas* by a single mancipation, so women in *manus* cease by a single mancipation to be in *manus*, and if manumitted from that mancipation

⁴ An entire page is illegible. It probably dealt with the third manumission necessary to make the son *sui iuris* and went on to consider the emancipation of daughters and grandchildren. § 133 is also a conjectural restoration from D.1.7.28, JI.1.12.7.

become *sui iuris*. **137a.** Between a woman who has made a *coemptio* with a stranger and one who has done so with her husband there is, however, this difference, that the former can compel her *coemptionator* to remancipate her to the person of her choice, whereas the latter can no more compel her husband to do this than a daughter can compel her father. But, whilst a daughter, even if adoptive, is absolutely incapable of compelling her father, a woman in the *manus* of her husband can, if she has sent him notice of divorce, compel him to release her, just as though she had never been his wife.

138. Persons in *mancipio*, since they rank as slaves, become *sui iuris* if manumitted by *uindicta*, census, or will. **139.** In this case, however, the *L. Aelia Sentia* does not apply, so that no inquiry is made into the ages of the manumitter and manumitted, nor whether the manumitter has a patron or a creditor. Neither does the numerical scale laid down by the *L. Fufia Caninia* apply to these persons. **140.** More than this, it is possible for them to obtain liberty by the census even against the will of their holder in *mancipio*, with the exception of one whom his father has mancipated with a proviso for remancipation to himself; for in that case the father is considered in a sense to reserve his *potestas*, in virtue of the fact that he recovers him by mancipation. Nor, we are told, does a person acquire liberty by the census against the will of his holder in *mancipio* if his father gave him in mancipation on account of his wrongful act, for example if he (the father) was condemned for theft on his account and surrendered him by mancipation to the plaintiff; for in that case the plaintiff holds him in lieu of money. **141.** Be it noted finally that we are not allowed to behave insultingly to those whom we hold in *mancipio*; if we do, we shall be legally liable for the insult. And further, a man is not detained long in this status, which for the most part is created only for a moment, as a matter of form, except, of course, where a man is mancipated on account of wrongdoing.

4. BOOK I [of persons: *tutela*]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)

Book I, §§ 142–200, pp. [odd nos.] 49–63 [footnotes omitted]

142. Now let us pass to another classification of persons who are neither in *potestas* nor in *manus* nor in *mancipium*, some are under *tutela* or under *curatio*, others under neither. Let us therefore see which are under *tutela* and which under *curatio*; so we shall know the others, who are under neither. **143.** First then of those who are in *tutela*.

144. Parents are allowed to appoint by will tutors to the children whom they hold in *potestas*, to males below the age of puberty, to females of whatever age, even if they be married. For the early lawyers held that women even of full age should be in *tutela* on account of their instability of judgment. **145.** Thus, if by his will a man has appointed a tutor to his son and daughter and both reach puberty, whereas the son ceases to have a tutor, the daughter none the less remains under *tutela*; for it is only by the *ius liberorum* (as mother of several children) that women are freed from *tutela* by the *L. Iulia et Papia Poppaea*. From this statement, however, we except Vestal virgins, whom even the early lawyers out of respect for their priestly office desired to be free from *tutela*; and so again it was provided by the law of the Twelve Tables. **146.** To grandsons and granddaughters we can appoint tutors by will only if they do not eventually lapse at our death into the *potestas* of their father. Thus, if my son is in my *potestas* at the time of my death, my grandsons by him cannot receive a tutor under my will, in spite of their having been in my *potestas*, for the simple reason that on my death they will be in their father's *potestas*. **147.** Just as in a number of other cases posthumous children are treated as if already born, so in the present case it is settled that tutors can be appointed by will to posthumous children no less than to those already born, provided that in the given circumstances they would, if born in the testator's lifetime, come under his *potestas*. Such children we can also institute as our heirs, whereas we may not institute stranger posthumous children. **148.** To a wife in one's *manus* one can appoint a tutor exactly as to a daughter, and to a daughter-in-law in one's son's *manus* exactly as to a granddaughter. **149.** The most correct form of appointing a tutor is: 'I give Lucius Titius as tutor to my children' or 'to my wife'; but it is also considered a correct appointment if the will reads: 'Let Lucius Titius be tutor to my children' or 'to my wife'. **150.** In the case, however, of a wife in *manus* option of tutor is admitted, that is to say the will may allow her to choose whom she likes for her tutor. The form is: 'I give my wife Titia the option of a tutor'; this permits her to choose a tutor for all purposes or, it may be, for only one or two. **151.** The option given may be unlimited or limited. **152.** An unlimited option is commonly given in the form just stated; a limited option thus: 'I give my wife Titia the option of a tutor not more than once' or 'not more than twice'. **153.** Between these two options there is a wide difference: a woman having an unlimited option is able to choose a tutor once, twice, thrice, or oftener, whereas one having a limited option can do so only

up to the number of times granted—once or twice, as the case may be, and not oftener. **154.** Tutors appointed by name in a will are called *datui*, those selected under an option *optivi*.

155. Those to whom no tutor has been appointed by will have under the law of the Twelve Tables their agnates as tutors; these are called *legitimi*. **156.** Agnates are those akin to each other through persons of the male sex, being as it were cognates on the father's side, for instance one's brother by the same father, his son and his grandson by that son, or again one's paternal uncle, his son, and his grandson by that son. Those connected through persons of the female sex are not agnates, but cognates related only by natural law. Accordingly, between a mother's brother and her son there is not agnation, but cognation; again, the son of my father's or my mother's sister is not my agnate, but my cognate, and of course my relation to him is the same, since children follow their father's, not their mother's, family. **157.** In former times, under the law of the Twelve Tables, women as well as males had their agnates for tutors, but the subsequent *L. Claudia* has abolished the *tutela* of agnates so far as women are concerned, with the result that a male below puberty has as tutor his brother, if of full age, or his paternal uncle, whereas a woman cannot have a tutor of this kind. **158.** By *capitis deminutio* the tie of agnation is ended, but that of cognition is unaffected, because considerations of civil law can destroy civil but not natural rights. **159.** *Capitis deminutio* is a change of previous status; it occurs in three ways, there being *capitis deminutio maxima*, *minor* (also called *media*), and *minima*. **160.** There is *capitis deminutio maxima* when a man loses both citizenship and freedom at the same time. This happens to those who evade inscription in the census, whom the regulations for the census order to be sold. A similar legal provision ...¹ who in contravention of that *lex* take up residence in the city of Rome. Another case is that of a woman who under the *SC. Claudianum* becomes enslaved to the owner of a slave with whom she has cohabited against the will and warning of that owner. **161.** There is *capitis deminutio, minor* or *media* when citizenship is lost but freedom is retained, as happens to one interdicted from fire and water. **162.** There is *capitis deminutio minima* when, though both citizenship and freedom are retained, there is a change of status, as happens to those who are adopted or who mate a *coemptio*, and to those given in mancipation and manumitted from it, so much so that a man undergoes *capitis deminutio* every time that he is mancipated or manumitted. **163.** Now, the right of agnation is destroyed not only by *capitis deminutio maxima* and *minor*, but also by *capitis deminutio minima*. Thus, if of two children a father has emancipated one, after the father's death neither can be the other's tutor by right of agnation. **164.** But though a *tutela* goes to agnates, it does not go to all of them at the same time, but only to those standing in the nearest degree. ...²

165. By the law of the Twelve Tables also the *tutela* of freedmen below puberty and of freedwomen belongs to their patrons and their patrons' children. This *tutela* likewise is styled *legitima*, not that there is any express provision concerning it in the *lex*, but because it has become accepted by interpretation exactly as though it had been introduced by the *lex* in so many words. For from the fact that the statute ordained that succession to freedmen and freedwomen dying intestate should go to their patrons and their patrons' children, the early lawyers inferred that the intention of the statute was that *tutela* over them should go to the same persons, seeing that it had ordained that agnates whom it called to succession should also be tutors. **166.** On the analogy of the *tutela* of patrons yet another *tutela* has become accepted, which also is styled *legitima*. For if one mancipates to another one's son, grandson, or great-grandson who is below puberty, or one's daughter, granddaughter, or great-granddaughter whether of full age or not, with a proviso for remancipation to oneself, and when they have been remancipated manumits them, one will be their *legitimus tutor*.

166a. There are other *tutela*e that are called *fiduciariae*, namely those that come to us through our having manumitted a free person mancipated to us by a parent or *coemptionator*. **167.** But *tutela* over Latin freedwomen and over Latin freedmen below puberty does not in all cases go to their manumitters and their children, but to those to whom before their manumission they belonged by Quiritary title. Therefore, if a female slave is yours by Quiritary title but mine by bonitary, manumission by me alone and not by you can make her a Latin, and her estate goes to me. Her *tutela*, however, falls to you; for so the *L. Iunia* provides. But if she has been made a Latin by one who owns her by both bonitary and Quiritary title, then both her estate and her *tutela* go to him.

¹ One and a half lines illegible.

² Seventeen lines are virtually illegible. The topic was probably the *legitima tutela* of *gentiles* (cf. GI.3.17) and probably another topic as well.

168. *Tutela* over women is allowed to be ceded *in iure* to another by agnates, patrons, and manumitters of free persons, but *tutela* over male wards is not allowed to be ceded, because, being terminated when the ward reaches puberty, it is not considered burdensome. **169.** The person to whom a *tutela* is ceded is called a *cessicius tutor*. **170.** If this tutor dies or undergoes *capitis deminutio*, the *tutela* reverts to the tutor who ceded it. Likewise, if he who ceded it himself dies or undergoes *capitis deminutio*, the *tutela* departs from the *cessicius* and reverts to him who stands in the next degree after the ceder in regard to that *tutela*. **171.** So far, however, as agnates are concerned no question of *tutela cessicia* arises at the present day, since agnatic *tutela* over women has been abolished by the *L. Claudia*. **172.** But some have held that fiduciary tutors also have no right of ceding their *tutela*, inasmuch as they have subjected themselves to the burden by their own act; but even if that view be accepted, the same should not be said in the case of a parent who has mancipated a daughter, granddaughter, or great-granddaughter to a third party with a proviso for remancipation to himself and who has manumitted her after such remancipation, since he is regarded as a *legitimus tutor* and should be accorded no less respect than a patron.

173. Furthermore, by a *senatusconsultum* women are allowed to apply for another tutor in place of a tutor who is absent; thereupon the previous tutor is retired. It does not matter how far away he is. **174.** But by an express exception a freedwoman is not allowed to apply for another tutor in place of her absent patron. **175.** We place on the same footing as a patron a parent who, by manumitting a daughter, granddaughter, or great-granddaughter after her remancipation to himself, has acquired *legitima tutela* over her. His children, however, are accounted fiduciary tutors, whereas a patron's children acquire the same kind of *tutela* as their parent had. **176.** But sometimes a woman is allowed to apply for another tutor in place of even an absent patron, for instance in order to accept an inheritance. **177.** The same has been decreed by the senate where a patron's son is himself a ward. **178.** For by the *L. Iulia de maritandis ordinibus* (regulating the marriages of the orders) a woman in the *legitima tutela* of a ward may apply to the urban praetor for a tutor for the purpose of creating a *dos* (dowry). **179.** Of course a patron's son becomes tutor of his father's freedwoman even if he be below puberty, though he is unable to give *auctoritas* in any matter, seeing that he himself is not allowed to do any act without his own tutor's *auctoritas*. **180.** Again, a woman in the *legitima tutela* of a lunatic or a dumb man is allowed by the *senatusconsultum* to apply for a tutor for the purpose of creating a *dos*. **181.** In the above cases it is clear that the *tutela* of a patron or a patron's son remains unimpaired. **182.** The senate has further decreed that if the tutor of a male or female ward be removed from his *tutela* as suspect, or be excused from office on some lawful ground, another tutor shall be appointed in his place; whereupon the previous tutor loses his *tutela*. **183.** The practice in all these cases is the same at Rome and in the provinces, namely that application for a tutor should be made at Rome to the praetor and in the provinces to the provincial governor.

184. In earlier times, when the *legis actiones* were in use, a tutor used to be appointed if there was to be a *legis actio* between a tutor and his ward, whether a woman or a male under puberty. For, inasmuch as the tutor could not himself give *auctoritas* in a matter in which he was himself interested, another tutor used to be appointed, in order that the *legis actio* might be carried through with his *auctoritas*. He was called a *praetorius tutor*, because appointed by the urban praetor. Some hold that since the abolition of the *legis actiones* this case of appointment of a tutor has gone out of use, but another view is that it is still available if the proceedings in view be by *iudicium legitimum*.

185. If a person has no tutor at all, one is appointed for him, at Rome by the praetor and a majority of the tribunes of the *plebs* under the *L. Atilia*, who is called *Atilianus tutor*, and in the provinces by the provincial governors under the *L. Iulia et Titia*. **186.** Accordingly, where a tutor has been appointed by a will subject to a condition or as from a certain date, a tutor can be appointed pending the realization of the condition or the arrival of the date. Again, where the testamentary appointment is absolute, a tutor may be applied for under the *leges* mentioned during such time as no one has qualified as heir; the tutor appointed ceases to be tutor as soon as someone becomes tutor under the will. **187.** Application for a tutor should also be made under the same *leges* if a tutor has been captured by the enemy; this appointed tutor ceases to be tutor if the captive tutor returns to Roman territory; for *iure postliminii* he recovers his *tutela* on his return.

188. From all this it is evident how many species or varieties of *tutela* there are. But to inquire into the number of *genera* between which these species are distributed would involve a long discussion, this being a point on which the older lawyers have been exceedingly doubtful. For our part, having dealt with the matter very carefully in our commentary on the Edict and in our books *ex Quinto Mucio*, we omit the whole discussion. It is enough to observe that some, for instance Quintus Mucius, have said that there are

five genera, others, for instance Servius Sulpicius, that there are three, others, for instance Labeo, that there are two, while others have held that there are as many genera as there are species.

189. That persons below puberty should be under guardianship occurs by the law of every State, it being consonant with natural reason that a person of immature age should be governed by the guardianship of another person; indeed, there can hardly be any State in which parents are not allowed to appoint guardians to their children below puberty by their will, though, as we have remarked, it seems that only Roman citizens have their children in their *potestas*. **190.** But hardly any valid argument seems to exist in favour of women of full age being in *tutela*. That which is commonly accepted, namely that they are very liable to be deceived owing to their instability of judgment and that therefore in fairness they should be governed by the *auctoritas* of tutors, seems more specious than true. For women of full age conduct their own affairs, the interposition of their tutor's *auctoritas* in certain cases being a mere matter of form; indeed, often a tutor is compelled by the praetor to give *auctoritas* even against his will. **191.** This is why no action on the *tutela* lies at the suit of a woman against her tutor. In contrast, where tutors manage the affairs of a male or female ward below age, they are held to account to their wards on their attaining, full age by the *tutela iudicium*. **192.** It must, however, be allowed that the *legitima tutela* of a patron or a parent is of some real efficacy, in that such guardians are not compelled to give *auctoritas* for the making of a will, the alienation of *res Mancipi*, or the incurring of obligations, except where a strong reason for alienating *res Mancipi* or incurring obligations exists. All this is provided in the interest of the tutors themselves, in order that, being entitled to the inheritance of their wards should these die intestate, they may not be excluded from it by a will nor receive it rendered less lucrative by the alienation of the more valuable property or by debts incurred. **193.** Among peregrines women are not in *tutela* in the same way as with us; still, in general, they are in a sort of *tutela*: a law of the Bithynians, for example, ordains that if a woman enters into any transaction, it must be authorized by her husband or full-grown son.

194. Freeborn women are released from *tutela* in right of three children, freedwomen in right of four if they are in the *legitima tutela* of their patron or his children, but otherwise, if they have tutors of another sort, such as *Atiliani* or *fiduciarii*, in right of three children. **195.** A freedwoman may have a tutor of another sort in various ways; thus, if she has been manumitted by a woman, she must apply, for a tutor under the *L. Atilia* or, in a province, under the *L. Iulia et Titia*, since she cannot be in the *tutela* of her patroness. **195a.** Again if, having been manumitted by a male and having with his *auctoritas* made a *coemptio*, she has then been remancipated and manumitted, she ceases to have her patron for tutor and now has him by whom she has been (secondly) manumitted, who is called a *fiduciarius tutor*. **195b.** Again, if her patron or his son has given himself in adoption, a freedwoman must apply for a tutor under the *L. Atilia* or *Iulia et Titia*. **195c.** A freedwoman must make a similar application under these *leges* if her patron dies leaving no issue of the male sex in the family. **196.** Males, on the other hand, are released from *tutela* when they reach puberty. Sabinus, Cassius, and the rest of our teachers consider that a boy reaches puberty when he shows the fact by his physical development, that is when he is capable of procreation, but in the case of those who cannot so develop, such as the naturally impotent, they hold that the normal age of puberty must be taken. The authorities of the other school consider that puberty must be judged simply by age, that is, they hold a boy to have reached puberty when he has reached the age of 14. ...³

197. ... has reached an age at which he is capable of looking after his own affairs, a practice which, as we have pointed out above, is observed among peregrine peoples. **198.** On the same grounds curators are likewise appointed in the provinces by their governors.

199. Against the destruction or wasting by tutors and curators of the property of their wards or of those in their *curatio* the praetor requires both tutors and curators to give security. **200.** But not in every case. For neither are tutors appointed by will obliged to give security, their trustworthiness and diligence having been approved by the testator himself, nor, for the most part, are curators whose office does not devolve on them by statute, but who are appointed by a consul, praetor, or provincial governor, they of course having been selected as sufficiently trustworthy.

³ A whole page is illegible in the ms. The sense may be given in Ulp. 11.28. Further discussion of the termination of *tutela* is missing (cf. JI.1.22) and all but the end of the treatment of *curatio*. Cf. JI.1.23, Ulp. 12, Epit.1.8.

5. BOOK II [of things: the acquisition of single things]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)

Book II, §§ 1–96, pp. [odd nos.] 67–91 [footnotes omitted]

BOOK II

1. In the preceding book we treated of the law of persons. Let us now consider things. These are either in private ownership or regarded as outside private ownership.

2. The leading division of things is into two classes: they are subject either to divine right or to human.

3. Subject to divine right are *res sacrae* and *res religiosae*. 4. *Res sacrae* are those consecrated to the gods above; *res religiosae* are those dedicated to the gods below. 5. That alone is considered *sacrum* which has been consecrated under the authority of the Roman people, for instance by *lex* or *senatus-consult* passed to that effect. 6. On the other hand, a thing is made *religiosum* by the act of a private person, when he buries a corpse in his own land, provided that the dead man's funeral is his affair. 7. In the provinces, however, the general opinion is that land does not become *religiosum*, because the ownership of provincial land belongs to the Roman people or to the emperor, and individuals have only possession and enjoyment of it. Still, even if it be not *religiosum*, it is considered as such. 7a. Again, though a thing consecrated in the provinces otherwise than under the authority of the Roman people is not strictly *sacrum*, it is nevertheless considered as such. 8. Moreover *res sanctae*, such as the walls and gates of a city, are in a manner subject to divine right. 9. Now what is subject to divine right cannot belong to anyone, whereas what is subject to human right belongs in general to someone, though it may belong to no one: thus, things forming part of a deceased's estate belong to no one until someone qualifies as heir. ...¹ 10. Things subject to human right are either public or private. 11. Public things are regarded as belonging to no individual, but as being the property of the corporate body. Private things are those belonging to individuals.

12. Further, things are divided into corporeal and incorporeal. 13. Corporeal things are tangible things, such as land, a slave, a garment, gold, silver, and countless other things. 14. Incorporeal are things that are intangible, such as exist merely in law, for example an inheritance, a usufruct, obligations however contracted. It matters not that corporeal things are comprised in an inheritance, or that the fruits gathered from land (subject to a usufruct) are corporeal, or that what is due under an obligation is commonly corporeal, for instance land, a slave, money; for the rights themselves, of inheritance, usufruct, and obligation, are incorporeal. Incorporeal also are rights attached to urban and rural lands. Examples of the former are the right to raise one's building and so obstruct a neighbour's lights, or that of preventing a building from being raised lest neighbouring lights be obstructed, also the right that a neighbour shall suffer rain-water to pass into his courtyard or into his house in a channel or by dripping; also the right to introduce a sewer into a neighbour's property or to open lights over it. Examples of rights attached to rural lands are the various rights of way for vehicles, men, and beasts; also that of watering cattle and that of watercourse. Such rights, whether of urban or rural lands, are called *servitutes*.

14a. Things are further divided into *mancipi* and *nec mancipi*. *Mancipi* are lands and houses on Italic soil; likewise slaves and animals that are commonly broken to draught or burden, such as oxen, horses, mules, and asses; likewise rustic praedial servitudes, whereas urban praedial servitudes are *nec mancipi*. *Nec mancipi* also are stipendiary and tributary lands. 15. But the effect of the statement we have made, that animals commonly broken to draught or burden are *mancipi*, is disputed, because they are not broken in at once on birth. The writers of our school hold that they are *mancipi* as soon as born, but Nerva, Proculus, and the other authorities of the opposing school hold that they become *mancipi* only when they have been broken in, or, if they cannot be broken in owing to their extreme wildness, that they become *mancipi* when they reach the usual age for breaking in. 16. Further, wild beasts such as bears and lions are *nec mancipi*, as are animals such as elephants and camels which are in much the same category; thus it does not matter that these last are commonly broken to draught or burden; for their very names did not exist in the times when the distinction between *res mancipi* and *nec mancipi* was being settled. 17. Also *nec mancipi* are almost all incorporeal things, except rustic praedial servitudes, which, it is settled, are *mancipi*, though they are in the category of incorporeal things.

¹ Eleven lines of the ms. are illegible. Some restoration has been made from D.1.8.1pr. Whether the remainder concerned *res* that are *nullius* but *humani iuris* or *res hereditariae* is disputed.

18. Now there is an important difference between *res Mancipi* and *nec Mancipi*. **19.** For *res nec Mancipi* become the full property of another by mere delivery, provided that they are corporeal and thus admit of being delivered. **20.** Thus, if I deliver a garment or gold or silver to you, whether on account of a sale or a gift or any other title, it at once becomes yours, provided only that I am its owner. **21.** The same applies to provincial lands, some of which we call stipendiary and others tributary. Stipendiary are lands in the provinces that are considered as belonging to the Roman people, tributary those in the provinces that are held to belong to the emperor. **22.** *Res Mancipi*, on the other hand, are those things that are conveyed by mancipation; and that is why they are called *Mancipi*. But *in iure cessio* (surrender in court) is as effective as mancipation. **23.** How mancipation is performed we have explained in the previous book. **24.** *In iure cessio* is performed as follows: in the presence of a magistrate of the Roman people, such as a praetor, the party to whom the surrender is being made, holding the thing, says 'I declare that this slave is mine by Quiritary title'; then, after this vindication, the praetor asks the surrenderor whether he makes counter-vindication and, on his replying in the negative or keeping silence, adjudges the thing to the vindicant. This procedure is called a *legis actio*. It can also be performed in a province before the governor. **25.** Usually, however, indeed nearly always, we use mancipation, since there is no need for us to do with greater difficulty before a praetor or provincial governor what we can do for ourselves in the presence of friends. **26.** But if instead of being mancipated or surrendered *in iure* a *res Mancipi* (is merely delivered,) ...² **27.** ... We must further note that the saying of the old lawyers, that there is *nexus* of Italic, but not of provincial land, means that Italic land is *Mancipi* and provincial *nec Mancipi*. For in ancient speech the act had a different name, and what for them was *nexus* is for us *Mancipatio*.

28. That incorporeal things do not admit of delivery is obvious. **29.** But while urban praedial servitudes can only be surrendered *in iure*, rustic can also be mancipated. **30.** Usufruct is susceptible only of *in iure cessio*. For an owner can cede *in iure* to another person the usufruct of his thing, so that the other gets the usufruct whilst he himself retains bare property. If in his turn the usufructuary cedes the usufruct *in iure* to the owner of the property, he causes the usufruct to pass away from himself and to merge in the property; but if he makes the *cessio* to a third party, he retains his right none the less, it being held that such a *cessio* is of no effect. **31.** But these statements hold good in regard to Italic lands, because the lands themselves are susceptible of mancipation and *in iure cessio*. If, on the other hand, it is over provincial lands that a man wishes to create a usufruct, rights of way for man or beast, a right of watercourse, a right to raise buildings or to prevent buildings being raised to the detriment of neighbouring lights, or any similar rights, he can effect his purpose (only) by means of pacts and stipulations, because the lands themselves are not susceptible of either mancipation or *in iure cessio*. **32.** But as usufruct can be created over slaves and animals generally, it should be understood that even in the provinces this can be done by *in iure cessio*. **33.** Our statement that usufruct admits only of *in iure cessio* was made advisedly, although it can be created by means of mancipation also, in the sense that it can be deducted in mancipating the property; for though the usufruct is not mancipated, yet the result of its being deducted in a mancipation of the property is that the usufruct is vested in one person and the property in another.

34. An inheritance likewise is susceptible only of *in iure cessio*. **35.** For if one on whom an inheritance devolves by the statute-law of intestacy, before accepting it, that is before he qualifies as heir, surrenders it *in iure* to another, the surrenderee becomes heir exactly as if he had himself been called to the inheritance by the statute. But if the heir surrenders after accepting responsibility, he remains heir himself none the less, and will thus be liable to the creditors of the inheritance, whereas the debts due to it are wiped out and so the debtors of the inheritance are the gainers. But the corporeal things in the inheritance pass to the surrenderee exactly as though they had been surrendered to him *in iure* one by one. **36.** *In iure cessio* of an inheritance by a testamentary heir is of no effect if made before his acceptance of the inheritance; if made after his acceptance, it has the same effects as those we have just mentioned in the case of a statutory heir by intestacy, if he surrenders *in iure* after accepting responsibility. **37.** The writers of the opposite school hold the same in the case of involuntary heirs, because they see no difference between one who becomes heir by acceptance and one who becomes such without choice; this distinction will be explained in the proper place. But our teachers regard *in iure cessio* of an inheritance by an involuntary heir as of no effect.

² A whole page of the ms. is virtually illegible. Cf. Ulp. 19.4.5.

38. Obligations however contracted are susceptible of none of these modes of transfer. For if I wish a debt owed by someone to me to be owed to you, I can effect my purpose by none of the methods whereby corporeal things are conveyed, but it is necessary that you should on my instruction take a stipulatory promise from the debtor. The result will be that he will be released from me and become liable to you. This is called a novation of the obligation. **39.** Without such a novation you will not be able to sue for the debt in your own name, but must proceed in my name as my *cognitor* or *procurator*.

40. Next we must observe that among *peregrini* there is only one ownership: a man either is owner or is not considered owner. In olden times the Roman people followed the same principle: a man was either owner *ex iure Quiritium* or not considered owner at all. But afterwards ownership was made divisible, so that one man may be owner by Quiritary title and another by bonitary. **41.** Thus, if I neither mancipate nor surrender *in iure*, but merely deliver a *res Mancipi* to you, it becomes yours by bonitary title, but will remain mine by Quiritary until you have usucapted it by possession; for once *usucapio* is completed it becomes yours by full title, that is by both bonitary and Quiritary, just as if it had been mancipated or surrendered *in iure*.

42. Usucapion of movables is completed in one year, of lands and buildings in two: so the law of the Twelve Tables provides.

43. We may also acquire by usucapion things which have been delivered to us by one who is not their owner, whether they be *Mancipi* or *nec Mancipi*, provided we have received them in good faith, believing the deliverer to be their owner. **44.** This system appears to have been adopted in order to obviate the ownership of things being uncertain for too long, the periods of one or two years appointed for usucapion by the possessor being sufficient for the owner to seek out his property.

45. But sometimes, though a man possess another's property in the best of faith, usucapion does not run in his favour, for example if he is in possession of a thing which has been stolen or taken by violence; for the law of the Twelve Tables forbids usucapion of a stolen thing, and the *L. Iulia et Plautia* that of a thing taken by violence. **46.** Again, provincial lands are not susceptible of usucapion. **47.** Again, in former times the *res Mancipi* of a woman who was in the *tutela* of her agnates could not be acquired by usucapion, except where she had delivered them with the *auctoritas* of her tutor; this was provided by the law of the Twelve Tables. **48.** Again, it is obvious that free men and *res sacrae* or *religiosae* cannot be acquired by usucapion. **49.** The saying that the usucapion of things stolen and of things taken by violence is forbidden by the law of the Twelve Tables does not mean that the actual thief or violent taker is unable so to acquire (for to him usucapion is closed for another reason, namely that he possesses in bad faith); what it means is that no further person, though he have bought from him in good faith, has the right so to acquire. **50.** Consequently in the case of movables it does not readily happen that usucapion is open to their possessor in good faith, seeing that one who sells and delivers another's property commits theft; and the same is equally true of delivery on some other account. Still, sometimes it is otherwise: thus, if an heir sells or makes a gift of a thing lent or hired to or deposited with the deceased in the belief that it belongs to the inheritance, he does not commit theft; neither does one who having a usufruct over a female slave sell or makes a gift of her offspring in the belief that it too belongs to him; for theft is not committed in the absence of theftous intention. And there are other occasions on which a man may transfer the property of another without taint of theft and enable the possessor to acquire it by usucapion. **51.** It may happen also that a man may without violence take possession of another's land, which is lying vacant, either through the owner's neglect, or because the owner has died without a successor or has been absent for a considerable time; if the taker transfers this possession to one who receives it in good faith, the transferee will be able to acquire the land by usucapion; and even though he who took the vacant possession knows that the land is another's, this is no obstacle to usucapion by the *bona fide* possessor, since the opinion once held that land can be stolen has been exploded.

52. On the other hand, there are cases where one who knows that he is in possession of another's property will acquire it by usucapion. Thus, where a man takes possession of a thing which belongs to an inheritance, but of which the heir has not yet obtained possession, he is allowed to acquire it by usucapion, provided that it is a thing that is susceptible of usucapion. This kind of possession and usucapion is termed *pro herede* (as heir). **53.** So liberally is this kind of usucapion allowed, that even land is thereby acquired in one year. **54.** The reason why in this case usucapion of land as well as of other things in one year has been admitted is that in former times through the possession of things comprised in an inheritance the inheritance itself was deemed to be acquired by usucapion, and this in one year. For

the law of the Twelve Tables laid down that lands should be acquired by usucapion in two years and other things in one. Thus an inheritance, not being land, indeed not even corporeal, was held to be among other things. And though later it was held that an inheritance itself could not be acquired by usucapion, yet usucapion in one year survived for everything, including land, comprised in an inheritance. **55.** That so dishonest a possession and usucapion should have been allowed at all is explained by the fact that the ancient lawyers wished inheritances to be accepted promptly, in order that there should be persons to carry on the family cults (*sacra*), to which the greatest importance was attached in those days, and in order that the creditors (of the inheritance) should have someone from whom to obtain their due. **56.** This kind of possession and usucapion is also termed *lucratiua* (gainful), because by it a man knowingly makes gain out of another's property. **57.** But at the present day it is no longer *lucratiua*. For a senatusconsult passed on the authority of Hadrian has provided for such usucapions to be revoked. Thus, by *hereditatis petitio* the heir can recover the thing from him who has acquired it by usucapion, just as if it had not been so acquired. **58.** However, if an involuntary heir exists, no usucapion *pro herede* is possible even at civil law. **59.** There are further cases in which a man knowingly acquires the property of another by usucapion. For if a man acquires possession of what he has mancipated or surrendered *in iure* to another by way of *fiducia* (trust), he can regain ownership of it by usucapion, and that in one year, even if it be land. This kind of usucapion is called *usureceptio*, because by the usucapion one recovers what one had previously owned. **60.** Now *fiducia* is contracted either with one's creditor by way of security or with a friend for the safer keeping of one's property in his hands. If it is contracted with a friend, *usureceptio* is allowed unconditionally, but if with a creditor, it is allowed unconditionally if the debt has been paid, but if the debt has not yet been paid, then only if the debtor has neither hired the thing from the creditor nor obtained his licence to possess it; in that case lucrative usucapion is admitted. **61.** Again, if a man obtains possession of property of his which has been mortgaged to the Roman people and sold by it, *usureceptio* is permitted; but in this case the period for land is two years. This is what is meant by the current saying that from *praediatūra* there is *usureceptio*; for a purchaser from the people is called *praediator*.

62. It sometimes happens that an owner has not the power of alienation or that a non-owner has. **63.** Thus, a husband is forbidden by the *L. Iulia* to alienate dotal land without his wife's consent, although it belongs to him, having been acquired as *dos* by mancipation, *in iure cessio*, or usucapion. Whether this rule applies only to Italic lands, or to provincial as well, is doubtful. **64.** On the other hand, by the law of the Twelve Tables the agnate curator of a lunatic can alienate the lunatic's property; again a *procurator* who has been given full power of administration can alienate property of his absent principal, and a creditor can under his agreement alienate property pledged to him, although it is not his; but here the explanation may be that the pledge is deemed to be alienated with the assent of the debtor, he having previously agreed that the creditor should have power to sell the pledge, if the debt were not paid.

65. It appears, then, from what we have said, that alienation takes place sometimes under natural law, as where it is by delivery, and sometimes under civil law; for mancipation, *in iure cessio*, and usucapion are institutions confined to Roman citizens.

66. But it is not only those things that become ours by delivery that we acquire under natural law, but also those that we acquire by occupation (by being the first takers), because they were previously no one's property, for example everything captured on land, in the sea, or in the air. **67.** Thus, if we capture a wild animal, a bird, or a fish, what we so capture becomes ours forthwith and is held to remain ours so long as it is kept in our control; but when it escapes from our keeping and recovers its natural liberty, it is once more the property of the first taker, because it ceases to belong to us. It is deemed to recover its natural liberty when it has escaped from our sight or when, although it is still in sight, its pursuit is difficult. **68.** But as regards such animals as habitually haunt some place, for instance pigeons and bees, or deer haunting a wood, there is a traditional rule that they cease to be ours and belong to the first taker, if they have ceased to have the disposition to return. They are considered to have ceased to have this disposition when they have abandoned the habit of returning. **69.** By natural law also things captured from the enemy become ours.

70. Alluvial accretions to our land become ours, again by natural law. That is held to be an accretion by alluvion which a river adds to our land so gradually that it is impossible to estimate how much is being added at any particular moment; whence the common saying, that an addition is by alluvion if it is so gradual as to be invisible. **71.** Accordingly, if a river tears away a piece of your land and carries it down to mine, that piece remains yours. **72.** But if an island arises in the middle of a river, it is shared by all the

riparian owners on either side of the river; if, however, it be not in the middle of the river, it belongs to the riparian owners on the nearer side. **73.** Furthermore, what a man builds on my land becomes mine by natural law, although he built on his own account, because a superstructure goes with the land. **74.** Much more is this the case with a slip which someone has planted in my land, provided it has taken root there. **75.** The same holds likewise of corn sown by another in my land. **76.** But if I bring an action for the recovery of the land or the building against the other man, and refuse to pay him his expenses on the building, the young plants, or the seed, he will be able to defeat me with the *exceptio doli mali*, at any rate if he was a *bona fide* possessor. **77.** On the same principle it has been held that what another has written on my paper or parchment even in letters of gold is mine, because the lettering goes with the paper or parchment. Hence, if I sue for the rolls or parchments, but refuse to pay the cost of the writing, I can be defeated by the *exceptio doli mali*. **78.** But if, say, someone has painted a picture on my panel, the contrary is held, the opinion preferred being that the panel follows the picture. The reasoning supporting this distinction is hardly satisfactory, but at any rate according to this ruling, if you bring an action against me who am in possession, claiming the picture as yours, but refuse to pay the value of the panel, you can be defeated by the *exceptio doli mali*; if on the contrary you are in possession, it follows that I should be allowed an equitable action against you, in which case, if I refuse to pay the cost of the painting, you will be able to defeat me by the *exceptio doli mali*, at any rate if you are a *bona fide* possessor. Of course if you or anyone else have stolen the panel, I have an action of theft.

79. On a change of species also we have recourse to natural law. Thus, if you make wine, oil, or grain out of my grapes, olives, or ears of corn, the question arises whether this wine, oil, or grain is mine or yours. Or again, if you make some utensil out of my gold or silver, or fashion a boat, chest, or chair out of my planks, or make a garment out of my wool, mead out of my wine and honey, or a plaster or eyesalve out of my drugs, the question arises whether what you have thus made out of my property is yours or mine. Some hold that the material substance is what counts, in other words that the manufactured article should be held to belong to the owner of the material substance; this is the opinion preferred by Sabinus and Cassius. But others consider that it belongs to its maker; this is the opinion preferred by the authorities of the other school, who add, however, that the former owner of the material substance has the action of theft against one who stole it, and also an action for its value (*condictio*), because, though things that have perished cannot be vindicated, they may nevertheless be the object of a *condictio* against thieves and certain other possessors.

80. Here we must observe that neither a woman nor a ward can alienate a *res Mancipi* without *tutoris auctoritas*, but that, while a woman can, a ward cannot so alienate a *res nec Mancipi*. **81.** Hence, if a woman lends money without her tutor's *auctoritas*, her contract is effective, because she makes the money—a *res nec Mancipi*—the property of the borrower. **82.** But a ward who does the same makes no contract, because without his tutor's *auctoritas* he does not make the money the property of the borrower. He can therefore vindicate his coins, assuming them to be extant, that is he can claim that they are his own *ex iure Quiritium*, whereas a woman cannot make such a claim, but only that the money is owed to her. Hence in the case of a ward it is a question whether, supposing the money lent by him to have been spent by the borrower, he has an action of some sort by which he can claim it, seeing that even without his tutor's *auctoritas* he can acquire the benefit of an obligation. **83.** On the other hand, *res Mancipi* and *nec Mancipi* without distinction can be paid to women and wards without their tutor's *auctoritas*, because even without it they are allowed to improve their position. **84.** Thus a debtor who pays a ward money he owes him makes the money the property of the ward, but is not himself discharged, because without his tutor's *auctoritas* a ward cannot release an obligation; indeed, without it he is not allowed to part with anything. Still, if he is the richer for the money and yet sues for the debt, he can be defeated by the *exceptio doli mali*. **85.** But to a woman payment of a debt can properly be made even without her tutor's *auctoritas*: the payer is discharged, since, as we have just said, women can part with their *res nec Mancipi* even without their tutor's *auctoritas*. At least this is true if she receives the money; but if she does not, but merely acknowledges its receipt, seeking to free her debtor by formal release without her tutor's *auctoritas*, this is beyond her power.

86. Acquisitions come to us not only by our own acts, but also through those whom we hold in *potestas*, *manus*, or *mancipium*; likewise through slaves over whom we have a usufruct, and again through free men and other people's slaves whom we possess *bona fide*. Let us consider these cases carefully one by one. **87.** Whatever children in our *potestas* or our slaves receive by mancipation or obtain by delivery, and whatever rights they acquire by their stipulations or any other title, are acquired for us,

because a person in *potestas* can have nothing of his own. Thus such a person, if instituted heir, cannot accept the inheritance except with our sanction, and if he accepts it with that sanction, it is acquired for us exactly as if we had been instituted heirs ourselves; and of course any legacy left to them goes to us on the same principle. **88.** But we must bear in mind that if a slave belongs to one man by bonitary title and to another by Quiritary, his acquisitions from all sources go solely to the owner with the bonitary title. **89.** Through those whom we hold in *potestas* not only ownership but also possession is acquired for us. For we are held to possess anything of which they have acquired possession; hence through them usucapion likewise takes place. **90.** But though through persons whom we hold in *manus* or *mancipium* ownership is acquired for us by every method of acquisition, as much as through those in our *potestas*, it is commonly questioned whether possession is acquired for us through them, since we do not possess the persons themselves. **91.** With regard to slaves in whom we have only a usufruct the rule is that whatever they acquire in connexion with our affairs or from their own work is acquired for us, but that anything they acquire outside these two accounts belongs to the owner of the property in them. Hence if such a slave is instituted *heres* or is given some legacy or present, this acquisition is for the owner of the property in him, not for me. **92.** The same rule applies to a person *bona fide* possessed by us, whether he be a free man or another's slave; for what has been held of a usufructuary is applied also to a *bona fide* possessor, so that whatever is acquired outside the two accounts above mentioned belongs either to the man himself if he is free, or to his owner if he is a slave. **93.** But once the *bona fide* possessor has acquired the slave by usucapion, he can, since he thereby becomes his owner, acquire for himself through the slave's instrumentality on every account. But a usufructuary cannot acquire the slave by usucapion, first because he has not possession of him, but only the right of using and taking profits, and secondly because he knows that the slave belongs to someone else. **94.** Through a slave in whom we have a usufruct it is a question whether we can possess a thing and acquire it by usucapion, because we have not possession of the slave himself. But through one whom we *bona fide* possess there is no doubt but that we can both possess and acquire by usucapion. In both cases what we are saying is subject to the limitation just explained, namely that acquisition by such persons is for us, when it is in connexion with our affairs or from their own work. **95.** From what we have said it is evident that through free men who are neither subject to our power nor *bona fide* possessed by us, and through the slaves of others of whom we have neither a usufruct nor a lawful possession, acquisition is impossible on any account. This is the meaning of the common saying that there cannot be acquisition for us through a stranger. The only doubt is whether possession can be acquired for us through a *procurator*. **96.** Finally it is to be noted that *in iure cessio* to persons in *potestas*, *manus*, or *mancipium* is impossible; for since such persons can have nothing of their own, it obviously follows that they cannot vindicate in court anything as their own.

6. BOOK II [of things: testaments]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book II, §§ 97–190, pp. [odd nos.] 91–121 [footnotes omitted]

97. For the present it suffices to have carried our exposition of the methods of acquiring single things thus far. For the law of legacies, under which likewise single things are acquired, will be treated of more conveniently in another place. Let us therefore now consider how things are acquired in mass (*per universitatem*). **98.** If we become heirs to some person or have been granted possession of his estate (*bonorum possessio*), or if we buy an insolvent's estate, or adopt someone, or take a woman into our *manus* as wife, that person's assets pass to us.

99. Let us consider first inheritances. Of these there are two kinds, according as they come to us by will or by intestacy. **100.** First let us consider those coming by will.

101. Originally there were two kinds of wills: men made them either in the *comitia calata*, which were held twice a year for the purpose of making wills, or *in procinctu*, that is when they were arming for battle, *procinctus* being the army mobilized and armed. Thus they made the former in the quiet of peace and the latter when on the point of sallying to battle. **102.** Later a third kind of will was added, that executed *per aes et libram*. A man who had not made a will either in the *comitia calata* or *in procinctu*, if threatened with sudden death, would mancipate his *familia*, that is his whole estate, to a friend, whom he would request to distribute it after his death to such persons as he desired. This is called the will *per aes et libram*, because it is executed by means of a mancipation. **103.** The two earlier kinds of will have fallen into desuetude, and that executed *per aes et libram* has alone remained in use. Its present scheme, however, is other than what it was of old. For then the *familiae emptor*, that is he who by mancipation received the estate from the testator, used to occupy the position of heir, and consequently it was to him

that the testator gave instructions as to the distribution of the estate after his death; but at the present day one person is instituted heir and the legacies are charged on him, whilst another figures formally as *familiae emptor* in imitation of the ancient system.

104. The proceedings are as follows: The testator, as in other mancipation, takes five Roman citizens above puberty to witness and a scale-holder, and, having previously written his will on tablets, formally mancipates his *familia* to someone. In the mancipation the *familiae emptor* utters these words: ‘I declare your *familia* to be subject to your directions and in my custody, and be it bought to me with this bronze piece and’ (as some add) ‘this bronze scale, to the end that you may be able to make a lawful will in accordance with the public statute.’ Then he strikes the scale with the bronze piece and gives it to the testator as the symbolic price. Next the testator, holding the tablets of his will says as follows: ‘According as it is written in these tablets and on this wax, so do I give, so do I bequeath, so do I call to witness, and so, *Quirites*, do you bear me witness.’ This utterance is called the nuncupation, *nuncupare* meaning to declare publicly; and the testator is considered by these general words to declare and confirm the specific dispositions which he has written on the tablets of his will.

105. One who is in the *potestas* of either the *familiae emptor* or the testator may not be among the witnesses, because, in imitation of the ancient law, the whole proceedings in executing a will are deemed to take place between the *familiae emptor* and the testator; indeed, as we have just said, in former times he who received the *familia* from the testator by mancipation was in the position of heir; consequently testimony from a man’s own house was rejected. **106.** For the same reason, if the person serving as *familiae emptor* is in the *potestas* of his father, the father cannot be a witness, neither can a person in the same *potestas*, for example the *familiae emptor*’s brother. Again, if a *filiusfamilias* makes a will in virtue of his *peculium castrense* after his discharge from the army, neither his father nor anyone in the *potestas* of his father is properly employed as witness. **107.** What we have said with regard to witnesses must be understood to apply equally to the scale-holder; for he too ranks as a witness. **108.** But one who is in the *potestas* of the heir or of a legatee, or one in whose *potestas* the heir or a legatee is, or one who is in the same *potestas* as either of them, can serve as witness or as scale-holder; indeed, the heir himself or a legatee can do so lawfully. But as regards the heir or one who is in his *potestas* or in whose *potestas* he is, we do well not to avail ourselves of this right.

109. Such strict observance of formalities in the making of wills has by imperial constitutions been relaxed for soldiers, because of their extreme inexperience. For though they fail to employ the ordained number of witnesses, or to sell their *familia*, or to make nuncupation of their wills, these are none the less valid. **110.** Moreover, they are allowed to institute both Latins and peregrines as heirs or to leave them legacies, though in general peregrines are prohibited from taking an inheritance or legacies by the principles of civil law, and Latins by the *L. Iunia*. **111.** Furthermore, unmarried persons, who are forbidden by the *L. Iulia* to receive an inheritance or legacies, and childless persons; whom the *L. Papia* forbids to take more than half of an inheritance or of legacies, take in full under the will of a soldier. ...¹

112. ... But later a senatusconsult was passed under the authority of the late emperor Hadrian whereby permission was given to women ...² to make wills without a *coemptio*, provided that they were not below the age of 12, and also, of course, that those not exempted from *tutela* must make their wills with the *auctoritas* of their tutors. **113.** Thus females appear to be better off than males; for a male below the age of 14 cannot make a will, even if he should propose to do so with his tutor’s *auctoritas*, whereas a female acquires the right to make a will from the age of 12.

114. Accordingly, in considering whether a will is valid, we must first ascertain whether its maker had the capacity to make it; next, supposing he had capacity, whether he made it according to the requirements of the civil law, except that, as stated, soldiers owing to their extreme inexperience are allowed to make their wills in any way they will or can.

115. The formalities which we have explained above, of selling the *familia*, witnesses and nuncupation, are not, however, sufficient for the validity of a will at civil law; **116.** but before everything else it must be ascertained whether there has been an institution of an heir made in solemn form; for if an

¹ Two pages are missing in the ms., and the first 21 lines the next page are virtually illegible. After completing the topic of military wills, Gaius probably proceeded to the question of testamentary capacity.

² About nine letters are illegible.

institution has been made otherwise, it is unavailing that the sale of the *familia*, the employment of witnesses, and the utterance of the nuncupation have been made in the manner we have mentioned. **117.** The solemn form of institution is this: ‘Be thou Titius my heir’; but the form: ‘I order that Titius be my heir’ seems now also to be approved; not approved is the form: ‘I wish Titius to be my heir’; also disapproved by most authorities are the forms: ‘I institute Titius my heir’, and ‘I make Titius my heir’.

118. It is further to be observed that if a woman who is in *tutela* makes a will, she must do so with her tutor’s *auctoritas*; otherwise her testament will be of no effect at civil law. **119.** The praetor, however, if the will is sealed with the seals of 7 witnesses, promises *bonorum possessio secundum tabulas* (possession of the estate in accordance with the testamentary tablets) to the heirs named in the will, and if there is no one to whom the inheritance goes by the statute-law of intestacy—for example a brother by the same father, or a father’s brother, or a brother’s son—the testamentary heirs will thus be able to keep the inheritance. And the law is the same when the will is invalid on some other account, such as that the *familia* was not sold, or that the testator did not utter the nuncupation. **120.** But let us consider whether, even if there is a brother or a father’s brother, they are preferred to the heirs named in the will. For by a rescript of the emperor Antoninus it is laid down that those who have been granted *bonorum possessio* under an improperly executed will can defend themselves by *exceptio doli mali* against parties claiming the inheritance by intestacy. **121.** Now it is certain that the rescript applies to the wills of males, and also to those of females that are invalid for such reason as that they have failed to sell their *familia* or to utter the nuncupation. What we have to consider is whether it applies to wills made by women without their tutor’s *auctoritas*. **122.** We refer only to women who are not in *legitima tutela* of parents or patrons, but have a tutor of some other kind, one who can be compelled to give *auctoritas* even against his will. For it is obvious that a parent or a patron is not ousted by a will made without his *auctoritas*.

123. Moreover, a testator who has a son in *potestas* must be careful either to institute him heir or to disinherit him by name; for if he passes him over in silence, his testament will be of no effect. So much so, that the teachers of our school hold that even if the son dies in the father’s lifetime, no one can qualify as heir under the will, because the institution was void *ab initio*. The authorities of the other school admit that if the son is living at the time of his father’s death, he bars the heirs named by the will and becomes himself heir by intestacy; but they hold that if he predeceases his father, entry on the inheritance can be made under the will, there being now no son to bar it, because evidently, in their view, the will is not avoided *ab initio*, by the son being passed over. **124.** But if a testator passes over any other *liberi* than a son, the will is good, but the persons so passed over come in by accretion with the testamentary heirs, for an aliquot share of the inheritance if the testamentary heirs are *sui heredes*, for half the inheritance if they are strangers. This means that if, for example, a testator institutes his three sons, but passes over his daughter, the daughter comes in by accretion as heir of a quarter, thus getting what she would have got had her father died intestate; but if the testator institutes strangers as heirs and passes over his daughter, the daughter by accretion comes in as heir of a half. What we have said of a daughter is to be understood to apply equally to a grandson and all other *liberi*, male or female. **125.** But there is more to be said. For though, according to our statement, such persons deprive the testamentary heirs of only half, nevertheless the praetor promises them *bonorum possessio contra tabulas* (possession of the estate against the will), and in this manner the stranger heirs are excluded from the entire inheritance and become heirs only in name (*sine re*). **126.** This law used to be applied to males and females without distinction. But recently the emperor Antoninus has declared by rescript that women *suae* are not to take more by *bonorum possessio* than they would get by their right of accretion. And this ruling is to be applied equally in the case of emancipated females, so that they too get by *bonorum possessio* exactly what they would have got by right of accretion had they been in *potestas*. **127.** But if a son is disinherited by his father, it must be by name; otherwise the disinherison is void. Disinherison is considered to be by name whether it be in the form ‘Let my son Titius be disinherited’ or in the form let my son be disinherited’ without the addition of his proper name. **128.** Other *liberi*, female or male, are sufficiently disinherited by the general clause ‘Let all others be disinherited’, words which are commonly added immediately after the institution of heirs. But this is so only at civil law. **129.** For the praetor orders all male *liberi*, that is grandsons as well and great-grandsons, to be disinherited by name, females, however, either by name or by the general clause. ...³

³ About two and a half lines are illegible following “great-grandsons.” The translation gives the generally agreed sense, but there must have been more.

130. *Liberi* born after the making of the will (*postumi*) must likewise be either instituted heirs or disinherited. **131.** In this respect all *sui heredes* are in the same position: whether it be a son or any other of the *liberi*, male or female, that is passed over, the will is valid, but it is broken by the subsequent agnation of a *postumus* or *postuma*, and thereby made absolutely void. Thus, if a woman of whom a *postumus* or *postuma* as expected miscarries, there is no obstacle to the succession of the testamentary heirs. **132.** Females (*postumae*) may be disinherited either by name or by the general clause, provided that if it be by the general clause some legacy be left to them, in order that they may not appear to have been passed over through forgetfulness. But it is agreed that males (*postumi*) cannot be validly disinherited except by name, that is in the form ‘Let any son that shall be born to me be disinherited’. ...⁴ **133.** Ranked as *postumi* are those who through succeeding to the position of a *suus heres* become *sui heredes* to their ancestors quasi-agnation. Thus, suppose I have in my *potestas* a son and a grandson and granddaughter by him; the son, being in the nearer degree, alone has the rights of a *suus heres*, although the grandson and granddaughter, his children, are in the same *potestas* as he; but if my son dies during my lifetime or passes out of my *potestas* in any manner, the grandson and granddaughter now succeed to his position and thus, by quasi-agnation, acquire the rights of *sui heredes*. **134.** Therefore, just as in order not to make a void will I am bound either to institute my son *heres* or disinherit him, so, in order to guard against my will being broken in the above manner, I must institute or disinherit any grandson or granddaughter by him, lest it should happen that my son should die in my lifetime and the grandson or granddaughter be succeeding to his position should break my will by quasi-agnation. This was provided for by the *L. Iunia Vellaea*, where also the form of disinherison is notified, namely that for male *postumi* it should be by name, while for female it may be either by name or by the general clause, provided, however, that some legacy be left to those disinherited by the general clause. **135.** At civil law it is unnecessary either to institute or disinherit emancipated *liberi*, because they are not *sui heredes*. But the praetor orders disinherison of all such, whether males or females, who are not instituted heirs, of males by name, of females either by name or by the general clause. To those who have been neither instituted nor disinherited in the manner stated the praetor promises *bonorum possessio contra tabulas*. **135a.** Not in the *potestas* of their father are children who have been granted Roman citizenship along with him, if he did not, when receiving the grant, ask to have them in his *potestas*, or asked, but unsuccessfully. Children brought under their father’s *potestas* by the emperor differ in no respect from those born in his *potestas*. **136.** Adoptive sons are in the same position as natural so long as they remain in adoption, but when emancipated by their adoptive father they take rank as *liberi* neither at civil law nor for the purposes of the praetor’s edict. **137.** It is just the reverse in relation to their natural father: so long as they are in their adoptive family they are reckoned strangers to him, but when emancipated by their adoptive father they are placed in the same legal position as they would have occupied if they had been emancipated by their natural father.

138. If after making his will a man adopts as son either a person *sui iuris* through the *comitia* or one who was in *patria potestas* through the praetor, the will is inevitably broken by the quasi-agnation of a *suus heres*. **139.** The same holds where, after the making of a will, the testator’s wife comes under his *manus* or one who was in his *manus* becomes his wife; for she thereby becomes in the position of his daughter and is a quasi *sua heres*. **140.** It is of no avail that such a woman or the adopted son has been instituted in the will; it seems idle to discuss their disinherison, seeing that at the time when the will was made they were not of the *sui heredes*. **141.** Further, a son who is manumitted from his first or second mancipation by returning into *patria potestas* breaks a previously made will, and it is of no avail that he has been instituted or disinherited in that will. **142.** Formerly, the law was similar regarding one on whose account a case of error is proved under the *senatusconsult*, say on the ground that he was born of a peregrine or a Latin mother, who had been taken to wife in the mistaken belief that she was a Roman. For even if he had been instituted heir or disinherited by his father, and whether the case was proved before or after his father’s death, he used inevitably to break his father’s will by quasi-agnation. **143.** But now, by a recent *senatusconsult* passed on the authority of the late emperor Hadrian, if the case is proved in the father’s lifetime, he inevitably breaks the will under the previous law, but where it is proved after his father’s death, he breaks the will if he is passed over in it, but if he is named as heir or is disinherited in it, he does not break it, clearly in order that wills made with due care should not be set aside when it is no longer possible to remake them.

⁴ A whole page is largely illegible. Restorations from D.28.3.13 and JI 2.13.2 are given in the translation.

144. An earlier will is also broken by a subsequent validly made will. It makes no difference whether an heir qualifies under the second will or not, the sole question being whether one could have qualified. Therefore, if the person appointed by a subsequent validly executed will refuses to be heir, or if he dies either in the lifetime of the testator, or after his death but before entering on the inheritance, or if he is shut out by a *cretio* (clause requiring formal acceptance within a definite period), or if he is defeated by, the failure of a condition subject to which he was instituted or if he is debarred from the inheritance under the *L. Iulia* by reason of celibacy—in all these cases the *paterfamilias* dies intestate. For the earlier will is invalid because broken by the second, and the second is of no effect because no one qualifies as heir under it.

145. Yet another way in which validly made wills are invalidated is where the testator afterwards undergoes a *capitis deminutio*; how this may happen has been set out in the first book. **146.** In this case we shall speak of the will becoming inoperative, though wills that are broken also become inoperative, and wills improperly executed in the beginning are inoperative; and on the other hand, wills properly executed in the beginning, but subsequently rendered inoperative by the testator's *capitis deminutio*, may equally be said to be broken. But as it is obviously more convenient to distinguish the various cases by special terms, we speak in some cases of wills being improperly executed, in others of properly executed will being broken or becoming inoperative.

147. But neither wills improperly executed in the beginning, nor wills properly executed but subsequently rendered inoperative or broken are entirely worthless. For if a will be sealed with the seals of 7 witnesses, the heir named in it may apply for *bonorum, posses secundum tabulas*, provided only that the deceased testator was both a Roman citizen and *sui iuris* at the time of his death. For if the cause that has rendered the will inoperative is, say, the testator's loss of citizenship or even of liberty, or that he gave himself in adoption and at the time of his death was in his adoptive father's *potestas*, the heir named in his will is not entitled to apply for *bonorum possessio secundum tabulas*. **148.** Persons receiving *bonorum possessio* under a will improperly executed from the beginning, or under a will properly executed but afterwards broken or rendered inoperative, will, if they are able to keep the inheritance, have *bonorum possessio cum re* (effectual *bonorum possessio*), but if the inheritance can be taken away from them, they will have *bonorum possessio sine re* (ineffectual *bonorum possessio*). **149.** For anyone who has been instituted heir in accordance with the civil law by a previous or a later will, or who is heir by the civil law of intestacy, can turn them out of the inheritance. But if there be no other person who is heir at civil law, they can keep the inheritance, and the cognates, possessing no title by civil law, have no right against them. **149a.** Sometimes, however, as we have already observed above, the heirs named in an invalid will are preferred even to the heirs by civil law, for example if the defect in the execution of the will was that the *familia* was not sold or that the testator did not utter the words of nuncupation; for in that case, if the agnates bring their suit for the inheritance, they can be defeated by the *exceptio doli mali* under the constitution of the emperor Antoninus. **150.** Clearly, where testamentary heirs have established themselves as *bonorum possessor* under the terms of the Edict, the *L. Iulia* does not deprive them of the inheritance. For by that statute an estate is escheated and must go to the people (*populus*) only where no one appears as heir to the deceased or as *bonorum possessor*.

151. It is possible for duly executed wills to be invalidated by change of intention. It is clear, however, that this cannot happen simply because later the testator desires that the will shall not stand; indeed, it remains valid at civil law even if he cuts its strings; and more than that, even if he effaces it or burns the tablets on which it is written, its contents do not on that account lose their validity, although their proof is difficult. **151a.** But what ensues? If someone applies for *bonorum possessio ab intestato* (by right of intestacy), the testamentary heir, if he brings his suit for the inheritance, will be defeated by the *exceptio doli mali*, [whilst, if no one applies for *bonorum possessio ab intestato*, the people will take the inheritance in preference to the testamentary heirs, he being considered unmeritorious, so that the succession shall on no account pass to one whom the testator wished to exclude]. So it is laid down by a rescript of the emperor Antoninus.

152. Heirs are termed either *necessarii* or *sui et necessarii* or *extranei*. **153.** A *necessarius heres* is a slave instituted heir with freedom annexed, so called because inevitably, whether he will or not, he is on the testator's death straightway free and heir. **154.** Hence those who doubt their own solvency, commonly institute either in the first, second, or a later place one of their slaves as free and heir, so that, if the creditors of the estate are not paid in full, the assets may be sold as belonging to this heir rather than to the testator himself, the object being that the discredit attaching to such a sale should fall on the heir

rather than on the testator himself. True we read in Fulfidius that Sabinus holds that he ought to be exempted from discredit seeing that the sale is not brought upon him by his own fault, but by operation of law; but the accepted law is not so. **155.** In compensation for this disadvantage he is given the advantage that everything he acquires after his patron's death for himself, whether before or after the sale, is reserved to him; and even if the sale realizes only a fraction of the liabilities, his property will not be subjected to a second sale on account of the hereditary liabilities, except where he acquires something in his capacity of heir, for instance if he is enriched out of property acquired by a (Junian) Latin (a freedman of the testator, who dies), whereas the subsequent acquisitions of all other persons whose property realizes only a fraction of their debts may be subjected to repeated sales. **156.** *Sui et necessarii heredes* are such persons as a son or daughter, grandson or granddaughter by a son, and the rest, provided that they were in the testator's *potestas* when he died. But for a grandson or granddaughter to be a *suus heres* it is not enough that they were in their grandfather's *potestas* at the time of his death; it is also necessary that their father should have ceased to be a *suus heres* in his father's (their grandfather's) lifetime, either he having been cut off by death or by having been freed from *potestas* in some way; for if that happens, the grandson or granddaughter succeeds to their father's position. **157.** They are called *sui heredes* because they are household heirs and even in their father's lifetime are considered in a manner owners. Accordingly, if a man dies intestate, the first right of succession belongs to his *liberi*. They are called *necessarii* because both under a will and by intestacy they inevitably become his *heredes*, whether they will or not. **158.** But the praetor allows them to abstain from the succession, in order that the assets may preferably sold as the ancestor's. **159.** The law is the same regarding a wife who is in *manus*, as she is in the position of a daughter, and regarding a daughter-in-law in a son's *manus*, as she is in the position of a granddaughter. **160.** Moreover, the praetor extends a similar power of abstaining to a person in *mancipii causa* if he be instituted heir with freedom annexed, though like a slave he is a *necessarius heres* and not also a *suus heres*. **161.** All other heirs, not being subject to the testator's *potestas*, are termed *extranei*. Accordingly, even our children, if not in our *potestas*, are regarded as *extranei heredes* when instituted heirs by us. It follows that those instituted by their mother are also in this same category, because women do not hold their children in *potestas*. In the same category also are slaves instituted as heirs with freedom annexed and afterwards manumitted by their owner. **162.** *Extranei heredes* are allowed a power of deliberating whether to enter on the inheritance or not. **163.** But if an heir who has the power of abstaining meddles with hereditary property, or if one who is allowed to deliberate whether to enter on the inheritance enters on it, he has thereafter no power of abandoning the inheritance, except if he be under the age of **25**. For the praetor relieves persons under that age if they rashly take up an insolvent inheritance, just as he does in all other cases where they have been deceived. I am aware, however, that the late emperor Hadrian relieved a person above the age of 25 in a case where after entry on an inheritance a large debt, which was unknown at the time of entry, came to light.

164. *Extranei heredes* are commonly given a *cretio*, that is a limited period for deliberation, so that they must either enter on the inheritance within the appointed period or in default of entry be barred on its expiry. This is called *cretio*, because *cernere* means to decide and determine. **165.** Thus, after writing: 'Be thou Titius my heir', we ought to add 'and do thou make *cretio* within the next hundred days during which thou knowest and canst. If thou canst not so make *cretio*, be thou disinherited'. **166.** One thus instituted heir must, if he wishes to be heir, make *cretio* within the appointed time, that is, he must make the following declaration: 'Whereas Publius Meuius by his will has instituted me his heir, I enter upon and make *cretio* of that inheritance.' If he does not do this, he is barred when the time of *cretio* has ended, and it is of no avail that he behave as heir, that is, deal with the hereditary property as if he were heir. **167.** But one instituted heir without *cretio*, or one who is called to the *hereditas* by the statute-law of intestacy, can become heir either by making *cretio*, or by behaving as heir, or even by informal (expression of) intention to take up the inheritance, and is free to enter on the inheritance at whatever time he likes. The praetor, however, on the petition of the hereditary creditors commonly fixes a time within which he may, if he chooses, enter on the inheritance; otherwise, the creditors are to be allowed to sell up the deceased's assets. **168.** But just as a person instituted heir with *cretio* does not become heir unless he makes *cretio* of the inheritance, so he is only debarred from the inheritance by not having done this within the time-limit of the *cretio*. Hence, although he may, before the end of the period, have decided not to enter on the inheritance, he can change his mind and become heir by making *cretio* before the period has expired. **169.** On the other hand, just as a person instituted *heres* without *cretio*, or one entitled by statue on intestacy, becomes heir by informal (expression of) intention, so by a contrary (expression of) intention he is forthwith barred from the inheritance. **17.** *Cretio* is always limited by a definite period.

For this purpose the period of 100 days has been found reasonable. Nevertheless, at civil law, a longer or a shorter period may be given; but the praetor sometimes shortens the period a longer period. **171.** Though *cretio* is always limited by a definite time period, there is, nevertheless, on form of *cretio* called ordinary *cretio* and another known as *cretio* of fixed days. The former is that above set out, namely that with the addition of the words ‘during which he knows and can’; that of fixed days is the same with these words omitted. **172.** There is a wide difference between the two. For when the ordinary *cretio* is given, only the days during which the man was aware that he had been instituted heir and was able to make *cretio* are counted against him. But where a *cretio* of fixed days is given, the days are counted against him continuously, even though he is not aware that he has been instituted heir, and even against one who for some reason is prevented from making *cretio*; and more than this, time runs against one instituted heir conditionally. Hence it is better and more suitable to employ the ordinary form. **173.** This *cretio* (of fixed days) is called continuous *cretio*, because the days are counted continuously. But since it works hardship, the other is the common form, which is why it is called ordinary *cretio*.

174. Sometimes we make two or more grades of heirs, as follows: ‘Be thou Lucius Titius my heir and do thou make *cretio* within the next 100 days during which thou knowest and canst. If thou dost not so make *cretio*, be thou disinherited. In that case be thou Meuius my heir and do thou make *cretio* within the next 100 days’, &c. And we can go on substituting as often as we like. **175.** We may substitute one or more persons for a single heir and vice versa one or more persons for several heirs. **176.** The heir named in the first grade becomes heir by making *cretio*, and the substitute is shut out; by failing to make *cretio* he is himself shut out even if he behaves as heir, and the substitute steps into his place. And if there are further grades, the same results follow at each grade. **177.** But if *cretio* is enjoined without disinherison, that is in these words: ‘if thou dost not make *cretio*, then be Publius Meuius my heir’, there is this difference, that if the first-named, while omitting to make *cretio*, behaves as heir, he lets in the substitute for a share, and both become heirs in equal shares. But if he neither makes *cretio* nor behaves as heir, then clearly he is altogether shut out, and the substitute comes in for the whole inheritance. **178.** But Sabinus’ opinion was that so long as the first person instituted had the right to make *cretio* and so become heir, the substitute was not let in by his merely behaving as heir; but that, once the period of *cretio* had run out, the substitute was let in even if he (the first-named) behaved as heir. But others have held that even if there is still time to make *cretio*, he can by behaving as heir let in the substitute for a share and can no longer fall back on *cretio*.

179. To our children below puberty and in our *potestas* we can institute substitutes not only in the manner we have described, namely to the effect that if they do not qualify as heirs someone else is to be our heir, but we can further appoint someone to be their heir in the event of their qualifying as our heirs and dying whilst still below puberty, for example thus: ‘Be thou my son Titius my heir. If my son shall not be my heir or shall be my heir and die before becoming his own tutor (reaching puberty), be thou Seius heir.’ **180.** In this case, if the son does not qualify as heir, the substitute becomes heir to the father, but if he does qualify and dies before puberty, the substitute becomes heir to the son. This means that there are in a sense two wills, one the father’s, the other the son’s, just as if the son had instituted an heir for himself; or at any rate there is a single will dealing with two inheritances. **181.** But to guard the ward against foul play after his father’s death the practice is to make the ordinary substitution openly, that is in the passage in which the ward is instituted. For the ordinary substitution calls the substitute to the inheritance only in the event of the ward not qualifying as heir at all; and this happens if he dies in his father’s lifetime, in which case we cannot suspect malpractice by the substitute, since of course in the testator’s lifetime the contents of his will are unknown. But the substitution whereby we appoint a substitute for the event of the ward qualifying as heir and dying before puberty we write separately, on later tablets, which tablets are closed up with strings and wax of their own, and it is provided in the earlier tablets that the later tablets shall not be opened whilst the son is alive and still below puberty. But it is far safer for both kinds of substitutions to be closed up separately on later tablets, because if they are closed up and kept separate in the way we have described, it can be inferred from the prior substitution that the same person is substituted in the later. **182.** Not only if we institute our *liberi* below age as heirs is it in our power to appoint substitutes for them, so that if they die before coming of age the person of our choice will be heir, but also if we disinherit them. In such case, all that the ward has acquired by inheritance, legacies, or presents from relatives goes to the substitutes. **183.** All we have said of substitution to instituted or disinherited *liberi* below age is to be understood to apply equally to *postumi*. **184.** But to an *extraneus heres* we cannot substitute to the effect that if he qualifies as heir and dies within

a certain time someone else shall be his heir; all we can do is by means of a trust to lay him under an obligation to make over, in whole or in part, what he inherits from us. This branch of law will be explained in its proper place.

185. Slaves, whether our own or another's, can be appointed heirs just as well as free men. **186.** But a slave of our own must be declared free as well as heir simultaneously, as thus: 'Be thou my slave Stichus free and my heir' or 'my heir and free'. **187.** For if he be instituted heir without freedom annexed, he cannot become heir even though later manumitted by his owner, because the institution did not hold good in respect of his person; so also, if he have been alienated, he cannot make *cretio* of the inheritance with the sanction of his new owner. **188.** But where he has been instituted heir with freedom annexed, he becomes, if he has remained in the same position, free in virtue of the will and therefore *heres necessarius*. But if he has been manumitted by the testator, he can choose for himself whether or not to enter on the inheritance; and if he has been alienated, he can enter with the sanction of his new owner, who thereby becomes heir through him; for the slave himself can be neither heir nor free. **189.** Again, if another man's slave having been instituted heir remains in the same position, he must enter on the inheritance with his owner's sanction, but if he is alienated by his owner, either in the testator's lifetime or after his death but before he makes *cretio*, he must make it with the sanction of his new owner; if, however, he has been manumitted, he can choose for himself whether or not to enter on the inheritance. **190.** Where another man's slave has been instituted heir subject to the ordinary *cretio*, the period of the *cretio* begins only when the slave himself is aware of his institution and there is nothing to prevent him from informing his master, so that he may be able to make the *cretio* with his sanction.

7. BOOK II [of things: legacies and trusts]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book II, §§ 191–190, pp. [odd nos.] 121–289 [footnotes omitted]

191. Next let us consider legacies. This branch of the law may appear to lie outside our present subject-matter; for we are dealing with the legal methods of acquiring things *per universitatem*. But seeing that we have spoken fully of wills and of heirs instituted by will, we shall be justified in taking next the law of legacies.

192. There are four kinds of legacies: for we legate either by vindication or by damnation or by way of permission or by preception.

193. By vindication we legate, for example, thus: "To Titius I give and legate the slave Stichus"; but if only one or other of the words is used, as 'I give' or 'I legate', it is equally a legacy by vindication; so also, according to the prevailing opinion, if the legacy be in the form: 'Let him take', or 'Let him have for himself', or 'let him seize'. **194.** It is called legacy by vindication because immediately on the inheritance being entered upon the thing becomes the legatee's by Quiritary title, and if he claims it from the heir or anyone else who possesses it, he must vindicate, that is, he must plead that the thing is his by Quiritary title. **195.** On a single point the learned differ. Sabinus, Cassius, and the rest of our teachers hold that a thing legated in this manner becomes the legatee's property immediately on the inheritance being entered upon, even though he is not aware of the legacy, but that if, having learnt of the legacy, he rejects it, it is as though it had not been left. On the other hand, Nerva and Proculus and the other authorities of that school hold that the thing becomes the property of the legatee only if that is his desire. At the present day, however, as the result of a constitution of the late emperor Antoninus Pius, the view taken by Proculus appears to be preferred. For in a case where a Latin (Junian Latin freedman) had been legated by vindication to a colony he said: 'The decurions are to consider whether they wish the Latin to be theirs, just as if he had been legated to an individual.' **196.** Only things belonging to the testator by Quiritary title can properly be legated by vindication. In the case of things reckoned by weight, number, or measure, such as wine, oil, corn, and money, it is held to be sufficient if they belong to the testator by Quiritary title at the time of his death. But all other things, it is held, are required to belong to him by Quiritary title at both times, namely that of his making the will and that of his death; otherwise the legacy is void. **197.** Such at least is the rule at civil law. But more recently a senatusconsult was passed on the authority of the emperor Nero whereby it is provided that, if a man legates a thing which at no time was his, the legacy is to be as valid as if it had been left in the most favourable form, that being legacy by damnation, whereby even another's property can be legated, as will appear below. **198.** If, however, a man legates what does belong to him, but after the execution of the will proceeds to alienate it, most authorities consider that not merely is the legacy void at civil law, but that it is not even validated by the

senatusconsult. The ground for this view is that even where a man legates something belonging to him by damnation, yet if he afterwards alienates it, then although, in the view of the majority, by strict law the legacy is due, nevertheless the legatee's suit can be defeated by the *exceptio doli mali*, as running counter to the deceased's intention. **199.** All agree in this, that where the same thing is legated by vindication, whether conjunctively, or disjunctively, to two or more persons, and all accept the legacy, each takes a share, and the share of a legatee who fails to take accrues to the co-legatee. Conjunctively one legates thus: 'To Titius and Seius I give and legate the slave Stichus'; disjunctively thus: 'to Lucius Titius I give and legate the slave Stichus. To Seius I give and legate the same Stichus.' **200.** Where a thing is legated conditionally by vindication, it is a question whose it is whilst the condition is pending. Our teachers hold it belongs to the heir, on the analogy of the *statu liber*, that is of a slave declared by a will free on condition, who admittedly belongs to the heir during the interim. But the authorities of the other school hold that during the interim the thing belongs to no one, and they maintain the same still more strongly of a thing legated unconditionally, up to when the legatee accepts the legacy.

201. By damnation we legate thus: 'Be my heir specially bound to convey my slave Stichus'; but if the will says 'let my heir convey', it is also a legacy by damnation. **202.** By this kind of legacy even another man's thing can be legated, so that the heir is bound to buy the thing and convey it, or else to pay its value. **203.** Also, a thing which does not exist, provided it will exist, can be legated by damnation, for example 'the coming crops of that land' or 'the child that shall be born of that slave-woman'. **204.** What has been so legated, even, if it be unconditionally and immediately, is not acquired by the legatee at once on the inheritance being entered upon, as in the case of a legacy by vindication, but belongs none the less to the heir. Hence the legatee must sue for it by action in *personam*, that is he must plead that the heir is under an obligation to convey it to him; thereupon, if the thing be *mancipi*, the heir must either mancipate or surrender it *in iure*, and deliver possession; if it be *nec Mancipi*, it suffices if he delivers it. For if he merely delivers a *res Mancipi* without mancipating it, it becomes the legatee's in full right only by usucapion, which, as we have said elsewhere, is completed in one year in the case of movables and in two years in the case of landed property. **205.** Another difference between this form of legacy and that by vindication is that where the same thing is legated by damnation to two or more persons, if this is done conjunctively, a share is clearly due to each, as in the case of a legacy by vindication, but if it is done disjunctively, the whole is due to each, with the result, of course, that the heir must give the thing to one legatee and its value to the other. Also, if the legacy is conjunctive, the share of a legatee who fails to take does not go to the co-legatee, but stays in the inheritance.

206. But in regard to our statement that under a legacy by damnation the share of a legatee who fails to take stays in the inheritance, whereas under a legacy by vindication it accrues to the co-legatee, it must be observed that this was so at civil law, before the *L. Papia*; but since that statute it becomes caducous and goes to the beneficiaries under the will who have children. **207.** And though the first place in claiming caducous gifts belongs to heirs having children, and the next, if the heirs are childless, to legatees having children, yet by the *L. Papia* it is expressly declared that a conjoined legatee having children is to be preferred to heirs, even if they have children. **208.** Most authorities hold that in regard to this right conferred by the *L. Papia* on conjoined legatees, it makes no difference whether the legacy be by vindication or damnation.

209. By way of permission we legate thus: 'Be my heir specially bound to permit Lucius Titius to take and have for himself the slave Stichus. **210.** This kind of legacy has a wider application than that by vindication, but a narrower than that by damnation. For by it a testator can validly legate not only his own thing, but also that of his heir, whereas by vindication he can legate only his own, but by damnation that of any third party. **211.** If, then, at the time of the testator's death the thing belongs either to the testator or to the heir, the legacy is clearly valid, even though at the time of making the will it belonged to neither. **212.** But if the thing first becomes the property of the heir after the testator's death, it is a question whether the legacy is valid. Most authorities pronounce it invalid. But what follows? Even though what a man has legated was at no time his property and at no time afterwards became that of his heir, under the *SC. Neronianum* it is treated as having been left by damnation. **213.** Just as a thing legated by damnation does not become the legatee's property at once on the *hereditas* being entered upon, but remains that of the *heres* until he has made it the legatee's by delivery, mancipation, or surrender *in iure*, so is the law also in the case of a legacy by way of permission. And consequently the action on account of such a legacy is likewise *in personam*, the claim being 'whatever the heir is under obligation by the will to convey or do'. **214.** Some, however, hold that under this form of legacy the heir is not to be held

bound to mancipate or surrender *in iure* or deliver the thing, but that it suffices if he suffer the legatee to take it, because the testator has enjoined on him no more than that he permit, that is suffer, the legatee to have the thing for himself. **215.** A more serious division of opinion regarding this form of legacy arises where you have legated the same thing to two or more persons disjunctively. One view is that the whole is due to each; another that the first taker is preferred, because, seeing that under this form of legacy the heir is put under obligation merely to be passive, it follows that if he has been passive in regard to the first taker and that legatee has taken the thing, he (the heir) is unassailable by one claiming the thing later, because he neither has the thing so as to be able to suffer it to be taken by the second nor has by fraud prevented himself from having it.

216. By preception we legate thus: ‘Let Lucius Titius take in advance the slave Stichus.’ **217.** Now our teachers hold that a legacy in this form; can be made to no one except to one who has been appointed in some part heir; for to precept is to take in advance, and this can only occur in the case of a person instituted heir in some part, because he is to get the legacy in advance, over and above his share of the inheritance. **218.** On this view a legacy by preception to a stranger (non-*heres*) is void; so much so that Sabinus held it was not even validated by the *SC. Neronianum*: ‘for’, he says, ‘by that senatusconsult are validated only those legacies that are invalid at civil law by reason of defective expression, not those which fail because of some disability personal to the legatee’. According to Julian and Sextus, however, the legacy is validated by the senatusconsult in the latter case also; for it is patent that there too it is owing to the words used that the legacy is invalid at civil law, seeing that it would be valid if made to the same person in different words, as by vindication or damnation or by way of permission, whereas a legacy is invalid owing to disability of the beneficiary only when it is left to one to whom it cannot be left in any form, as to a peregrine, in respect of whom there is no power of testation: in such a case admittedly the senatusconsult does not apply. **219.** Our teachers also hold that one to whom a legacy in this form has been left can recover it by no other method than an action for division of the inheritance, namely that lying between heirs *de hereditate erciscunda*, that is for its division; for it is in the province of the *iudex* to adjudicate to the legatee what has been left to him by preception. **220.** Hence it is intelligible that according to our teachers nothing can be legated by preception but what belongs to the testator; for nothing but what comes from the deceased is brought within the scope of this action. Consequently, if a testator legates by this method a thing that is not his, the legacy will be void at civil law; but it will be validated by the senatusconsult. Our teachers, however, admit that in a particular case there can be a legacy by preception of another’s thing, where a man legates a thing which he has mancipated to his creditor by way of *fiducia*; for they consider that it lies within the powers of the *iudex* to compel the coheirs to redeem the thing by paying the debt, so that the legatee in question can have it in advance. **221.** But the authorities of the other school hold that there can be a legacy by preception even to a stranger, as if it were expressed: ‘Let Titius take (*capito*) the slave Stichus’, with a superfluous syllable *prae* added, and that therefore the thing appears to have been legated by vindication. This view is said to have been confirmed by a constitution of the late emperor Hadrian. **222.** According to this opinion, therefore, if the thing legated belonged to the deceased by Quiritary title, it can be vindicated by the legatee, whether he be one of the heirs or a stranger; but if it was the testator’s by only bonitary title, the legacy will be valid under the senatusconsult if made to a stranger, but if to an heir will be secured to him under the powers of the *iudex* in the action for the division of the inheritance; while if the testator had no title to the thing at all, the legacy will be valid under the senatusconsult, whether made to an heir or to a stranger. **223.** If the same thing is legated conjunctively or disjunctively to two or more persons, each is entitled to a share, where the legatees are heirs according to our school, whether they are heirs or strangers according to the other school.

224. In ancient times it was permissible to exhaust the whole estate by legacies and gifts of liberty, and to leave the heir nothing but the empty title of heir. And the law of the Twelve Tables seemed to allow this, by providing that whatever a man had by his will enjoined regarding his property should hold good, the words of the statute being: ‘as a man shall have legated of his property, so let law be’. In consequence, testamentary heirs would abstain from the inheritance, and thus many persons used to die intestate. **225.** Hence was enacted the *L. Furia*, whereby no one except certain persons was allowed to take more than 1,000 *asses* by legacy or gift *mortis causa*. But this statute failed of its purpose. For a man having, for example, an estate worth 5,000 *asses* could exhaust the whole estate by giving a legacy of 1,000 to each of five persons. **226.** Later, therefore, the *L. Voconia* was enacted, providing that no one might by legacy or gift *mortis causa* take more than the heirs. By this statute the heirs would evidently

obtain at any rate something; but a similar defect came to light. For by distributing his estate among numerous legatees a testator was able to leave his heir so very little that it was not to the latter's interest to shoulder the burdens of the whole inheritance for so little gain. **227.** Consequently the *L. Falcidia* was enacted, providing that a testator may not legate more than three-quarters of his estate. An heir is thus bound to get a quarter of the inheritance. And this is the law observed to-day. **228.** The *L. Fufia Caninia*, as mentioned in our first book, moderated extravagance in the giving of liberty (by will to slaves).

229. A legacy preceding the institution of an heir is void, for the simple reason that wills derive their whole efficacy from the institution of an heir, and on this account the institution of an heir is reckoned to be, as it were, the source and foundation of the whole will. **230.** On the same ground also liberty cannot be conferred before the institution of an heir. **231.** Our teachers hold that tutors too cannot be appointed in that place. But Labeo and Proculus hold that this can be done, because by the appointment of a tutor nothing is taken out of the inheritance. **232.** Void also is a legacy to take effect after the death of the heir, that is, if made in this way: when my heir shall have died, I give and legate' or 'let him give'. But the legacy is good if expressed thus: when my heir shall die', because the gift is not after the death of the heir, but at the last moment of his life. But again, one cannot legate thus: 'On the day before my heir dies', though this ruling seems to have been accepted without sufficient reason. **233.** The same remarks are to be taken to apply to gifts of liberty. **234.** The question whether a tutor can be appointed after the death of the heir may perhaps be regarded as raising the same issue as the question which arises as to the appointment of a tutor before the institution of the heir.

235. A legacy by way of penalty is also void. Considered as such is one that is left for the purpose of constraining the heir to do or not to do something, for example the following: 'If my heir gives his daughter in marriage to Titius, let him pay Seius 10,000 sesterces', or this one: 'If thou dost not give thy daughter in marriage to Titius, do thou pay Titius 10,000 sesterces'; and again, if the testator orders the heir, in the event of his not erecting a monument to him (the testator) within, say, two years, to pay Titius 10,000 sesterces. And, to cut matters short, from the very definition one can conceive many similar illustrations. **236.** Neither can liberty be conferred by way of penalty, though on this point there has been question. **237.** But concerning the appointment of a tutor there can be no question, because by the appointment of a tutor the heir cannot be constrained to do or not to do anything, and therefore, even if in the testator's intention an appointment of a tutor was by way of penalty, the appointment will be regarded as conditional rather than penal.

238. A legacy to an uncertain person is void. A person is considered uncertain of whom the testator had no certain conception, as where the legacy runs: "To the first person who comes to my funeral let my heir pay 10,000 sesterces." The law is the same if the legacy be to all in general 'whosoever shall come to my funeral'. In the same case is a legacy left thus: 'Let my heir pay 10,000 sesterces to whoever gives his daughter in marriage to my son.' Also, a legacy 'to the first persons designated consuls after the making of this will' is equally considered to be to uncertain persons. And in short there are many other cases of this kind. But a legacy to an uncertain person of a defined class is valid, for instance: 'To that one of my kindred now living who is the first to come to my funeral let my heir pay 10,000 sesterces.' **239.** It appears to be also impossible to confer liberty on an uncertain person, because the *L. Fufia Caninia* requires slaves to be liberated by name. **240.** Appointment to be tutor must also be of a certain person. **241.** A legacy to an afterborn stranger is likewise void. An afterborn stranger is one who when born will not be of the testator's *sui heredes*. Thus even a grandson begotten by, an emancipated son is an afterborn stranger; also a child in the womb of a woman whom the civil law does not regard as a wife is an afterborn stranger in relation to his father. **242.** Nor yet can an afterborn stranger be instituted heir; for he is an uncertain person. **243.** But though in general the rules we have stated apply strictly only to legacies, it is a reasonable opinion held by some that an heir cannot be instituted by way of penalty; for it makes no difference whether an heir be charged with a legacy in the event of his doing or not doing something, or if a coheir be added to him, seeing that he is constrained to do or not to do something, against his own desire as much by the addition of a coheir as by the charging of a legacy.

244. It is a question whether we can validly, legate to one who is in the *potestas* of him whom we are instituting heir. Servius holds that the legacy is valid, but that it is avoided if, at the time when the legacies vest, the legatee is still in *potestas*, and that therefore the legacy is due alike if it be unconditional and the legatee cease in the testator lifetime to be in the heir's *potestas*, or if it be conditional and the same happen before the condition is fulfilled. Sabinus and Cassius hold such a legacy to be valid if conditional but invalid if unconditional, arguing that though it is possible that the legatee may cease

during the testator's lifetime to be in the *potestas* of the heir, the legacy must nevertheless be considered void, for the reason that it would be absurd that what would be invalid if the testator died immediately after the execution of the will should be valid just because he had a longer span of years. The authorities of the other school hold the legacy invalid even if conditional, on the ground that we can no more be conditionally debtors of those in our *potestas* than we can unconditionally. **245.** On the other hand, it is agreed that a legacy to you can validly be charged upon one in your *potestas* who is instituted heir, but that if you become heir through him, the legacy is avoided, because you cannot owe yourself a legacy; if, however, the person instituted, being a son, is emancipated or, being a slave, is manumitted or transferred to someone else, and either qualifies as heir himself or makes someone else heir, the legacy, it is held, is due.

246. Let us now pass on to trusts.

247. And to begin with let us consider their application to inheritances. **248.** In the first place it must be borne in mind that it is necessary that someone be instituted heir directly, and that it be committed to his good faith to make over the inheritance to someone else; for a will in which no one is directly instituted is void. **249.** The following words seem to be the most usual in imposing trusts: 'I beg', 'I request', 'I desire', 'I commit to your good faith'; any one of them by itself is as binding as if all are employed cumulatively. **250.** Thus, after writing: 'Be thou Lucius Titius my heir', we may add: 'I request and beg thee, Lucius Titius, as soon as thou art able to enter upon my inheritance, to render and make it over to Gaius Seius.' We may, however, likewise make the request with regard to a fraction of the inheritance; also it is open to us to leave trusts conditionally or absolutely, or as from a certain date. **251.** After the inheritance has been transferred, the transferor still remains heir, while the transferee is sometimes in the position of an heir, sometimes in that of a legatee. **252.** But in former times he was in the position neither of an heir nor of a legatee, but rather in that of a purchaser. For the practice then was that the inheritance should formally be sold for a nominal sum to him to whom it was being made over, and the same stipulations as are usual between the vendor and the purchaser of an inheritance were entered into between him and the heir, that is to say, the heir would stipulate from the recipient of the inheritance that he (the heir) should be indemnified against any judgment given against him, and in respect of anything he might otherwise part with in good faith, on account of the inheritance, and that in general he should, if sued on account of the inheritance, he properly defended, while on his side the recipient of the inheritance stipulated that whatever should have come to the heir from the inheritance should be made over to him (the recipient), and further that the heir should suffer him to bring the actions belonging to the inheritance as his *procurator* or *cognitor*. **253.** But in more recent times a senatusconsult passed in the consulship of Trebellius Maximus and Annaeus Seneca has provided that where an inheritance has been made over in obedience to a trust, the actions which would lie at civil law in favour of and against the heir should be granted in favour of and against him to whom the inheritance has been made over under the trust. In consequence of this senatusconsult the stipulations above mentioned have fallen out of use. For the praetor now gives *actiones utiles* in favour of and against the recipient of the inheritance as though in favour of and against the heir, and these actions are published in the Edict.. **254.** Another point: seeing that heirs, when requested to make over the whole or almost the whole inheritance, used commonly to refuse to enter on the inheritance for very little or no gain and thereby trusts were being brought to naught, the senate later, in the consulship of Pegasus and Pusio, decided that one who had been requested to make over an inheritance should be permitted to retain a quarter of it, just as he is allowed to do against legacies under the *L. Falcidia*; and the same right to retain a quarter was allowed against trust gifts of individual things. In consequence of this senatusconsult it is the heir who carries the burdens of the inheritance, whilst the recipient of the remaining fraction of the inheritance is in the position of a partiary legatee, that is of a legatee to whom a fraction of the estate is left. This kind of legacy is called a *partitio*, because the legatee shares (*partitur*) the inheritance with the heir. The result is that the stipulations customary between an heir and a partiary legatee are entered into between the recipient of an inheritance on account of a trust and the heir; these stipulations provide that both profit and loss on the inheritance shall be shared between the parties proportionately to their respective fractions. **255.** Accordingly, if a testamentary heir is requested to make over not more than three-quarters of the inheritance, then the transference takes place under the *SC. Trebellianum*, and the actions arising from the inheritance are granted against each proportionately, against the heir by civil law and against the transferee of the inheritance under the *SC. Trebellianum*. It is true the heir remains such in respect also of the fraction which he has made over, and (at civil law) actions arising out of the inheritance lie in favour

of and against him in full, but (by the *SC.*) his liability is carried no farther than, and actions in his favour are not granted beyond, the beneficial interest in the inheritance remaining with him. **256.** Where, however, the heir is requested to make over more than three-quarters or even the whole of the inheritance, the *SC. Pegasianum* comes into operation. **257.** Now, once the heir has entered on the inheritance provided he does so voluntarily, he shoulders the whole of the liabilities of the inheritance, whether he retains his quarter or chooses not to. But if he retains his quarter, stipulations dividing the rights and liabilities proportionately as between a partiar legatee and an heir must be entered into. If, however, he makes over the whole inheritance, stipulations on the model of those between a purchaser and vendor of an inheritance must be entered into. **258.** But if a testamentary heir refuses to enter on the inheritance, alleging that he doubts its solvency, it is provided by the *SC. Pegasianum* that if the person to whom he has been requested to transfer so desires, he be ordered by the praetor to enter on and transfer the inheritance, and that actions be granted in favour of and against the transferee as under the system of the *SC. Trebellianum*. In this case no stipulations are required, because the transferor of the inheritance is protected against liability and at the same time the actions arising from the inheritance are carried over in favour of and against the transferee. **259.** It makes no difference whether an heir instituted to the whole inheritance is requested to make over the whole or a fraction of it, or an heir instituted to a share is requested to make over the whole or a fraction of that share; for in the latter case also account is taken under the *SC. Pegasianum* of the quarter of his share.

260. It is also possible to leave individual things, such as land, a slave, a garment, silver, or money, by means of a trust, and the request to make the things over may be addressed either to the heir himself or to a legatee, though a legacy cannot be charged on a legatee. **261.** Further, not only what belongs to the testator, but also what belongs to the heir or legatee or to anyone at all may be left by means of a trust. Thus one may request even a legatee to make over to someone else not only the actual thing legated to him, but also something else, whether belonging to the legatee himself or to a third party. The only point to beware of is that a man be not requested to make over to others more than he himself takes under the will; for beyond that the request is ineffectual. **262.** Where a third party's thing is left by way of trust, the person charged with the trust is bound either to buy the actual thing and make it over, or else to pay its value, as is the law where a third party's thing is legated by damnation. Some, however, hold that if the owner of the thing left by way of trust will not sell it, the trust is avoided, but that in the case of a legacy by damnation it is otherwise.

263. Also, liberty can be conferred on a slave by means of a trust, either the heir or a legatee being requested to manumit him. **264.** It makes no difference whether the request concerns a slave of the testator himself or one belonging to the heir or the legatee or even a third party. **265.** Thus even a third party's slave must be bought and manumitted. But if his owner will not sell him, clearly the trust for liberation is avoided, because in this case there can be no valuation in money. **266.** A slave manumitted under a trust does not become the testator's freedman, even though he was the testator's own, but becomes the freedman of him who manumits. **267.** He, on the other hand, who is directly ordered to be free by the will, for instance in the form: 'Let my slave Stichus be free', or 'I order that my slave Stichus be free', becomes the freedman of the testator himself. And further, no one can obtain freedom directly under a will but one who belonged to the testator by Quiritary title both when he made his will and when he died.

268. There are many differences between gifts left by way of trust and those left by direct legacy. **269.** Thus, by means of a trust property can be left away from the heir of one's heir, whereas a legacy charged on him is void. **270.** Again, by means of a trust a man about to die intestate can leave things away from the person to whom his property is going, whereas he cannot be charged with a legacy. **270a.** Again, a legacy left by codicil is only valid if the codicil has been confirmed by the testator, that is if he has provided in his will that anything he should have committed to codicils should hold good. But a trust can be left even by unconfirmed codicil. **271.** Again, a legacy cannot be charged on a legatee, but a trust can. Indeed, from one to whom we are leaving something by means of a trust we can by means of a further trust leave something to a further person. **272.** Again, upon a slave belonging to someone else liberty cannot be conferred directly, but it can be by way of trust. **273.** Again, it is impossible for anyone to be instituted heir or disinherited by a codicil, even though it be confirmed by a will. But a person instituted heir by a will may be requested by codicil to make over the inheritance in whole or part to someone else, even though the codicil be not confirmed by the will. **274.** Again, a woman, though prevented by the *L. Voconia* from being instituted heir by a person assessed in the census at more than 100,000 asses, can

nevertheless take the inheritance if left to her by means of a trust. **275.** Also Latins, though forbidden by the *L. Iunia* to take inheritances and legacies directly, can take under a trust. **276.** Again, though it is forbidden by senatusconsult¹ to free and institute as heir one's slave under 30 years of age, the general opinion is that one can order that he be free when he shall be 30 years old, and can request that the inheritance should then be made over to him. **277.** Again, although we cannot institute from after the death of the heir who succeeds us a further heir in his place, still we can request our heir, when he shall die, to make over our inheritance in whole or part to a further person. Moreover, since a trust can be imposed from after the death of the heir, we can obtain the same result by writing thus: 'when my heir Titius is dead, I wish my inheritance to go to Publius Meuius.' By either method Titius leaves his own heir bound by the trust to transfer the inheritance. **278.** Further, we sue for legacies by *formula*, but claim trust gifts at Rome before a consul or the praetor having special jurisdiction over trusts, in the provinces before the provincial governor. **279.** Again, at Rome jurisdiction over trusts is exercised at all seasons, but over legacies only during term. **280.** Again, interest and mesne profits are due on trust-property where the person owing the trust is late in performance, but there is no liability for interest on legacies; so it is declared by a rescript of the late emperor I Hadrian. I am aware, however, that Julian held that in the case of legacies left by way of permission the law was the same as for trusts, and I observe that even today this opinion is preferred. **281.** Again, legacies are invalid, but trusts valid, if expressed in Greek.² **282.** Again, if an heir denies a legacy left by damnation, the action against him is for double; but on a trust the claim is always for the simple amount. **283.** Again, what has by mistake been paid on a trust beyond what was due can be recovered, but what has been paid in excess on a legacy by damnation cannot be recovered. The law is the same where a payment not due at all has on either account been made by mistake.

284. There used to be further differences, which do not now exist. **285.** Thus peregrines could take under trusts—indeed, this was probably the origin of trusts—but later this was forbidden, and now on the proposition of the late emperor Hadrian a senatusconsult has enacted that such trusts should be claimed for the fisc. **286.** Also, unmarried persons, though forbidden by the *L. Iulia* to take inheritances or legacies, were at one time considered able to take under trusts. **286a.** Again, childless persons, though under the *L. Papia* they forfeit a moiety of inheritances and legacies because they have no children, were at one time considered to take trust gifts in full. But later, by the *SC. Pegasianum*, they have been forbidden to take trust gifts just as much as legacies and inheritances, these being transferred to beneficiaries under the will who have children, or, if none of them have children, to the people, as is the rule in regard to legacies and inheritances, which for the same or like reason become caducous. **287.** Again, at one time a trust could be left in favour of an uncertain person or an afterborn stranger, though such persons can neither be instituted heirs nor be left legacies. But by a senatusconsult made on the authority of the late emperor Hadrian the same rule has been established for trusts as for legacies and inheritances. **288.** Again, there is now no doubt that a penal gift cannot be left even by way of trust.

289. But though in many points of law trusts are far freer than, and in others just as effective as, direct testamentary gifts, still a tutor cannot be appointed by will otherwise than directly, as thus: 'Let Titius be tutor to my children', or thus: 'I appoint Titius tutor to my children.' He cannot be appointed by means of a trust

¹ "to institute free and heir one's slave" F.deZ.

² The scanner read this as "Creek"!

8. BOOK III [of things: intestacy]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book III, §§ 1–89; pp. [odd nos.] 155–179 [footnotes omitted]

BOOK III

1. The inheritances of intestates, by the law of the Twelve Tables, go first to *sui heredes*. **2.** Are reckoned *sui heredes*, as we have said above, children who were in the *potestas* of the deceased when he died, such as a son or daughter, a grandson or grand daughter by a son, a great-grandson or great-granddaughter by grandson by a son, and it makes no difference whether they are natural or adoptive children. A grandson or granddaughter, however, or a great-grandson or great-granddaughter, is in the class of *sui heredes* only if the preceding person has ceased to be in the ancestor's *potestas*, whether owing to death or in some other way, as by emancipation. For if at the time of a man's death his son is in

his *potestas*, his grandson by that son cannot be a *suus heres*. The same must be taken to apply to ulterior descendants. **3.** A wife who is in her husband's *manus* is likewise *sua heres* to him, being in the position of a daughter. So also is a daughter-in-law who is in the *manus* of a son, she being in the position of a granddaughter but she will be a *sua heres* only if the son in whose *manus* she has been is not, when the father dies, in his *potestas*. The same applies also to a woman who is in the *manus* of a grandson as his wife, she being in the position of a great-granddaughter. **4.** *Sui heredes* also are posthumous children who would have been in the ancestor's *potestas* had they been born in his lifetime. **5.** In the same legal position are those on whose behalf a case under the *L. Aelia Sentia* or the *senatusconsult* is proved after their father's death; for, had their case been proved in the father's lifetime, they too would have been in his *potestas*. **6.** The same is to be taken to apply to a son manumitted from a first or second mancipation after his father's death. **7.** Accordingly, where a son or daughter and grandsons or granddaughters by another son survive, they are all called to the inheritance simultaneously, and the nearer in degree does not exclude the more remote; for it was considered just that grandsons and granddaughters should succeed to their father's place and share. On the same principle also, if there be a grandson or granddaughter by a son and a great-grandson or great-granddaughter by a grandson, they are all called to the inheritance simultaneously. **8.** And, it having been settled that grandsons and granddaughters, and great-grandsons and great-granddaughters, succeed to their parent's place, it has been held consistent that the inheritance should be divided not by individuals, but by stocks, so that a son takes half the inheritance and two or more grandchildren by another son the other half, and so that, if there survive grandchildren by two sons—say one or two by one of them and three or four by the other—half goes to the one or two and the other half to the three or four.

9. If there be no *suus heres*, then by the same law of the Twelve Tables the inheritance goes to the agnates. **10.** Are termed agnates those related by civil cognation. Now cognation is civil where the connexion is through persons of the male sex. Thus brothers born of the same father (also termed consanguineous) are agnates to each other, and whether they had also the same mother is irrelevant. Again, an uncle is agnate to his brother's son and, conversely, his brother's son to him. Also agnates to each other are *fratres patruales* (also commonly called *consobrini*), that is the sons of two brothers. And pursuing this principle we can arrive at further degrees of agnation. **11.** But the law of the Twelve Tables does not give the inheritance to all agnates simultaneously, but only to those who are nearest in degree at the moment when it is established that there is an intestacy. **12.** In this title by agnation there is no succession, and therefore, if the nearest agnate abstains from the inheritance or dies before having entered upon it, the next nearest agnates have no right under the statute. **13.** The reason why we inquire who stood nearest at the moment when it was established that there is an intestacy, and not at the time of the death, is that where a man dies having made a will, it has been found preferable to look for the nearest agnate at the moment when it first becomes certain that no one will be heir under that will. **14.** But as regards women in this branch of the law one rule has been adopted in respect of the taking of an inheritance from them and another in that of the taking of an inheritance by them. For inheritances left by women come to us by title of agnation on precisely the same principle as those left by males, whereas inheritances left by us do not go to women beyond the degree of sisters by the same father. Thus a sister is a statutory heir of her brother or sister, but a father's sister or a brother's daughter cannot be statutory heir. Also in the position of sister to us is our mother or stepmother, if she has acquired the rights of a daughter in our father's house by coming under his *manus*. **15.** If the deceased leaves a brother and a son of a second brother, the brother, as appears from what has already been said, is preferred, because he is nearer in degree, whereas between *sui heredes* the law has been otherwise interpreted. **16.** If, however, no brother of the deceased survives, but there are children of brothers, the inheritance goes to all of them. But the question has arisen, if the families are of unequal numbers, that is, if there are, say, one or two children by one brother and three or four by the other, whether the inheritance is to be divided by stocks, as is the law between *sui heredes* or by individuals. It has, however, long been established that the division is to be by individuals. Consequently the inheritance will be divided into as many shares as there are individuals in the two families, each individual getting one share.

17. If there be no agnate, the same law of the Twelve Tables calls the *gentiles* (fellow-clansmen) to the inheritance. Who *gentiles* are we have explained in the first book. And, seeing that, as we there observed, the whole law relating to them has fallen into disuse, it is superfluous at the present point to enter once more into the details of the subject.

18. This is the extent of the regulation of intestate succession by the Twelve Tables. It is obvious how narrow that system was. **19.** Thus to begin with emancipated children have no rights under the statute to their ancestor's inheritance, since they have ceased to be *sui heredes*. **20.** The same applies where children are not in their father's *potestas* because, when granted Roman citizenship along with him, they were not brought under his *potestas* by the emperor. **21.** Again, under the statute agnates who have undergone *capitis deminutio* are not admitted to the inheritance, because the title of agnation is destroyed by *capitis deminutio*. **22.** Again, if the nearest agnate does not enter on the *hereditas*, that is no reason for the next nearest being let in under the statute. **23.** Again female agnates more remote than sisters by the same father have no right under the statute. **24.** Similarly, cognates who are related through females are not admitted, so much so that no right of inheriting from each other exists even between a mother and her son or daughter except where the rights of children by the same father have been created between them by the mother having come under (the father's) *manus*.

25. But these injustices of the law have been amended by the praetor's Edict. **26.** For he calls to the inheritance all children deficient in statutory title exactly as though they had been in the ancestor's *potestas* at the time of his death, whether they stand alone or whether *sui heredes*, that is persons who were in the father's *potestas*, come in with them. **27.** But agnates who have undergone *capitis deminutio* he does not call in the second class, next after the *sui heredes*; in other words, he does not call them in the class in which they would have been called by the statute had they not undergone *capitis deminutio* but in a third class, as next of kin. For though by *capitis deminutio* they have lost their statutory right, they indubitably retain their rights of cognation. If therefore there be someone else who retains the right of agnation unimpaired, he will be preferred, even if more remote in degree. **28.** The law is the same, as some hold, in the case of an agnate who, on the nearest agnate abstaining from the inheritance, is not thereby let in by statutory right. But there are others who hold that such a one is called by the praetor in the same class as that in which the inheritance is given by the statute to the (nearest) agnates. **29.** Female agnates beyond the degree of sisters by the same father are unquestionably called in the third class, supposing, that is, that there is neither a *suus heres* nor an agnate. **30.** In the same class also are called persons related through females. **31.** Children who are in an adoptive family are also called in this same class to the inheritance of their natural parents.

32. But those whom the praetor calls to an inheritance do not become heirs at civil law. For the praetor cannot make heirs, it being only by a *lex* or some similar enactment, such as a *senatusconsult* or imperial constitution, that heirs are made. But when the praetor grants them *bonorum possessio*, they are established in the position of heirs.

33. In the granting of *bonorum possessio* the praetor also makes several other classes, his object being, that no one shall die without a successor. Of these we deliberately do not treat in the present work as we have explored the whole subject fully in a special work. **33a.** It suffices to remark; only this. ...¹

33b. Sometimes, however, the praetor promises *bonorum possessio* for the purpose rather of supporting the ancient law than of amending or combating it. Thus he grants *bonorum possessio secundum tabeas* equally to persons instituted heirs by a properly executed will. **34.** Again, on an intestacy, he calls the *sui heredes* and the agnates to *bonorum possessio*. In these cases his indulgence appears to be of advantage only in that one who so applies for *bonorum possessio* can use the interdict beginning with the words *Quorum bonorum*, the advantage of which we shall explain in the proper place; for in any case, even apart from *bonorum possessio*, the inheritance belongs to these persons by civil law.

35. Frequently, however, *bonorum possessio* is granted in such circumstances that the grantee does not get the inheritance. Such *bonorum possessio* is called *sine re* (ineffectual). **36.** For instance, if an heir instituted by a properly executed will makes *cretio*, but chooses not to apply for *bonorum possessio secundum tabulas*, being satisfied with being heir at civil law, those called to the succession on intestacy can apply for *bonorum possessio* none the less; but it goes to them *sine re*, since the testamentary heir can evict them from the inheritance. **37.** The law is the same where in a case of intestacy the *suus heres* does not choose to apply for *bonorum possessio*, being satisfied with his statutory right: if this happens, *bonorum possessio* is open to the agnate, but *sine re*, since he can be evicted from the inheritance by the *suus heres*. In like manner, if an inheritance goes to an agnate by civil law and he enters upon it, but does

¹ The remaining 14 lines of this page and virtually all of the next are illegible. The topics probably included mothers' right of succession under the SC. *Tertullianum* and perhaps others as well.

not choose to apply for *bonorum possessio*, and then one of the nearest cognates applies for it, the latter will have a *bonorum. possessio sine re*, for the same reason. **38.** And there are other similar cases, some of which we have mentioned in the previous book.

39. Now let us consider the estates of freedmen. **40.** In early days a freedman was allowed to pass over his patron in his will with impunity. For the law of the Twelve Tables called a patron to his freedman's inheritance only if the freedman had died intestate, leaving no *suus heres*. Thus, even if a freedman died intestate but leaving a *suus heres*, the patron had no claim on his estate. And if it was one of his natural children that he left as *suus heres* no grievance was apparent; but if it was an adoptive son or daughter, or a wife who was in *manus*, that was *suus* or *sua heres*, it was obviously unjust that no right should remain to the patron. **41.** In consequence this legal injustice was corrected by the praetor's Edict. For if a freedman makes a will, he is commanded to make it in such manner as to leave his patron one half of his estate, and if he leaves him nothing or less than the half, the patron is granted *bonorum possessio contra tabulas* in respect of half; or if he dies intestate, leaving as *suus heres* an adoptive son or a wife who was in his own *manus* or a daughter-in-law who had been in his son's, equally the patron is granted *bonorum possessio* in respect of half against these *sui heredes*. But natural children enable a freedman to exclude his patron, and not only those of them whom he holds in *potestas* at the time of his death, but also those emancipated or given in adoption, provided that they are appointed heirs in some part by the will or that, if passed over by it, they apply under the Edict for *bonorum possessio contra tabulas*: for, if disinherited, they in no way exclude the patron. **42.** Later, by the *L. Papia*, the rights of patrons were enlarged in respect of wealthier freedmen. For by that statute it is provided that of the estate of a freedman who leaves a fortune of 100,000 sesterces or more and has fewer than three children, whether he dies testate or intestate, there shall be due to his patron a share proportionate to the number of the children. Thus, where the freedman leaves only one son or daughter as heir, half of his estate is due to his patron, just as if he had died childless; where he leaves two sons or daughters as heirs, a third is due; where three, the patron is shut out.

43. In regard to the estates of their freedwomen patrons suffered no wrong under the ancient law. For a freedwoman being in her patron's statutory *tutela*, could not make a will except with his *auctoritas*. Thus, if he had given *auctoritas* for the execution of a will either he had himself to blame if he was not left heir by her, or if he was, the inheritance came to him under the will. If on the other hand he had not given *auctoritas*, so that she died intestate, again the inheritance went to him, since a woman cannot have *sui heredes*; for in early days there was no one who could, whether as heir or as *bonorum possessor*, keep the patron out of the estate of his intestate freedwoman. **44.** But later the *L. Papia*, in view of the fact that it was liberating freedwomen in right of four children from the *tutela* of their patrons and was thereby permitting them to make a will even without a tutor's *auctoritas*, provided that there shall be due to the patron a share of his freedwoman's estate proportionate to the number of children she had at the time of her death. Thus, if such a freedwoman leaves all four children surviving her, a fifth of her estate is due to her patron, but if she outlives all her children, the whole inheritance goes to him.

45. Our statements regarding a patron must be taken to apply equally to his son, grandson by a son, and great-grandson by a grandson by a son. **46.** On the other hand, while in early days a patron's daughter, granddaughter by a son, and great-granddaughter by a grandson by a son had the same rights as those given to a patron by the Twelve Tables, the praetor calls only male *liberi* of patrons. But under the *L. Papia* a daughter is entitled in right of three children to apply for *bonorum possessio* against the will of her father's freedman, or for *bonorum possessio ab intestato* against the freedman's adoptive son, or his wife or daughter-in-law who was in his *manus*; apart from this *lex* she has not these rights. **47.** But, in the opinion of some, she is not entitled, even in right of children, to a proportionate part of the estate of a freedwoman who, having four children, has left a will. Yet when a freedwoman dies intestate, the express terms of the *L. Papia* entitle her (the patron's daughter) to a proportionate part. If, on the other hand, a freedwoman leaves a will, the patron's daughter is given the same rights as she has against the will of a freedman, that is, the same rights as those possessed by male descendants of a patron against the will of a freedman. This part of the *lex* is, however, drafted with insufficient care. **48.** From all this it is clear that extraneous heirs of a patron are very far from possessing the rights belonging to the patron either over the succession to an intestate freedman or against his will.

49. In early days, before the *L. Papia*, patronesses had over the estates of their freedmen only the same rights as were by the law of the Twelve Tables given to patrons. For the praetor did not, as in the case of a patron and his children provide for them to apply for *bonorum possessio* against the will of an

ungrateful freedman or, if the freedman died intestate for *bonorum possessio* against his adoptive son or his wife or daughter-in-law (in *manus*), in respect of half the estate. **50.** But the *L. Papia* has given to a patroness enjoying if free-born, the privilege of two children, and, if a freedwoman, that of three, pretty well the same rights as patrons possess under the praetor's Edict, while to a free-born patroness enjoying the privilege of three children it has given the rights that it bestows on a patron; to a freedwoman patroness, however it has not given the same rights. **51.** But in respect of the estates of freedwomen who die intestate the *L. Papia* gives a patroness enjoying the privilege of children no new rights. Hence if neither the patroness nor the freedwoman has undergone *capitis deminutio* the inheritance goes to the patroness under the law of the Twelve Tables, and the freedwoman's children are excluded. This rule applies even where the patroness is not privileged by reason of children; for, as observed above, females cannot have a *suus heres*. But if *capitis deminutio* of either patroness or freedwoman has occurred, the freedwoman's children in their turn exclude the patroness, because, the patroness's statutory right having been destroyed by the *capitis deminutio*, the result is that the freedwoman's children are preferred in right of cognation. **52.** On the other hand, where a freedwoman dies testate, a patroness, if not privileged by reason of children, has no right against the freedwoman's will; but if so privileged, she is accorded by the *L. Papia* the same right as under the Edict a patron enjoys against his freedman's will.

53. To a patroness's son privileged by reason of children the same *lex* has given pretty well the right of a patron; but in his case privilege by reason of a single son or daughter suffices.

54. It is enough to have carried our summary account of the various rights (over the estates of citizen freedmen and freedmen) thus far; a more detailed exposition has been given in a special work.

55. We proceed to consider the estates of (Junian) Latin freedmen. **56.** In order to make this branch of the law clearer we must call to mind that, as we have said elsewhere, those who are now termed Junian Latins were in earlier times slaves by Quiritary law, but that they were maintained in apparent freedom by the praetor's intervention; and therefore their property used to go to their patrons by title of *peculium*; but that later, owing to the *L. Iunia*, all who used to be protected in a state of freedom by the praetor came to be free and to be styled Junian Latins: Latins because the law made them as free as if they were free-born Roman citizens who, by migrating from the city of Rome to Latin colonies, had become colonial Latins, Junian because it was by the *L. Iunia* that they were made free, though not Roman citizens. Now the author of the *L. Iunia*, realizing that as the result of this fiction the estates of deceased Latins would no longer go to their patrons, because of course they would die neither as slaves, whose property would go to their patrons as *peculium*, nor as (citizen) freedmen, whose estates would go to their patrons by right of manumission—the author of the *L. Iunia*) deemed it necessary, in order to prevent the benefit given to them from being turned to the injury of their patrons, to provide that their estates should go to their manumitters just as if the *lex* had not been passed. Hence under the *lex* the estates of Latins go to their manumitters as it were by right of *peculium*. **57.** The consequence is that the rights created by the *L. Iunia* over the estates of Latins differ widely from those holding good where the inheritances of citizen freedmen are concerned. **58.** For the inheritance of a citizen freedman goes in no case to his patron's extraneous heirs, but always to his patron's son, grandsons by a son, or great-grandsons by a grandson by a son, even though these have been disinherited by their ancestor; whereas the estate of a Latin goes, like a slave's *peculium*, to the heirs, even if extraneous, and not to the disinherited children of his manumitter. **59.** Again, the inheritance of a citizen freedman goes to two or more patrons in equal shares, even though they owned him, when a slave, in unequal shares; whereas the estate of a Latin goes to several patrons in proportion to their former shares as his owners. **60.** Again, in the inheritance of a citizen freedman a patron shuts out the son of a second patron, and the son of a patron the grandson of a second patron; whereas the estates of Latins go to both a patron and the heir of a second (deceased) patron jointly, the latter taking the share that would have gone to the manumitter (whom he represents) himself. **61.** Again, if there are, say, three children of one patron and one of a second, the inheritance of a citizen freedman is divided by the number of persons concerned, that is, the three brothers take three shares and the only child a fourth; whereas the estate of a Latin goes to the successors of a manumitter in the same proportion as that in which it would have gone to the manumitter himself. **62.** Again, if one of two patrons rejects his share in the inheritance of a citizen freedman, or dies before making *cretio* the whole inheritance goes to the other patron; whereas the estate of a Latin, in respect of the share of a patron who fails to take, becomes caducous and goes to the people.

63. Later, in the consulship of Lupus and Largus, the senate decreed that the estates of Latins should devolve first on those who had freed them, next on their children, if not expressly disinherited, according

to propinquity, and finally, under the old law, on the heirs of those who had freed them. **64.** In the opinion of some the intention of this senatusconsult was that we should apply to the estates of Latins the same rules as we apply to the inheritances of citizen freedmen. The chief exponent of this opinion was Pegasus. But it is clearly erroneous; for the inheritance of a citizen freedman never goes to his patron's extraneous heirs, whereas by this very senatusconsult the estates of Latins go, if no children of the manumitter stand in the way, even to extraneous heirs. Again, in respect of the inheritance of a citizen freedman the manumitter's children are never disabled by disinheriton; whereas the terms of the senatusconsult are that in respect of the estates of Latins express disinherison does disable them. **64a.** It is therefore more correct to say that the sole intention of the senatusconsult is that children of the manumitter, if not expressly disinherited, should be preferred to extraneous heirs. **65.** Thus, where an emancipated son of the patron has (merely) been passed over (in his father's will), he is, even though he does not apply for *bonorum possessio contra tabulas* in respect of his father's estate, nevertheless preferred to extraneous heirs in succession to Latins. **66.** Again, a daughter and further *sui heredes*, though disinherited by a general clause and thus barred from the whole inheritance of their ancestor at civil law, will nevertheless, in regard to the estates of Latins, be preferred to extraneous heirs, except if they have been disinherited by name by their ancestor. **67.** Again the estates of Latins belong to the manumitter's children notwithstanding that they have refrained from their ancestor's inheritance; for no more shall those passed over without mention by the will can they be said to have been disinherited. **68.** From all this it is sufficiently clear that one who makes a Latin freedman. ...² **69.** Again, it further appears to be agreed that, if a patron institutes his children as sole heirs, but in unequal shares, the estate of a Latin belongs to them, if they qualify as heirs to their father, in the same shares, because, where no extraneous heir is present, the senatusconsult does not apply. **70.** But where a patron leaves an extraneous person heir along with his children, Caelius Sabinus says that the whole estate (of a deceased Latin) belongs to the children of the deceased in equal shares, because, when an extraneous heir is present, the senatusconsult, and not the *L. Iunia*, applies. But Iavolenus says that the patron's children will share equally under the senatusconsult only that fraction of the Latin's estate which the extraneous heirs would have had under the *L. Iunia*, before the senatusconsult, but that the rest of the estate belongs to them in proportion to their shares in their father's inheritance. **71.** It is also a question whether this senatusconsult applies to a patron's descendants through his daughter or granddaughter, so that my grandson by my daughter will be preferred to my extraneous heir in respect of the estate of my Latin freedman. And a further question is whether the senatusconsult applies to a mother's Latin, so that a patroness's son will be preferred to his mother's extraneous heir in respect of the estate of her Latin. Cassius held that the senatusconsult applied in both cases, but his opinion is generally rejected, on the ground that the senatusconsult does not contemplate the case of children belonging to another family, and this, it is argued, appears from the fact that it bars children expressly disinherited; for the children contemplated would appear to be those who, if not instituted, are customarily disinherited; but there is no need for either a mother to disinherit her son or daughter, or a maternal grandfather his grandson or granddaughter, when not instituting him or her as heir, whether the question be as to the civil law or as to the praetorian Edict, whereby *bonorum possessio contra tabulas* is offered to children simply passed over by a will.

72. Sometimes, however, a citizen freedman dies as a Latin, for instance where a Latin has been granted Roman citizenship by the emperor, with a saving of his patron's rights. For, as the late emperor Trajan laid down, a Latin who obtains Roman citizenship from the emperor against the will or without the knowledge of his patron resembles, so long as he lives, any other citizen freedman, and the children he begets are his by civil law, but he dies under the law of a Latin, and neither can his children be his heirs nor has he any power to make a will, except that he may do so by instituting his patron as his heir and substituting someone else for him in the event of his declining to be heir. **73.** And as it seemed to result from this constitution (Trajan's) that such persons could never die as Roman citizens, even though they had afterwards availed themselves of the procedure for becoming citizens under the *L. Aelia Sentia* or the senatusconsult, the late emperor Hadrian, moved by the injustice of the case, caused a senatusconsult to be passed, to the effect that persons who, having obtained Roman citizenship from the emperor without the knowledge or against the opposition of their patrons, afterwards availed themselves of the procedure whereby under the *L. Aelia Sentia* or the senatusconsult they would, had they remained Latins, have

² The last line of this page and virtually all of the first 21 lines of the next are illegible.

obtained Roman citizenship should be treated exactly as if their citizenship had been obtained under the *L. Aelia Sentia* or the *senatusconsult*.

74. The estates of freedmen placed by the *L. Aelia Sentia* in the rank of *dediticii* go to their patrons in some cases as if they were those of citizen freedmen, in others as if they were those of Latins. **75.** For the estates of those who, had they not been in some disgrace, would by manumission have become Roman citizens, are by the same statute allotted to their patrons, as though they were the estates of citizen freedmen. Such persons, nevertheless, have no power to make a will, according to the well-grounded general opinion; for it seemed incredible that the legislator should have intended to concede the power of making a will to persons of the lowest status. **76.** On the other hand, the estates of those who had they not been in some disgrace, would by manumission have become Latins, are allotted to their patrons exactly as though they had died Latins. I am not forgetting that the legislator has not expressed his intention on the point with sufficient particularity.

77. Let us further consider the succession that comes to us by *emptio bonorum* (purchase of an insolvent's estate). **78.** The owner of the estate sold may be living or dead. The estates of living persons are sold if they abscond with intent to defraud and are not defended in their absence or if they give up their estates under the *L. Iulia*, or if they are judgement-debtors and the period allowed to them partly by the law of the Twelve Tables and partly by the praetor's edict for finding the money has expired. The estates of deceased persons are sold when it is established that they have left neither heirs nor *bonorum possessor*s nor any other lawful successor. **79.** Where the estate that is being sold belongs to a living person, the praetor orders that it be held in possession and advertised for 30 successive days; where it is that of a deceased person, for 15 days. After that he orders the creditors to meet and appoint one of their number as manager, that is as the one to carry out the sale. And so, if the estate that is being sold is that of a living person, he orders this to be done in 10 (?) days, if that of a deceased person, in half that time. Thus he requires adjudgment of the estate to the buyer to take place in the case of a living person in 40 (?) days, in that of a deceased person in 20. The reason why he requires sales of estates of living persons to be completed more slowly is that in their case special care was necessary to save them from inconsiderate sales of their estates. **80.** Full ownership is not acquired by either *bonorum possessor*s or *bonorum emptor*s, but only bonitary. Quiritary ownership is acquired by them only if they have completed usucapion. Sometimes, however, not even usucapion is open to a *bonorum emptor*, for example if. ...³ **81.** Also, debts owed to or by the former owner of the estate are not owed to or by the *bonorum possessor* or *bonorum emptor* at civil law, and therefore on all claims they sue and are sued by *actiones utiles*, which we shall describe in our next book.

82. There are also successions of another kind, brought in neither by the law of the Twelve Tables nor by the praetor's Edict, but by the law received by general consent. **83.** For when a man *sui iuris* has given himself in adoption, or a woman (*sui iuris*) has entered *manus*, all his or her assets, incorporeal as well as corporeal, and debts due to him or her, are acquired by the adoptive father or *coemptionator*, except rights that are destroyed by *capitis deminutio*, such as a usufruct, a freedman's obligation of services contracted by means of an oath, and issues joined in a *iudicium legitimum* (statutory suit). **84.** Contrariwise, what the man who has given himself in adoption, or the woman who has entered *manus*, owed does not become the debt of the *coemptionator* or adoptive father, except if the debt be hereditary; in that case the adoptive father or *coemptionator* is directly liable, because he becomes heir himself, whilst the person who has given himself in adoption or entered *manus* ceases to be heir. But for debts owed by such persons on their own account, though neither the adoptive father nor the *coemptionator* is liable, and though even the person who has given himself in adoption or entered *manus* no longer remains liable, because freed by the *capitis deminutio*, still a *utilis actio*, in which the *capitis deminutio* is set aside, is given against him or her, and if they are not defended against this action, the praetor permits the creditors to sell the whole of the property that would have been theirs, had they not subjected themselves to another's power.

85. Again, if an heir, before making *cretio* or behaving as heir, surrenders *in iure* to another person an inheritance coming to him by statute, the surrenderee becomes heir in full right precisely as if he were himself called to the inheritance by the statute. If, however, the heir surrenders after qualifying as heir, heir he remains, and consequently it is he that will be liable to the deceased's creditors; but he will transfer the corporeal things (in the inheritance) just as though he had surrendered them *in iure* one by

³ Approximately two and a half lines are illegible.

one, while the debts due (to the inheritance) are destroyed, and in this manner the debtors of the inheritance are gainers. **86.** The law is the same where a testamentary heir surrenders *in iure* the inheritance after he has qualified as heir, but his surrender of the inheritance before entering upon it is void. **87.** It is a question whether surrender *in iure* by a *suus heres* or by a *necessarius heres* has any effect. Our teachers think it has none; the authorities of the other school think it has the same effect as surrender made by other heirs after they have entered on the inheritance; for it makes no difference whether one becomes heir by *cretio* or behaving as heir, or is bound to the inheritance by legal necessity.

9. BOOK III [obligations *ex contractu*]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book III, §§ 88–181; pp. [odd nos.] 179–213 [footnotes omitted]

88. Let us now proceed to obligations. These are divided into two main species: for every obligation arises either from contract or from delict.

89. First let us consider those that arise from contract. Of such there are four *genera*: for an obligation by contract arises either *re* (by delivery of a *res*: real contract), by words (verbal contract), by writing (literal contract), or by consent (consensual contract).

90. A real obligation is contracted, for instance, by conveyance on loan for consumption. Such a contract takes place properly in the case of things that are reckoned by weight, number, or measure—such things as money, wine, oil, corn, bronze, silver, gold. We convey these things by counting, measuring, or weighing them out, to the end that they should become the property of the recipients, and that at some future time there should be restored to us not the identical things, but others of the same kind. Hence the term *mutuum*, because what is conveyed in this manner by me to you becomes *ex meo tuum* (from being mine yours). **91.** He too who receives what is not due to him from one who pays in error comes under a real obligation. For the *condictio* with the pleading ‘if it appear that the defendant is bound to convey’ lies against him precisely as if he had received the payment by way of loan. Hence some hold that a ward or a woman, to whom without their tutor’s *auctoritas* payment of what is not due has been made in error, is not liable under the *condictio* any more than under a loan for consumption. This sort of obligation, however, appears not to be founded on contract, because one who gives with intent to pay means to untie rather than to tie a bond.¹

92. A verbal obligation is created by question and answer in such forms as: ‘Do you solemnly promise conveyance? I solemnly promise conveyance’; ‘Will you convey? I will convey’; ‘Do you promise? I promise’; ‘Do you promise on your honour? I promise on my honour’; ‘Do you guarantee on your honour? I guarantee on my honour’; ‘Will you do? I will do.’ **93.** Now the verbal obligation in the form *dari spondes? spondeo* is peculiar to Roman citizens; but the other forms belong to the *ius gentium* and are consequently valid between all men, whether Roman citizens or peregrines. And even though expressed in Greek, in such words as Δώσεις; Δώσω· Ὁμολογεῖς; Ὁμολογῶ Πίστει κελύεις; Πίστει κελύω· Ποιήσεις; Ποιήσω, they are still valid between Roman citizens, provided they understand Greek. Conversely, though expressed in Latin, they are still valid even between peregrines, provided they understand Latin. But the verbal obligation *dari spondes? spondeo* is so far peculiar to Roman citizens that it cannot properly be put into Greek, although the word *spondeo* is said to be derived from a Greek word. **94.** Hence we are told that there is one case only in which a peregrine can incur obligation by using this word, namely where our emperor puts to the ruler of a peregrine people the question of peace in this wise: ‘do you solemnly promise that there shall be peace?’ or our emperor in turn is interrogated in the same form. But this statement is over-ingenious; for if the treaty is broken, there is no action on the stipulation, but recourse is had to the law of war. **95.** A point on which doubt may arise is ...² **95a.** There are also other cases in which obligations [can be contracted by words spoken without any previous interrogation, as where a woman constitutes a dowry by declaration to her betrothed or to her wedded husband, as can be done whether the property is movable or immovable. And by this form not only can the woman herself incur obligation, but also her father; and so can] her debtor, by declaring as dowry,

¹ Similar language in D.44.7.5.3 (Gaius, *Aurea*, book 2).

² One and half lines are illegible. The discussion may have concerned what happens if the language of the question and answer differed or whether languages other than Latin and Greek were admissible. Cf. D.45.1.1.6, Theoph. 3.15.1.

with her authority, what he owes to her. But no other person than these can incur obligation in this form. If therefore another person desires to promise dowry on behalf of a woman, he must engage himself in the ordinary form, that is he must make the promise in answer to a stipulatory question by the husband. **96.** Another case in which a binding contract is formed by the spoken promise of one party without a previous question from the other is where a freedman has taken an oath to make his patron some gift or render him some observance or services. This is the one case of obligation being contracted by oath; in Roman law at least we find no other. As to peregrine law, an examination of the systems of the various States will teach us that the rule varies from place to place.

97. If the thing for conveyance of which we stipulate is one that cannot be conveyed, our stipulation is void, for instance if one were to stipulate for conveyance of a free man whom one believed to be a slave, or of a dead slave whom one believed to be alive, or of sacred or religious land which one thought to be subject to human law. **97a.** Again, if one stipulates for a thing which cannot exist at all, such as a hippocentaur, the stipulation is likewise void. **98.** Again, if one stipulates subject to a condition which cannot happen, for instance on condition that one touches the sky with one's finger, the stipulation is void. Yet a legacy left subject to an impossible condition is held by our teachers to be due precisely as though it had been left unconditionally, whereas the authorities of the other school consider a legacy to be as void as a stipulation in such a case. One must admit that it is not easy to give a satisfactory ground for distinguishing. **99.** Further a stipulation is void in which a man, not knowing that a thing belongs to him, stipulates for its conveyance to himself, obviously because what belongs to a man cannot be conveyed to him. **100.** Then again, a stipulation is void in which a man stipulates for conveyance thus: 'Do you solemnly promise conveyance after my death?' or 'after your death?'. Yet it is valid in the form 'when I am dying' or 'when you are dying', so that the obligation is made to begin at the last moment of the stipulator's or the promisor's life; for it was felt to be against principle that an obligation should start from the heir. But again, we cannot stipulate thus: 'Do you solemnly promise conveyance on the day before I die?' or 'on the day before you die?', because the day before a death cannot be known till the death has taken place, but when that has happened, the obligation is carried back into the past and is something like a stipulation: 'Do you solemnly promise conveyance to my heir?', which is of course void. **101.** Everything we have said about death must be taken to apply also to *capitis deminutio*. **102.** The stipulation is also void if the promisor does not answer the question put to him, for example, if I stipulate for 10,000 sesterces and you promise 5,000 or if I stipulate unconditionally and you promise conditionally. **103.** Further, if we stipulate for conveyance to a person to whose power we are not subject, the stipulation is void. Hence a question has arisen how far a stipulation for conveyance to oneself and to one to whose power one is not subject is valid. Our teachers hold it to be completely valid, and that the whole of what is promised is due to him alone who put the stipulation, just as if he had not added the stranger's name. But the authorities of the other school consider that half is due to the stipulator, but that the stipulation is void as to the other half. **103a.** The case is different if I stipulate thus: 'Do you solemnly promise conveyance to me or Titius?' Here it is agreed that the whole is due to me and that I alone can sue on the stipulation, though you are discharged if you pay Titius. **104.** Further, the stipulation is void if I stipulate from one who is subject to my power or he from me. Indeed a slave, a person *in mancipio*, a daughter in *patria potestas*, and a woman in *manus* are incapable of incurring obligation not only to him to whose power they are subject, but also to anyone at all. **105.** That a dumb man can neither stipulate or promise is obvious. The same is accepted also in the case of a deaf man, because it is necessary both that the stipulator should hear the words of the promisor and that the promisor should hear those of the stipulator. **106.** A lunatic is incapable of any transaction, because he does not understand what he is doing. **107.** A ward is capable of any transaction, provided that his tutor's *auctoritas* is obtained when it is necessary, as when it is he who is incurring obligation; for he can lay someone else under an obligation to himself even without his tutor's *auctoritas*. **108.** The law is the same for women who are in *tutela*. **109.** But what we have said about a ward is only true of a ward who has attained to some understanding. For an infant or one little more than an infant does not differ much from a lunatic, because at such an age the ward has no understanding. But in their case, for practical reasons, a lenient view of the law has been taken.

110. It is, however, possible for us, when we stipulate, to bring in another person to stipulate for the self-same thing; this person is commonly called an *adstipulator*. **111.** Action can be brought by him and payment can lawfully be made to him exactly as by and to ourselves; but by the *actio mandati* he will be compelled to make over to us whatever he may so obtain. **112.** An *adstipulator* may employ other words

than those employed by the principal stipulator. He can, for instance, where the stipulator has used the form 'Do you solemnly promise conveyance?' use the form 'Do you promise the same thing on your honour?' or 'Do you guarantee the same thing on your honour?'; or the variance may be reversed. **113.** Further, he may stipulate for less, though not for more (than the principal stipulator). Thus where I have stipulated for 10,000 sesterces he may stipulate for 5,000; but he may not stipulate for more than 10,000. Again, if I have stipulated unconditionally, he may stipulate conditionally; but not the other way about. 'More' or 'less' are not solely a question of amount, but also one of time: for to convey at once is more, to convey after time is less. **114.** This institution has some peculiar legal features. Thus, the *adstipulator's* heir has no action. Again, a slave's *adstipulation* is a nullity, though in all other cases he acquires by stipulation for his owner. The same has been held, according to the better view, of a person *in mancipio*, he being in the position of a slave. But *adstipulation* by one in *patria potestas* is not entirely ineffectual: he does not acquire for his father, though he does so in all other cases by stipulating, and even he himself has an action only if he has left his father's *potestas* without undergoing *capitis deminutio*, for example by his father's dying or his being himself inaugurated priest of Jupiter. The same rules must be understood to apply to a daughter in *patria potestas* or a woman in *manus*.

115. On behalf of the promisor also it is common for other persons to become bound; some of these are termed *sponsores*, others *fidepromissores*, others *fideiussores*. **116.** To a *sponsor* the question put is 'Do you solemnly promise the conveyance of the same thing?', to a *fideipromissor* 'Do you promise the same thing on your honour?', to a *fideiussor* 'Do you guarantee the same thing on your honour?' What special name can be applied to those to whom we put the question 'Will you convey the same thing?' or 'Do you promise the same thing?' or 'Will you do the same thing?' we shall see. **117.** We commonly take *sponsores*, *fidepromissores*, and *fideiussores* when seeking to obtain better security, but we bring in an *adstipulator* in general only when we are stipulating for something to be conveyed after our death. For because our stipulation for conveyance to ourselves after our death is a nullity, we bring in an *adstipulator*, in order that he may sue after our death. Whatever he recovers he is liable by the *actio mandati* to make over to our heir.

118. The positions of *sponsor* and a *fidepromissor* resemble one another and are very different from that of a *fideiussor*. **119.** For *sponsores* and *fidepromissores* can become accessory to none but verbal obligations, though occasionally they are bound when the principal promisor is not, as where conveyance is promised by a woman or a ward without tutor's *auctoritas*, or where anyone promises conveyance after his own death. But it is a doubtful point whether a *sponsor* or *fidepromissor* is bound on behalf of a slave or peregrine who has promised using the word *spondeo*. **119a.** A *fideiussor*, on the other hand, can become accessory to any kind of obligation, that is whether it arises from real, verbal, literal, or consensual contract. It does not even matter whether the principal obligation be civil or natural; indeed a *fideiussor* becomes bound even on behalf of a slave, whether he who is taking a *fideiussor* from the slave be a stranger, or the slave's own master in respect of what may be due to him. **120.** Further, the heir of a *sponsor* or *fidepromissor* is not bound, except where a peregrine *fidepromissor* is in question and his city follows a different rule. But the heir of a *fideiussor* is bound like the *fideiussor* himself. **121.** Again, *sponsores* and *fidepromissores* are discharged after two years under the *L. Furia*, and, whatever be their number at the time when the debt falls due, the obligation is divided between them into as many parts, and each of them will be called on only for his aliquot part. *Fideiussores*, on the other hand, are bound for all time; and, whatever be their number, each is liable for the whole debt. Therefore the creditor is free to sue whichever he pleases for the whole. However, at the present day he is compelled under an epistle of the late emperor Hadrian to sue each of them, provided they are solvent, for a proportionate part only. This epistle differs therefore from the *L. Furia* in that, if one of several *sponsores* or *fidepromissores* is insolvent, the burden of the others is not thereby increased, whereas if only one of a number of *fideiussores* is solvent, the burden of the others also falls on him. **121a.** As, however, *L. Furia* applies only in Italy, the result is that in the provinces *sponsores* and *fidepromissores* are bound for all time, just like *fideiussores*, and that each is liable for the whole debt, unless it be that they are relieved as to part by the epistle of the late emperor Hadrian. **122.** Furthermore, the *L. Appuleia* introduced a sort of partnership between *sponsores* and *fidepromissores*. For to any one of them who has paid more than his share the statute gives an action against the others for the excess. This statute was passed before the *L. Furia*, at a time when each was liable for the whole. It is therefore asked whether since the *L. Furia* the benefit of the *L. Appuleia* still survives. The answer is that outside Italy it does survive, because the *L. Furia* is in force only in Italy, but the *L. Appuleia* in the provinces in general. It is, however, very

questionable whether the benefit of the *L. Appuleia* survives in Italy too. To *fideiussores*, on the other hand, the *L. Appuleia* has no application, and therefore, if a creditor has recovered the whole debt from one *fideiussor*, the loss is solely his, assuming of course that the principal debtor is insolvent. But, is clear from what has already been said, a *fideiussor* sued by the creditor for the whole will be entitled, under the epistle of the late emperor Hadrian, to demand that the action should be granted against him only for a rateable share. **123.** Further, it is provided by the *L. Cicereia* that one who is taking *sponsores* or *fidepromissores* shall publicly notify in advance and declare both the matter in respect of which he is securing himself and how many *sponsores* or *fidepromissores* he is taking in respect of it; if he fails to give this notice, the *sponsores* and *fidepromissores* are allowed within 30 days to ask for a prejudicial action to determine whether notice has been given in accordance with the statute, and if the decision is in the negative, they are discharged. No mention is made of *fideiussores* in this statute, but the practice is to give the notice also when we are taking *fideiussores*.

124. The benefit of the *L. Cornelia*, on the other hand, is common to them all. This statute forbids the same person to become surety for the same debtor to the same creditor in the same year for a larger sum of *pecunia credita* than 20,000 sesterces. And though *sponsores* or *fidepromissores* or *fideiussores* should have undertaken obligation for so large a sum, as say, 100,000 sesterces, they are nevertheless liable only up to 20,000. By *pecunia credita* we mean not only money advanced on loan, but any money which, at the time when the obligation is contracted, is certain to become due, that is, any money that is brought unconditionally into obligation. Consequently money stipulated to be paid at a fixed date is in this category, because it is certain to become due, though action for it is deferred. The term *pecunia* in this statute covers every kind of thing, so that whether what we stipulate for be wine or corn or land or a slave, the statute must be complied with. **125.** In certain cases, however, the statute allows security to be taken without limit, as where it is taken on account of *dos*, or of a debt under a will, or by order of a *iudex*. Further, the statute concerning the 5 per cent. duty on inheritances enacts that to the securities for which it provides the *L. Cornelia* shall not apply. **126.** In yet another point the position of all *sponsores*, *fidepromissores*, and *fideiussores* is identical, namely that they cannot incur a greater obligation than that of their principal. On the other hand, they can incur a lesser obligation: we made the same remark with regard to an *adstipulator*. For in their case, as in that of an *adstipulator*, the obligation is accessory to a principal obligation, and the accessory cannot contain more than the principal. **127.** The position of all is identical also in this, that they have an *actio mandati* against their principal for the recovery of anything they have paid on his behalf. More than this, *sponsores* have under the *L. Publilia* an action of their own, called *actio depensi*, for double the amount.

128. A literal obligation is created by transcriptive entries. A transcriptive entry is made in two ways: *a re in personam* or *a persona in personam*. **129.** It is made *a re in personam* where, for instance, I enter to your debit what you owe me on account of a purchase, a hiring, or a partnership. **130.** It is made *a persona in personam* where, for instance, I enter to your debit what Titius owes me, provided, that is, that Titius has assigned you to me as debtor in his place. **131.** The entries known as cash-entries are of a different nature. For in their case the obligation is real, not literal, since their validity depends on the money having been paid, and payment of money creates a real obligation. This is why it is right to say that cash-entries create no obligation, but merely afford proof of an existing obligation. **132.** It is therefore incorrect to say that even peregrines are bound by cash-entries, because what they are bound by is not the entry itself, but the payment of money; the latter form of obligation is *iuris gentium*. **133.** But whether peregrines can be bound by transcriptive entries is questioned with good reason, because this kind of obligation is in a way *iuris civilis*. Nerva held accordingly, but Sabinus and Cassius considered that peregrines as well as citizens are bound if the transcriptive entry is *a re in personam*, but not if it is *a persona in personam*. **134.** Furthermore, literal obligation appears to be created by chirographs and syngraphs, that is to say documents acknowledging a debt or promising a payment, of course on the assumption that a stipulation is not made in the matter. This form of obligation is special to peregrines.

135. Obligations are created by consent in sale, hire, partnership, and mandate. **136.** The reason why we say that in these cases the obligations are contracted by consent is that no formality whether of words or writing is required, but it is enough that the persons dealing have consented. Hence such contracts can be formed between parties at a distance, say by letter or messenger, whereas a verbal obligation cannot be formed between parties at a distance. **137.** Further, in these contracts the parties are reciprocally liable for what each is bound in fairness and equity to perform for the other, whereas in verbal obligations the one party puts and the other gives the stipulatory promise, and in literal contracts the one party by entering the

debit imposes and the other incurs the obligation. **138.** It is, however, possible to make a transcriptive entry against an absent person, though a verbal obligation cannot be contracted with such a one.

139. A contract of sale is concluded when the price has been agreed, although it have not yet been paid and even no earnest have been given. For what is given by way of earnest is evidence of a contract of sale having been concluded. **140.** The price must be definite. Thus, if we agree that the thing be bought at the value to be put on it by Titius, Labeo said that this transaction was of no effect, and Cassius approves his view. But Ofilius thought it was a sale, and Proculus followed his view. **141.** Also, the price must be in money. There is, however, much question whether the price can consist of other things, for example whether a slave or a robe or land can be the price of something else. Our teachers hold that the price can consist of another thing. Hence their opinion commonly is that by exchange of things a sale is contracted and that this is the most ancient form of sale. They argue from the Greek poet Homer, who somewhere says: 'Thence the long-haired Achaeans bought wine, some for copper, some for gleaming steel, some for hides, some for the cattle themselves, and some for slaves.' The other school dissent, holding that exchange or barter is one thing and sale another; for if not, so they argue, one cannot, when things are exchanged, determine which is the thing sold and which that given as price, while on the other hand it seems absurd that both things should be considered as both sold and given as price. Caelius Sabinus, however, says that if I give you a slave as the price of something, for instance land which you are offering for sale, then the land is to be considered as having been sold and the slave as having been given as price for the land.

142. Hire is governed by rules similar to those of sale; for unless a definite reward be fixed, there is held to be no contract of hire. **143.** Hence, if the reward is remitted to the arbitrament of a third party, say 'for as much as Titius thinks reasonable', it is a question whether a contract of hire is formed. Accordingly, if I give clothes to a cleaner to be cleaned or furbished or to a tailor to be mended, but no reward is fixed at the time, the understanding being that I am to pay later what we may agree, it is a question whether a contract of hire is formed. **144.** Again, if I lend you something for your use and receive in return another thing for my use, it is a question whether a contract of hire is formed. **145.** The affinity between sale and hire goes so far that in certain cases there is a standing question whether the contract is one of sale or of hire, for example where a thing is let in perpetuity. This is the practice with the lands of municipalities: they are let upon the terms that, so long as the rent is paid, the land shall not be taken away from either the tenant or his heir. But the prevailing opinion is that this is a letting. **146.** Again, if I supply you with gladiators upon the terms that for each man who comes out scatheless I shall be paid 20 *denarii* in return for his exertions, but for each one who is killed or disabled 1,000, the question arises whether the contract is one of sale or of hire. The prevailing opinion is that it is one of hire of those who come out scatheless, but of sale of those who are killed or disabled: which it is, the events declare, there being understood to be a conditional sale or hire of each gladiator. For there is no longer any doubt that things can be sold or hired conditionally. **147.** The question whether the contract is one of sale or hire is also raised where I agree with a goldsmith for him to make me rings of a certain weight and pattern out of gold of his, he receiving, say, 200 *denarii*. Cassius says that the contract is one of sale of the material, but hire of the work. But most jurists hold that it is a contract of sale. It is agreed, however, that if I supply the gold, a reward for the work being settled, the contract is one of hire.

148. We enter into a partnership either in respect of our entire fortunes or for some particular business, such as the buying and selling of slaves. **149.** There has been a great dispute as to whether a partnership is possible on the terms that one of the partners should have a larger share in profits than in losses. Q. Mucius considered this to be against the nature of partnership, but Servius Sulpicius, whose opinion has prevailed, held that not only is partnership possible on these terms, but even on the terms that one partner shall bear no share of losses and yet have a share in profits, on the supposition that his services are considered so valuable that it is fair that he should be admitted to partnership on such terms. For it is settled law that a partnership agreement may provide that one partner should, and the other should not, bring in money, and yet that the profits should be shared; for a man's services are often as valuable as money. **150.** What is certain is that, if no express agreement has been made between the parties as to their shares in profit and loss, their shares in either will be equal. But if their shares in, say, profits have been expressly agreed, but their shares in losses have not been mentioned, their shares in what has not been mentioned will be in the same proportion. **151.** A partnership lasts as long as the parties remain of the same mind, but when one of them renounces the partnership, it is dissolved. But of course if one of the partners renounces for the purpose of profiting alone by some coming gain, for example, if my partner in

a universal partnership, having been left heir by someone, renounces the partnership in order to gain the inheritance for himself alone, he will be compelled to share this gain. If, however, he makes other gain which he has not sought for, this belongs to him alone. I, on the other hand, have the sole right to anything whatever that I acquire after his renunciation of the partnership. **152.** Partnership is also dissolved by the death of a partner, because one who enters into a partnership selects a particular person. **153.** A partnership is also held to be dissolved by *capitis deminutio*, because in the conception of civil law *capitis deminutio* is equivalent to death; nevertheless if the parties still consent to be partners, a new partnership is held to begin. **154.** Again, a partnership is dissolved if the property of one of the partners is sold up for public or private indebtedness. The partnership of which we are speaking, namely that which is formed by simple consent, is *iuris gentium* and thus obtains by natural reason among all men. **154a.** But there is another kind of partnership peculiar to Roman citizens. For at one time, when a *paterfamilias* died, there was between his *sui heredes* a certain partnership at once of positive and of natural law, which was called *ercto non cito*, meaning undivided ownership: for *erctum* means ownership, whence the term *erus* for owner, while *ciere* means to divide, whence the words *caedere* and *secare*. **154b.** Other persons too, who desired to set up a partnership of the same kind, could effect this by means of a definite *legis actio* before the praetor. Now in this form of partnership, whether between brothers succeeding as *sui heredes* or between other persons who contracted a partnership on the model of such brothers, there was this peculiarity, that even one of its members by manumitting a slave held in common made him free and acquired a freedman for all the members, and also that one member by mancipating a thing held in common made it the property of the person receiving in mancipation.

155. There is a contract of mandate when we give a commission either in our own interest or in that of another. Thus, whether I commission you to conduct affairs of my own or those of a third party, a binding contract of mandate is formed, and we shall be liable to one another for whatever each ought as a matter of good faith to perform for the other. **156.** For if I give you a commission only on your own behalf, the mandate is superfluous, because anything that you have to do on your own behalf you should do on your own judgment, and not under a mandate from me. Thus, if I urge you to put out at interest money that you have lying idle at home, then, even though you lend it to someone from whom you are unable to recover it, you will not have the *actio mandati* against me. Again, if I urge you to buy something, then, even though you had better not have bought it, I shall not be liable to you in mandate. This principle is carried so far that it is questioned whether one who tells you to lend at interest to a particular person (Titius) is liable in mandate. Servius said not, there being no more an obligation in this case than where general advice is given to a man to put out his money at interest. But we follow Sabinus' contrary opinion, because you would not have lent to the particular person if you had not received a mandate. **157.** An unquestionable rule is that if a commission is given which offends against morality, no obligation is contracted—if, for instance, I give you a commission to steal from Titius or to insult him. **158.** Again, if a man gives me a commission to be executed after my death, the mandate is void, it being a general principle that an obligation cannot begin in the person of an heir. **159.** A contract of mandate, though validly formed, is dissolved if revoked before it has been acted on. **160.** A contract of mandate is also dissolved if, before it has been acted on, death of either party, the giver or the receiver of the mandate, occurs. But on practical grounds it has become established that if I carry out a mandate after its giver's death, but in ignorance of that fact, I can sue by *actio mandati*; otherwise my justifiable and natural ignorance will cause me loss. Similarly, according to most authorities, a debtor of mine, who pays my cashier in ignorance of the fact that he has been manumitted, is discharged from the debt, though on strict legal principle he could not be discharged by a payment made to a wrong person. **161.** If he to whom I have given a valid mandate exceeds his instructions I have, on my side, an *actio mandati* against him up to the amount I have lost by his not having carried out the mandate, provided that was possible; but he has no action against me. Thus if, for example, I give you a mandate to buy an estate for me for 100,000 sesterces, and you buy for 150,000, you will have no *actio mandati* against me, even supposing you to be willing to convey to me for the sum at which I commissioned you to buy; this was the view preferred by Sabinus and Cassius. But if you buy for less than 100,000 you will of course have an action against me, because a man who gives a mandate to buy for 100,000 is naturally taken to authorize purchase at a lower price if possible. **162.** In conclusion it should be noted that if I commission the doing of something without reward, where, had I fixed a reward, there would have been a hiring, the *actio mandati* lies: if, for example, I give clothes to a cleaner to be cleaned or refurbished or to a tailor to be mended.

163. Having explained the various *genera* of obligations arising from contract we must now observe that there is acquisition for us not only through our own contracts, but also through those of persons who are in our *potestas*, *manus*, or *mancipium*. **164.** There is acquisition for us also through the contracts of free men and slaves of other persons whom we possess in good faith, but this only in two cases, namely where they make an acquisition through their own work or in connexion with our affairs. **165.** The acquisition is likewise for us in these two cases through slaves in whom we have a usufruct. **166.** But one who has only a bare Quiritary title to a slave, though he is owner, is considered to have less right in this respect than a usufructuary or a *bona fide* possessor. For it is settled law that in no case can there be acquisition for him, not even, in the opinion of some, if the slave stipulates for conveyance to him by name or takes by mancipation in his name. **167.** That a slave of several owners acquires for them each in proportion to their respective shares in him is beyond doubt, except that, if he stipulates or receives by mancipation for one of them by name, he acquires for that one alone, for example if he stipulates thus: ‘Do you solemnly promise conveyance to my master Titius?’ or receives by mancipation thus: ‘I affirm that this thing is the property of my master Lucius Titius by Quiritary title and be it bought for him by this bronze ingot and bronze scale.’ **167a.** It is a disputed point whether authorization of the contract by one of the owners has the same effect as his being expressly named. Our teachers hold that there is acquisition for the giver of authorization exactly as though the slave had stipulated or taken by mancipation naming him alone. The authorities of the other school consider that the acquisition is for both the owners, just as though there had been no authorization.

168. Obligations are discharged principally by payment or performance of what is due. On this the question arises whether one who, with his creditor’s consent, pays or performs something else instead of what is due, is discharged at law, as our teachers have held, or whether he remains under the obligation at law, but may resist an action brought on it by means of the *exceptio doli mali*, as the authorities of the other school have thought.

169. Obligations are also discharged by *acceptilatio*. This is a sort of imaginary payment: if you wish to release me from what I owe you under a verbal obligation, it can be done by your allowing me to say, ‘What I promised you, have you received?’ and replying yourself ‘I have’. **170.** By this method, as we have said, obligations resting on verbal contract are extinguished, but others are not. For it has been held appropriate that an obligation created by words should be discharged by other words. However, what is due on some other ground can be thrown into a stipulation and then be discharged by *acceptilatio*. **171.** But although *acceptilatio* takes the form of an imaginary payment, still a woman cannot release her debtor by *acceptilatio* without her tutor’s *auctoritas*, though a real payment can be made to her without it. **172.** And again, a debt can be validly paid in part, but whether a partial *acceptilatio* is possible has been questioned.

173. There is also another kind of imaginary payment, namely *per aes et libram*, which likewise is admitted only in certain cases, as where something is owing on a transaction *per aes libram* or under a judgment. **174.** Not less than 5 witnesses and a *libripens* are obtained. Then the party who is being released must say as follows: ‘Whereas I have been condemned to pay you so many thousand sesterces, in respect thereof I loose and free myself from you by this bronze ingot and bronze scale. I weigh out to you this pound as the first and last in compliance with the public statute.’ He then strikes the scale with the coin and gives it to him by whom he is being released in token of payment. **175.** Similarly a legatee by the same process sets the heir free from a legacy left by damnation, with this difference that where the judgment debtor declares himself to have been *condemnatus*, the heir states that he has been *testamento damnatus*. An heir can, however, be released by this method only from a debt of things reckoned by weight or number, and then only if the debt be certain. Some hold the same of things reckoned by measure.

176. Furthermore, obligations are discharged by novation, for instance if I stipulate from Titius for payment of what you owe me; for by a new party coming in a new obligation arises and the previous obligation is discharged, being transformed into the later one. Indeed, sometimes the prior obligation is discharged by novation in spite of the later stipulation being void, for instance if I stipulate for what you owe me from Titius as from after his death, or from a woman or a ward without tutor’s *auctoritas*; in such a case I lose my right, for both the former debtor is freed and the later obligation is void. The law is different if I take the stipulation from a slave: in this case the former debtor remains under obligation just as if I had not stipulated from anyone. **177.** But where the person from whom I take the later stipulation is the same, there is novation only if there is something new in the later stipulation, for example if a

condition or a date or a *sponsor* is added or omitted. **178.** Our statement regarding a *sponsor* is not universally accepted; for the authorities of the other school hold that the addition or omission of a *sponsor* does not produce novation. **179.** Our statement that there is novation if a condition is added must be understood as meaning that there is novation only if the condition is realized; for if it fails, the previous obligation continues. But let us consider whether one who sues on it cannot be defeated by the *exceptio doli mali* or the *exceptio pacti conventi*, because the *intention* of the parties appears to have been that an action should lie on it only if the condition in the later stipulation were realized. Servius Sulpicius thought that novation takes place at once, even during the pendency of the condition, and that if it fails, no action lies on either ground, so that all claim is lost. Consistently he further advised that, if a man stipulates from a slave for what he is owed by Lucius Titius, novation takes place and the claim is lost, because action cannot be brought against a slave. But in both cases we follow a different rule: in such cases novation does not take place any more than where, in stipulating for what you owe me from a peregrine who is outside the communion of *sponsio*, I use the word *spondes*.

180. Yet again, obligations are discharged by joinder of issue, if the action be by *iudicium legitimum*. For thereupon the original obligation is dissolved and the defendant becomes bound by the joinder of issue. Then, if he is condemned, the joinder of issue is discharged and he becomes bound by the judgment. Hence the saying in ancient writers, that before joinder of issue a debtor ought to pay, after joinder he ought to be condemned, and after *condemnation* he ought to satisfy judgment. **181.** The result is that if I claim a debt by a *iudicium legitimum*, I am debarred by mere operation of law from suing for it afresh, because my pleading that payment is due to me is vain, seeing that it ceased to be due on issue being joined (in the first action). But it is otherwise if I sue by a *iudicium imperio continens*; for in this case the existing obligation continues, and therefore I am not debarred by mere operation of law from suing afresh, but I must be defeated by means of the *exceptio rei iudicatae uel in iudicium deductae*. What proceedings are *iudicia legitima* and what *iudicia imperio continentia* we shall state in our next book.

10. BOOK III [obligations *ex delicto*]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book III, §§ 182–223; pp. [odd nos.] 213–229 [footnotes omitted]

182. Now let us pass on to obligations arising from delict, as where theft or robbery is committed, or damage to property is done, or injury to the person. Obligations from these sources all belong to one *genus*, whereas, as we have already explained, obligations from contract are distributed among four *genera*.

183. According to Servius Sulpicius and Masurius Sabinus there are four *genera* of theft—manifest, non-manifest, *conceptum*, and *oblatum*; according to Labeo there are two—manifest and non-manifest, *conceptum* and *oblatum* being rather *species* of actions connected with theft than *genera* of thefts. The latter seems clearly the better view, as will appear below. **184.** Manifest theft, according to some, is theft detected whilst being committed. Others extend it to theft detected in the place where it is committed, holding, for example, that a theft of olives committed in an olive-grove, or of grapes committed in a vineyard, is manifest if detected whilst the thief is still in the olive-grove or vineyard, or, where there is theft in a house, whilst the thief is still in the house. Others, going further, have maintained that a theft remains manifest up to when the thief has carried the thing to the place he intended. And others go so far as to say that it is manifest if the thief is seen at any time with the thing in his hands. This last opinion has not been accepted, nor does the opinion that the theft is manifest if detected before the thief has carried the thing to where he intended, seem to be approved, because it raises a considerable doubt as to whether this is to be limited to one day or extends to several, the point being that thieves often intend to carry off what they have stolen to another town or province. Either of the first two opinions is tenable, but the second is generally preferred. **185.** What non-manifest theft is can be gathered from what we have said. For what is not manifest is non-manifest. **186.** There is what is called *furtum conceptum*, when a stolen thing has been sought and found on a man's premises in the presence of witnesses. Against him, even if he be not the thief, a special action called *concepti* has been established. **187.** There is what is called *furtum oblatum*, when a stolen thing has been passed off to you by someone and has been found on your premises, at any rate if he gave it to you with the *intention* that it should be found on your premises rather than on his own. A special action called *oblati* has been established in favour of you, on whose premises the thing has been found, against him who passed it off to you, even if he be not the thief. **188.**

There is also an action *prohibiti furti* against one who prevents another who wishes to search for a stolen thing from doing so.

189. Under the law of the Twelve Tables the penalty for manifest theft used to be capital. A free man was scourged and then solemnly assigned by the magistrate (*addictio*) to him from whom he had stolen; whether by the *addictio* the thief was made a slave, or was placed in the position of a judgment debtor, used to be disputed by the early lawyers. A slave, after being similarly scourged, was put to death. But in later times the ferocity of the penalty was reprobated, and in the case of both a slave and a free man an action for fourfold was established by the praetor's Edict. **190.** For non-manifest theft a penalty of double is imposed by the law of the Twelve Tables, and this is preserved by the praetor. **191.** For *conceptum* and *oblatum* the penalty under the law of the Twelve Tables is threefold, and this is likewise preserved by the praetor. **192.** An action for preventing search (*prohibiti furti*) for fourfold has been introduced by the praetor's Edict. The law of the Twelve Tables provides no penalty for this, but merely ordains that one wishing to search must do so naked, girt with a *licium* and holding a platter; if he finds anything, the law says it is to be manifest theft. **193.** What, it has been asked, is the *licium*? Probably it is some sort of cloth for covering the privy parts. The whole thing is ridiculous; for one who will not let you search with your clothes on is not going to let you do so with them off, especially when, if you search and find in this manner, he is brought under a heavier penalty. Again, of the two explanations of the requirement of a platter in the hands—namely, that the object is to engage the searcher's hands and so prevent him from palming anything off, or else that it is for him to place on it what he finds—neither will serve, if we suppose the thing sought for to be of such a size or nature that it can neither be palmed off nor be placed on the platter. At any rate there is no doubt that the statute is complied with whatever the platter is made of. **194.** The fact that the statute enacts that in such case there is manifest theft causes some writers to say that theft may be manifest by statute or in fact: by statute in the case we are now discussing, in fact in the circumstances described previously. But the truth is that manifest theft means manifest in fact; for statute can no more turn a thief who is not manifest into a manifest thief than it can turn into a thief one who is not a thief at all, or into an adulterer or homicide one who is neither the one nor the other. What statute can do is simply this: it can make a man liable to a penalty as if he had committed theft, adultery, or manslaughter, though he has committed none of these crimes.

195. Theft is committed not only by removing another's property with intent to appropriate it, but also by any handling whatsoever of another's property against his will. **196.** Accordingly, one who makes use of a thing left in his custody commits theft. Again, one who turns to some other use a thing lent to him for a particular use is liable for theft, for example one who obtains a loan of silver on the plea that he is giving a party and then takes it abroad, or one who borrows a horse for a ride and takes it further than was meant; the old writers laid this down of the man who took a borrowed horse into battle. **197.** It is, however, agreed that those who use borrowed things for purposes outside the agreement commit theft only if they are aware that their act is against the owner's will, and that, had he known of it, he would not have allowed it; but if they believe that he would have allowed it, they are not guilty of theft. This is a thoroughly sound distinction, because theft is not committed without dishonest *intention*. **198.** But even though one believes that one is handling the thing against its owner's will, still, if in fact he is willing, no theft is held to be committed. Hence the following problem: Titius having solicited my slave to steal certain things from me and bring them to himself, the slave reports the matter to me; I, wishing to catch Titius in the very act of stealing, allow the slave to take certain things to him: is Titius liable to me in the action for theft, or in that for corrupting a slave, or in neither? It has been held that he is liable in neither; not in the action for theft, because his handling of the things was not against my will, not in that for corrupting a slave, because the slave was not corrupted. **199.** Sometimes there is theft even of free persons, for instance where a child in my *potestas* or my wife in *manus* or my judgment debtor or my sworn gladiator is stolen. **200.** Sometimes a man actually commits theft of his own property, for example, if a debtor purloins a thing he has pledged to a creditor, or if I steal my own thing from its *bona fide* possessor. Accordingly it has been held to constitute theft if an owner hides his slave who has escaped from a *bona fide* possessor and returned to himself. **201.** On the other hand, it is sometimes possible, without its being considered theft, to take and acquire by usucapion things belonging to another, for example hereditary things of which the heir has not yet taken possession, except where there is a *heres necessarius*; for if there is, it is settled law that usucapion *pro herede* is impossible. Or again, a debtor may without theft take possession of and acquire by usucapion a thing that he has mancipated, or surrendered *in iure*, by way of trust to a creditor, as we have related in the preceding book. **202.**

Sometimes a man is liable for a theft of which he is not the actual perpetrator; we refer to one by whose aid and counsel the theft has been carried out, for instance a man who knocks coins out of your hands, or obstructs you, for another to make off with them, or who stampedes your sheep or cattle for another to catch them. So the old lawyers wrote of one who stampeded a herd with a red rag. But if it is a mere prank, without *intention* of furthering a theft, the question will be whether an *actio utilis* ought not to be given, since even negligence is punished by the *L. Aquilia*, which governs damage to property.

203. The action of theft lies at the suit of one who has an interest in the safety of the thing, though he be not its owner. Therefore it is not open even to an owner except if he is interested in its not being lost.

204. Consequently it is clear that a creditor can sue in theft if his pledge has been stolen from him; indeed he can do so even if it has been taken by its owner, that is, the debtor. **205.** Again, if for a definite reward a fuller has received clothes to be cleaned or refurbished, or a tailor clothes to be mended, and loses them by theft, it is he, and not their owner, who has the action of theft, because the owner has no interest in their not being lost, seeing that he can recover his damages from the fuller or tailor by *actio locati*, provided that the fuller or tailor is able to meet the damages; for if he is insolvent, then the owner, not being able to recover his damages from him, has the action of theft himself, because in this case he has an interest in the safety of the thing. **206.** What we have stated of a fuller or tailor will apply equally to one to whom we have lent a thing for use. For just as the former by accepting a reward make themselves responsible for safe-keeping, so likewise a borrower, in consideration of the benefit he gets by using the thing, must take the same responsibility. **207.** On the other hand, one with whom a thing is deposited is not answerable for its safe-keeping, but is liable only for his own wilful fault. Therefore, if the thing deposited is stolen from him, not being liable in the action of deposit for its restitution and having therefore no interest in its not being lost, he cannot sue in theft, but the action goes to the thing's owner.

208. Finally be it noted that it has been a question whether a person below puberty commits theft by removing another's thing. Most lawyers hold that, since theft depends on *intention*, the child is only liable on such a charge if he is approaching puberty and so understands that he is doing wrong.

209. He who takes another's property by violence is also liable in theft. For who more truly handles another's property against the will of its owner than one who robs him with violence? Thus he has rightly been described as an outrageous thief. However, the praetor has introduced a special action on this delict, called *ui bonorum raptorum*, which lies for fourfold within a year, and after that for simple value. This action is available even if the robbery is of but a single thing of insignificant value.

210. An action for wrongful damage exists under the *L. Aquilia*, the first chapter of which provides that one who has wrongfully killed another's slave, or his four-footed beast of the class of cattle, shall be condemned to pay the owner the highest value thereof in that year. **211.** He is deemed to kill wrongfully, by whose malice or negligence the death is caused. There being no other statute which visits damage caused without fault, it follows that a man who, without negligence or malice, but by some accident, causes damage, goes unpunished. **212.** In an action under this statute it is not only the value of the thing damaged in itself that is assessed, but also if by the killing of his slave an owner suffers loss exceeding the value of the slave, this too is assessed. Suppose, for example, that my slave has been killed after he has been instituted heir by someone, but before he has by my authority formally accepted the inheritance; in that case not only the personal value of the slave, but also the amount of the lost inheritance is assessed. Again, if one of twins, or a member of a troupe of actors or musicians, has been killed, account is taken not only of the value of the person killed, but also of the depreciation of the survivors. It is the same if one of a pair of mules or of a team of chariot-horses is killed. **213.** The owner of a slave who has been killed has the option between prosecuting the killer on a capital charge and suing under the present statute for his damages. **214.** The effect of the words in the statute 'the highest value thereof in that year' is that if, for instance, a slave is killed who is lame or one-eyed, but had been free from defect within the year, the measure of the *condemnation* is his highest value in the year, not his value at the time of his being killed. This means that sometimes an owner recovers more than the loss that has been inflicted on him.

215. The second chapter provides, against an *adstipulator* who has released the debtor in fraud of his principal, an action for the amount in question. **216.** This part of the statute, like the rest, obviously introduces a remedy for damage; but the provision was unnecessary, as the action of mandate would meet the case, except that the statutory action is for double against a defendant who denies liability.

217. The third chapter deals with all other damage to property. Accordingly, it provides an action if a slave or a four-footed beast of the class of cattle is wounded, or if a four-footed animal other than cattle,

such as a dog, or a wild beast like a bear or a lion, is either wounded or killed. It also gives a remedy for wrongful damage to all other animals and to any inanimate things. For it provides an action if anything is 'burnt, destroyed (*ruptum*), or broken', though the single term *ruptum* would have covered all the cases. For by *ruptum* we understand physically damaged (*corruptum*) in any way at all. Thus not only burning and breaking, but also cutting, bruising, spilling, and all kinds of damage, destruction, or spoiling are covered by the word *ruptum*. **218.** Under this chapter, however, the person doing the damage is condemned to pay the value not in that year, but in the last 30 days. Indeed the word *plurimi* (highest) is not inserted, and consequently some jurists have thought that the *iudex* is free to assess the value in the last 30 days at its highest or when it was less. But Sabinus held that we must interpret as if here too the word *plurimi* had been inserted, the legislator having thought it sufficient to have used the word in the first chapter. **219.** It has been decided that there is an action under the statute only where a man has done damage with his own body; consequently actions on the case are granted if the damage has been caused in some other way, for example, if one shuts up and starves to death another man's slave or cattle, or drives his beast so hard that it founders, or if one persuades another's slave to climb a tree or to go down a well and he falls and is killed or physically injured in climbing up or down, or if one throws another's slave into a river from a bridge or bank and he is drowned, though in this case there would be no difficulty in seeing an infliction of damage with the defendant's body in the act of throwing.

220. Outrage is committed not only by striking a man with the fist or a stick or by flogging him, but also by raising a clamour against him, or if, knowing that he owes one nothing, one advertises his property for sale as a debtor's, or by writing defamatory matter in prose or verse against him, or by following about a matron or a youth, and in short in many other ways. **221.** A man is deemed to suffer outrage not only in his own person, but also in the persons of his children in potestas and his wife. Accordingly, if you commit an outrage on my daughter (in *potestas*) who is married to Titius, an *actio iniuriarum* lies against you not only in her name, but also in mine and Titius'. **222.** A slave is not considered personally to suffer outrage, but an outrage is held to be committed through him on his owner, though not in all the ways in which it is held to be committed on us through our children or wives, but only if the act is specially shocking and obviously intended as an insult to his owner, as where one flogs another's slave—a case for which a *formula* is published in the Edict. But for raising a clamour against a slave or striking him with the fist there is no *formula* published in the Edict, nor is one lightly granted to a plaintiff.

223. Under the Twelve Tables the penalties for outrage used to be: for destroying a limb retaliation, for breaking or bruising a bone 300 *asses* if the sufferer was a free man, 150 if a slave; for all other outrages 25 *asses*. These penal sums were considered sufficient in those days of extreme poverty. **224.** But the system now in force is different. For the praetor allows us to make our own assessment of the outrage, and the *iudex* may, at his discretion, condemn in the amount of our assessment or in a lesser sum. But as it is customary for the praetor impliedly to assess an aggravated outrage himself, when he determines in what sum the defendant must give security for reappearace, the plaintiff limits the claim in his *formula* to the same amount, and the *iudex*, though he has power to condemn in a lesser sum, generally out of deference to the praetor does not venture to reduce it. **225.** An outrage is regarded as aggravated either by the actual deed, for example wounding or flogging or cudgelling a man, or by the place, for example if an outrage is inflicted in the theatre or the marketplace, or by the person, for example if an outrage is inflicted on a magistrate, or on a senator by a person of low degree.

[Book 4 is found in Section 2.]