

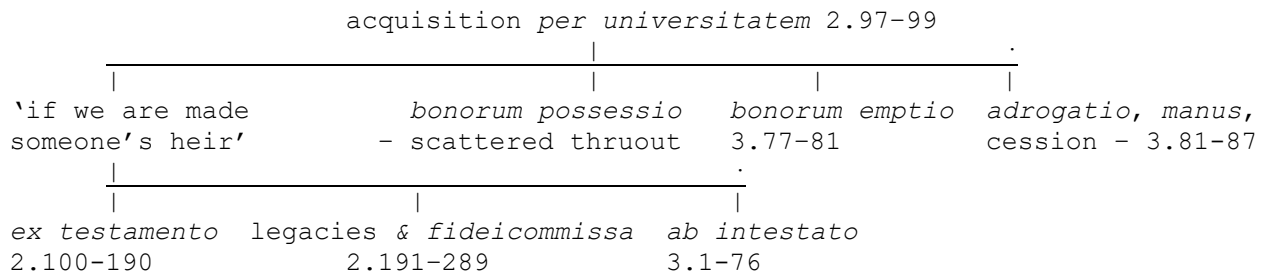
line between persons and things. The Latin word *familia* can mean ‘family’ in our sense, but it usually means ‘estate’ as in ‘decedents’ estates’. The *familia* includes persons, like slaves, and the line between slaves and children is not sharp.

The estate also includes obligations. Hence, the Romans do not need an executor.

Let me spell out that last remark. The Roman heir succeeds to both the active and the passive of the obligations of the decedent. That is to say, the heir can collect what was owed to the decedent and has to pay what the decedent owed. That is not completely true because the passive of the decedent’s delictual obligations, what decedent owed as a result of his/her delicts, died with the decedent. Whether the active of the decedent’s delictual obligations died with the decedent too is not completely clear. What is clear is that the active and the passive of all the contractual obligations of the decedent passed to the heir.

The function of an executor or administrator of a decedent’s estate in our system is to marshal the assets of the decedent, pay the debts and expenses of the estate, and turn over the balance if it is positive, to the legatees and heirs. If the heir, as in the Roman system, is charged with the debts of the decedent and with paying the legacies, then you do not need an executor. The heir can be trusted to marshal the decedent’s assets, and can be sued if s/he does not pay what is owed.

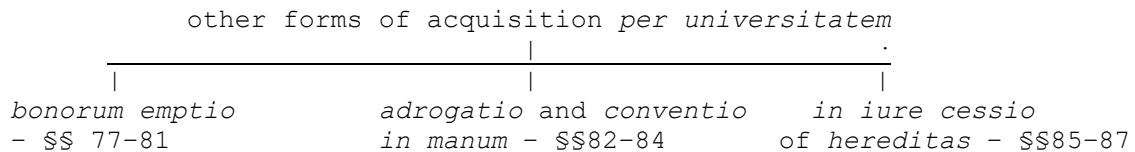
- Here’s the general outline of the topics that G. takes up under the heading of acquisition *per universitatem*:



G. deals first with ‘if we are made someone’s heir’, first by way of testament, then he considers legacies and *fideicommissa* for the rest of sections in book 2. The first 76 sections of book 3 are devoted to becoming an heir of someone who died intestate. He then considers universal succession by *bonorum emptio*, literally ‘purchase of goods’, and then by way of adrogation, passage into *manus*, and cession in court.

- Now I’m going to reverse the order, beginning at the end with acquisitions *per universitatem* not by way of succession upon death 3.77-87

The detail breaks down into three groups:



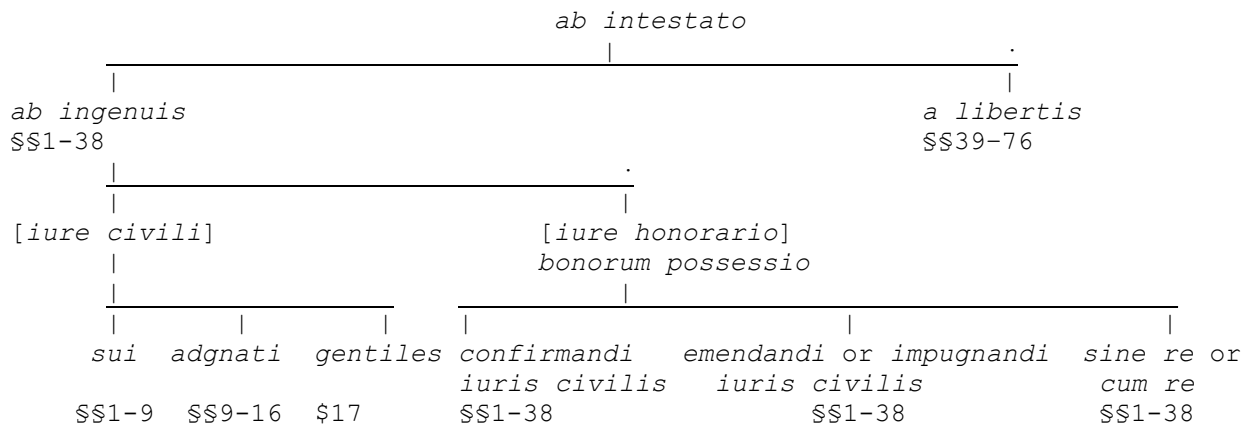
§§ 77–81 deal with *bonorum emptio*.¹ It was a form of bankruptcy. One or more creditors applied to the praetor to sell the estate of an insolvent or recalcitrant debtor (who could himself be alive or dead). The creditors then appointed a manager who sold the estate at public auction to the highest bidder. The successful bidder could collect the debts owed to the original debtor and was liable for his/her debts. Gaius describes in book 4 the actions² that were used by and against the purchaser (4.34–35, 65–68). The key point is that the purchaser was liable only up to the amount that he had paid for the estate. To the extent that the actual value of the estate was greater than the amount that he had bid, he could pocket the difference.

Gaius does not tell us how the system handled the problem of preferences. There must, however, have been some way to handle it, because otherwise the purchaser could pay off one creditor in full up to the amount of the purchase price and leave the others holding the bag. There was nothing equivalent to our discharge in bankruptcy. The creditors could still proceed against the debtor if he were still alive; the debtor became infamous for having gone through this process, and any assets that the debtor later acquired were available to the creditors.

§§ 82–84 are fairly straightforward. If a man *sui iuris* was adrogated³ or if a woman *sui iuris* entered into *manus* with her husband, the entire estate of the man adrogated or the woman passing into *manus*, including the active and the passive of the obligations, passed to the adoptive father or the husband.

§§ 85–87 suggest that *in iure cessio* of an entire inheritance⁴ could be done only by an intestate heir who did not become *sui iuris* as a result of death of the decedent and before the intestate heir had entered into the inheritance. Why only he could do this is obscure, but it may be related to the fact that the civil-law scheme of intestate inheritance gave the inheritance to someone who might not be the decedent’s closest kin.

5. To quote Gaius in another context: ‘Now let us pass on to acquisition *per universitatem* from an intestate’



¹ ‘Purchase of goods’, sometimes, and perhaps more accurately, called *bonorum venditio*, ‘sale of goods’.

² *actiones utiles*.

³ We are not informed about the adoption of a woman *sui iuris*, though it seems that it was possible and had the same effect.

⁴ *hereditas*.

Gaius first deals with the intestacy of those who were born free (*ingenui*), (§§ 3.1-38). Intestate succession from freed persons (*liberti*) was sufficiently different from that from freeborn persons that G. has to consider it separately. We will deal with it briefly below. The basic division of intestacy is between intestacy under the civil law and that under the law of the praetor, the *ius honorarium*. The two cannot be considered separately, however, because sometimes the praetor granted *bonorum possessio* (literally ‘possession of goods’) in support of the civil law⁵ and sometimes by way of emending or overturning the civil law.⁶ Sometimes these grants of possession were just that, grants of possession only (*sine re*, literally ‘without the thing’), and sometimes they granted both possession and ownership (*cum re*, literally ‘with the thing’).

In both cases the praetorian order was *ex parte* and interim in the sense that the action to claim an inheritance⁷ was not barred by a claim that the award of *bonorum possessio*, which was technically an interdict not an action, made the action *res iudicata*. But if the *bonorum possessio* was *cum re*, the claimant could not allege that what the praetor had done was contrary to the civil law. The claimant had to allege that s/he was better qualified under praetor’s edict not under the civil law. We don’t know what the limitation period was on the action to claim an inheritance. It may have been the time-periods set out in the praetor’s edict for application for various types of *bonorum possessio*. It was more likely to have been, in effect, the periods for usucapion, the grant of *bonorum possessio*, assuming good faith, having given the possessor a just title on which to ground usucapion.

We are ill-informed about what was *cum re* and what was *sine re* and in what period. It seems likely that all of the of ones concerning intestacy were, for the most part, *cum re* in Gaius’ time.

There were three classes of civil-law intestate heirs: First class (1) *sui*, with representation per stirpes. These were the persons who became *sui iuris* upon the death of the decedent. They were known as *sui heredes*, ‘heirs of him or her’, and the adjective *suus* or *sua*, the form depending on whether the person was male or female, was frequently used to describe such people while the decedent was still alive. The *sui* would normally be the children of the decedent, and they took equal shares without regard to gender. If one or more of the decedent’s sons had predeceased and left children, those grandchildren would take their deceased parent’s share, which is what is meant by ‘representation per stirpes’. Representation was not allowed to the children of predeceased daughters.

Second class (2) Agnates,⁸ without representation or succession of grades. Agnates were relatives in the male line. Only one’s father’s relatives were one’s agnates. That means that the nearest agnate might be more distantly related to the decedent than were his mother’s relatives (who, together with agnates were called ‘cognates’⁹). If the nearest agnates were the

⁵ *confirmandi iuris civilis*.

⁶ *emendandi* or *impugnandi iuris civilis*.

⁷ *hereditatis petitio*.

⁸ *adgnati*.

⁹ *cognati*.

decedent's full siblings, they took without regard to gender. Otherwise, women were excluded from agnatic succession.

If one of the class of nearest agnates had died but left children, the children did not take their parent's share. Agnatic succession was 'without representation'. If the nearest agnate or agnates did not take up the inheritance (which they were entitled not to do), the next closest agnate or agnates did not succeed. Agnatic succession was succession 'without grades'.

[(3)] If the nearest agnate could not be found or refused to take up the inheritance, the XII Tables prescribed that the decedent's *gens* ('tribe') should take it. We have very little idea how this worked. The references to it in later times are skimpy. By Gaius' time there did not seem to be any way that a *gens* could claim. The institution had become obsolete.

The praetor intervened with a complicated system that offered *bonorum possessio* to various grades of heirs with time-limitations. *Liberi* (children, with representation) and *parentes* (parents, for example, the father of an emancipated son) had a year in which to apply. All others 100 days. The first grade was known as *unde liberi* ('whence children'). The praetor included within this class all natural children of the decedent so long as they were not in the *potestas* or *manus* of someone else. In order to qualify the emancipated had to agree to bring into the inheritance all of their property, except *peculium castrense*, or as much of their property as was necessary to make up for what the *sui* had lost by their addition.¹⁰

The next grade was called *unde legitimi* ('whence those by statute'). It included the nearest agnates by the civil law. In Gaius' time, the membership in the class was changed by two remarkable *senatusconsulta*, the SC Tertullianum of the time of Hadrian and the SC Orphitianum of 178 AD, passed after GI was written but about which G. wrote a monograph, probably shortly before his death. Under the SC Tertullianum, a mother who had had three or more children was admitted as a statutory heir¹¹ of her predeceased intestate child if that child had no *liberi* or consanguine brothers.

Under the SC Orphitianum the children of an intestate mother were admitted as her heirs, effectively in the first grade, because no one could qualify under *unde liberi*.

In the third grade were cognatic relatives in the broad sense of the term, that is to say, both those related agnatically and those related through women, up to the sixth or seventh degree of kinship (child of a second cousin). Only after that, could a husband succeed to his wife or vice-versa. If no one qualified, the property escheated to the public treasury.

The provisions about the succession to freed persons were quite complicated. We give only the basics here. In intestacy, in the absence of descendants, the freedman's patron, the person who manumitted him, gets the inheritance because a freedman has no agnates other than his descendants. A freed woman has no agnates at all. Hence, the freed woman has to make a testament in order to give the property to someone other than her patron. She could not do this without her tutor's *auctoritas*, and her tutor was normally her patron. A freedman who was a citizen, and some others, could make a testament without anyone's approval, and could make anyone whom he wanted to make his heir. The praetor intervened and allowed the patron to

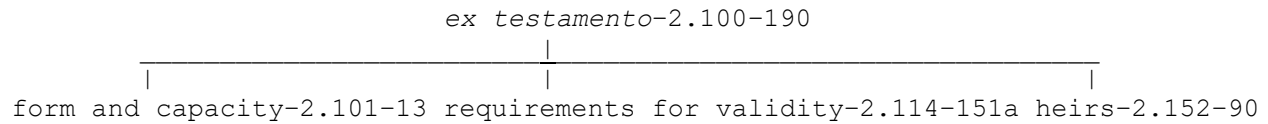
¹⁰ *collatio bonorum*.

¹¹ *legitima heres*.

succeed to one-half of the freedman’s estate, even if the freedman had made a testament, but only if the freedman left no natural descendants or did not make them his heirs.

6. GI.2.100–190 – acquisition per universitatem by way of testament.

Here are the subcategories:



7. First, form of testaments and capacity to make them §§ 101–113

a. Gaius tells us that there were historically three forms of testament (§§ 101–111).¹² The *testamentum per aes et libram* was the only one that was effective in G’s time. He adds a side note on the witnesses: They cannot have an interest in the inheritance. There must be seven, including the *familiae emptor*, literally ‘the purchaser of the family’, the scale-holder, and the five witnesses normal in a mancipation. He adds another note on soldiers’ wills. They did not have to follow the formalities. Here’s how he describes the current system (2.103–104).

“**103.** The two earlier kinds of testament 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 mancipations, 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.”

The praetor intervened. He offered *bonorum possessio* ‘according to the tablets’,¹³ to the heir under the tablets if the tablets contained the seals of the 7 witnesses, so long as no

¹² That made (a) *calatis comitiis*, that made (b) *in procinctu*, and that made (c) *per aes et libram*.

¹³ *bonorum possessio secundum tabulas*.

civil-law heir objected. Antoninus Pius extended this provision to exclude the possibility that the civil-law heirs could object.

- b. §§ 112–113 are a fragment concerning women’s testaments. Unfortunately, they are just a fragment. The whole section may have dealt with capacity to make a testament generally. Other sources tell us that the maker of the will, as a general matter, had to be a *sui iuris* Roman citizen above the age of puberty; the heir had to be a Roman citizen as well, *sui iuris* or made so by the death of the testator, but s/he need not be above the age of puberty.
8. The requirements for validity of a testament are laid out in some detail in §§ 114–146. Testaments must be made, Gaius says, ‘according to the rule of the civil law’.¹⁴ The form of making the testament has already been discussed. These requirements are about what must be in or exist prior to the testament, on the one hand, or, on the other, about things that can invalidate it after it is made.
- a. Initial requirements:
 - i. A testament had to institute an heir.¹⁵ With very few exceptions, the institution had to be at the beginning of the testament, and there was a right way to do it. Other ways of doing it would void the institution and hence the testament. These formalities do not seem to have been relaxed until the 4th century.
 - ii. A woman had to have the authority of her tutor to make a testament. It is here that Gaius takes up *bonorum possessio* ‘according to the tablets’. He takes it up here because it seems to him that the rescript of Antoninus Pius has made it clear that a failure to sell the *familia* or use the right words in announcing the testament to the witnesses were no longer grounds for invalidating the testament, but he is not sure about authority of the tutor, which, after all, if the tutor were not the patron or one appointed by law, could be compelled by the praetor.
 - iii. If there were *sui heredes* who were not instituted as heirs, they had to be excluded by the testament.¹⁶ If they were sons, they had to be excluded by name, but in the civil law daughters and sons’ children could be excluded generally.
 - iv. The praetor granted *bonorum possessio* ‘against the tablets’,¹⁷ to *liberi* whether or not emancipated unless they were excluded by name if they were male or generically if they were female. Failure to exclude *liberi* did not invalidate the testament, though it did invalidate the institution of an heir who was not a descendant of the testator. Otherwise, the excluded child took a share equal to that of children who were instituted.¹⁸ In order to compensate the *sui* for the fact that they had no opportunity to acquire for themselves, emancipated children, as in the case

¹⁴ *secundum iuris civilis regulam*, GI.2.114.

¹⁵ *heredis institutio*.

¹⁶ *exhaereditio*.

¹⁷ *bonorum possessio contra tabulas*.

¹⁸ Known as the *ius accrescendi*.

of intestacy, had to agree to bring into the inheritance all of their property, except *peculium castrense*, or as much of their property as was necessary to make up for what the *sui* had lost by their addition.

b. Subsequent requirements:

- i. A unborn person, as being an 'uncertain person',¹⁹ could not be excluded in a testament. Hence, the birth (or adoption) of a *suus*, without regard to gender or degree of relationship to the testator, invalidated the testament at civil law.²⁰ By Gaius' time a combination of juristic interpretation and legislation had made it possible for a testator to avoid this situation with appropriate language except in the case of adoption or bringing his wife into *manus*.²¹
- ii. A subsequent testament was the only way in civil law to invalidate a previous one. Even the destruction of the testament with the intention to revoke it would not do the job. The praetor, however, intervened and gave *bonorum possessio* 'from an intestate'²² in this situation.
- iii. Loss of civil capacity (*capitis deminutio*) of the testator invalidated the testament at civil law. The problem of the testator captured by the enemy was solved by legislation at the beginning of the classical period.²³ The praetor was willing to give *bonorum possessio* 'according to the tablets'²⁴ in any situation where the testator had capacity both at the time of making the testament and at his death, for example, where he had been adopted and emancipated in the interim. But in the classical period this was *cum re* only if the civil-law heir had been instituted in the testament.

9. The civil law recognized three types of heirs:

- a. *necessarii*, literally 'necessary', but not *sui*
- b. *sui* and *necessarii*
- c. *extranei*, 'extraneous', everyone who did not fall into the other two categories

The reason for these distinctions is that being an heir was not always to the advantage of the heir. Because the heir was personally liable for the debts of the testator, s/he might end up having to pay out his/her own pocket if the assets of the estate were not sufficient to cover the debts of the testator. Hence, those who were *extranei* could refuse to take up the inheritance. If they acted as heir, however,²⁵ they were stuck. Normally, an extraneous heir would make a formal declaration, called a *cretio*, that s/he intended to take up the inheritance. Gaius tells us

¹⁹ *incerta persona*.

²⁰ *postumi*. (*agnatio* and *quasi agnatio*, i.e. adoption).

²¹ *conventio in manum*.

²² *ab intestato*.

²³ Lex Cornelia de captivis, probably 81 BC.

²⁴ *secundum tabulas*.

²⁵ The phrase was *pro herede gestio*, literally 'performing as heir'.

that it was the practice for testators to require an heir to make *cretio* within a certain period, say a hundred days, or someone else would be instituted as heir.

In the civil law the *sui* could not refuse to take up the inheritance. If instituted, they became heirs automatically upon the death of the testator. They were thus *sui* and *necessarii*. In Gaius' time, however, if they had not acted in any way as heirs, they could apply to the praetor for the right to abstain from the inheritance.²⁶

It became the practice for testators who feared that their estates might be insolvent to manumit a slave in their testaments, and make him (it was almost always a male slave) heir. This slave could not refuse to take up the inheritance; he was a necessary heir²⁷ who was not a *suus*. He would, of course, if the testator's fears turned out to be true, be subject to *bonorum emptio*, but he would be free. The praetor helped the necessary heir who was not a *suus* by allowing him to separate his after-acquired assets,²⁸ so that the creditors of his manumittor could not reach them. In a further development along these lines, Justinian allowed *extranei* to make up an inventory of the decedent's assets,²⁹ and limit their liability to what was in the inventory.

10. As we have already seen, it was possible for a testator to institute an heir and then substitute another if certain conditions were not met. There were two kinds of substitution common in Gaius' time:
 - a. 'Ordinary substitution',³⁰ includes the substitution that we just mentioned: 'if X does not make *cretio* within 100 days let Y be heir', but it also applied to the general condition of all institutions, that the heir be alive at the death of the testator.
 - b. 'Substitution for orphans (*pupilli*)'.³¹ If the heir was below the age of puberty (this could apply even to a child *in utero*), the testator could by way of substitution designate that child's heir if the child died before reaching the age of puberty. This is quite extraordinary because the substitute is heir of the child, and took not only what the child³² got from the testator but also everything else the s/he might have.
11. Institution of slaves as heirs.
 - a. We have already mentioned the institution of the testator's own slave as heir. It could only be done if the slave were at the same time manumitted, and the slave became a necessary heir.
 - b. One could also institute the slave of a third person. The slave needed the authority of his owner in order to accept the inheritance. This was done to allow the transfer of the entire

²⁶ *ius abstinendi*.

²⁷ *heres necessarius*.

²⁸ *separatio bonorum*.

²⁹ Called *beneficium inventarii*.

³⁰ *substitutio vulgaris*.

³¹ *substitutio pupillaris*.

³² *pupillus*.

inheritance to the owner. The slave in question might frequently have been owner's business manager.

12. Gaius does not mention the *querela inofficiosi testamenti*, literally 'complaint about undutiful testament'. The institution existed in G's time but we are not well informed how it worked in his time. In a later period it allowed the close kin of the testator who for no apparent reason had not received at least one-quarter of what they would be entitled to in intestacy to void the testament. In a still later time, the testament would not be voided but the excluded heir would get his/her one-quarter.

13. Legacies and *fideicommissa*

The Roman law of legacies *fideicommissa* was quite complicated. We can give only the basics here.

a. Legacies came in four types, depending both on their wording and on what type of ownership the testator had in the thing legated:

i. A legacy by vindication had to use a particular form of words, though these were expanded over the classical period. It purported to convey Quiritary ownership to the legatee outright, though it could be used, if needed, to pay the testator's debts and was subject to reduction if under the *lex Falcidia* of 40 BC if the heir did not receive at least one-quarter of the total value of the estate. The testator had to be Quiritary owner of the item legated both when the testament was made and when s/he died. It seems to have been used principally for corporeal things and for *in rem* rights. It could not be used for money, except for existing coins.

ii. A legacy by damnation did not convey an existing thing to the legatee but imposed a strong obligation on the heir to convey something or do something for the benefit of legatee. Like the legacy by vindication there was particular form of words. The range of things that could be so legated was quite broad. It could, for example, convey to the legatee what was owed the testator under a contract with a third party, an exception to the rule the obligations could not be conveyed. If the legacy was of a thing that neither the heir nor the testator owned, the heir would have to go out and buy it. If the owner would not sell it, the heir would have to pay the legatee its value.

iii. A legacy by permission³³ imposed a weak obligation on the heir. The heir did not have to do anything, but he could not prevent the legatee from taking the thing legated out of the estate.

iv. A legacy by preception gave one of a number of co-heirs the right to take something out of the estate before the estate was partitioned among the co-heirs. We suspect that it was used for heirlooms: 'My son Marcus gets his grandfather's watch'.

³³ Known as *legatum sinendi modo*, 'legacy in the manner of allowing'.

Some of the mystery was taken out of making legacies by a SC Neronianum (54 X 68 AD) which gave the legatee whatever was most effective without regard to the form of words used.

- b. The following legacies were void
 - i. A legacy could not be put in a testament before the institution of an heir. This formal requirement, abolished by Justinian, remained throughout the classical period.
 - ii. A legacy could be made to take effect at some time in the future, but it could not be made to take effect after the death of the heir. If this reminds you of the ‘lives in being’ part of the common-law Rule Against Perpetuities, it should.
 - iii. A legacy that was made as a penalty for the heir doing or not doing something that the testator did not want or did want the heir to do was void.
 - iv. A legacy, like an institution of an heir, made to an uncertain person was void. This had the effect prohibiting many of what would be valid gifts at common law, for example, to the heir’s first-born son, when there was no such son.
 - v. A legacy to those *in potestate* of the heir was void.
- c. Limitations on legacies. What Gaius has to say about the statutory limitations on legacies is a little long, but it’s interesting and worth quoting in full:

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. . . . In consequence, testamentary heirs would abstain from the inheritance, and thus many persons used to die intestate. **225.** Hence was enacted the *lex Furia* [c. 200 BC], 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 *lex Voconia* [169 BC] 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 *lex Falcidia* [40 BC] 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 *lex Fufia Caninia* [2 BC], as mentioned in our first book, moderated extravagance in the giving of liberty (by testament to slaves).

This is a classic example of what is sometimes called ‘lawyers’ legal history’. Gaius assumes that each of these statutes had the same purpose, to leave enough of the inheritance so that the heir would take it up and avoid an intestacy. Assuming that purpose, there was an obvious loophole in the l. Furia, a less obvious one, but still a loophole, in the l. Voconia, and they finally got it right in the l. Falcidia, which is still in effect. Modern legal historians have their doubts.

We know little about the l. Furia, but the l. Voconia also provided that a woman could not be instituted as heir of anyone who was in the first census class, which at the time was someone who had an estate evaluated at 100,000 sesterces or more. The provision of the l. Voconia, and perhaps of the l. Furia, may have been designed to prevent a testator in the first census class from doing by way of legacy what he could not do by instituting his wife or daughter as his heir. We have already seen that the l. Fufia Caninia probably has little to do with, in Gaius' words, 'moderating extravagance in giving liberty'.

The lex Voconia's prohibition on women becoming heirs of the estates of those in the first census class was no longer in effect in Gaius' time, since the census had not been taken up for many years.

14. *Fideicommissa*

- a. A *fideicommissum* (singular of *fideicommissa*) was the grant of property to someone who was authorized to take it, but who was then charged on his faith – hence the *fides* part of the word *fideicommissum* – to do something with that property for the benefit of someone else. The parallels to the common-law trust are striking, and even Zulueta, who is normally reluctant to translate Latin technical legal terms with their common-law equivalents, is comfortable with translating *fideicommissum* as 'trust'.

There was a large variety of things that could be charged with a *fideicommissum*. The most common seem to have been of:

- i. an entire inheritance
- ii. single thing
- iii. liberty³⁴

The first two require no explanation. A *fideicommissum* of liberty was done when the purpose of the *fideicommissum* was manumitting a slave. The *fiduciarius*, the equivalent of the trustee, could even be charged with buying the slave from a third-party, in order to manumit him/her.

The transfer of the title to the *fiduciarius* had to take place as the law prescribed, by testament, or mancipation, or handing-over, but no formalities were, until quite late, required for the *fideicommissum* itself. It seems to have been quite common to include them in codicils, which were themselves quite formless documents, and which, unlike as in our law, did not require the support of an underlying valid testament.

- b. *Fideicommissa* arose in the late Republic, and for a while were subject to no legal regulation or enforcement. A couple of egregious cases of unfaithful *fiduciarium*, were referred to Augustus, and he charged the consuls to look into the matter. In the time of Claudius two fideicommissary praetors were established, later reduced to one. They proceeded according to the *extraordinaria cognitio*. The jurists became interested in what they were doing, though the law that they were creating was neither the civil law nor the *ius honorarium* of the urban praetor.

³⁴ *libertas*.

It seems clear that one of principal reasons for creating *fideicommissa* was to benefit people who could not be benefited under the existing law, in particular non-citizens, who might be quite closely related to the person establishing the *fideicommissum*, and ‘uncertain persons’, who might be persons not yet born, descendants of the person establishing the *fideicommissum*. The formal requirements of testaments and legacies could also be avoided by the use of the *fideicommissum*.

There began a long process whereby what one could do by way of *fideicommissum* was gradually limited to what one could do by way of legacy or instituting an heir. There is some uncertainty as to the dates. A SC Trebellianum (52 AD) made the *fideicommissarius*, the beneficiary of the *fideicommissum*, proportionally liable for the debts of an estate, thereby removing the possibility of using the device as a means of avoiding one’s creditors.

The SC Pegasianum (time of Vespasian, probably 72 AD) extended the lex Falcidia to *fideicommissa*; legacies and *fideicommissa* together could not exceed three-quarters of an estate. It made applicable to *fideicommissa* the rules of the *leges Iuliae et Papiae Poppaeae*, which disabled unmarried people from becoming testamentary heirs and limited the share of childless people to one-half of what they would otherwise get.

The SC Pegasianum may have extended the prohibition on non-citizens becoming heirs or taking legacies to the beneficiaries of *fideicommissa*. By Gaius’ time, the only people who could be benefited by a *fideicommissum* who could not be benefited by a legacy were Junian Latins. Finally, in the reign of Hadrian, *fideicommissa* in favor of uncertain persons were prohibited, taking away the planning flexibility that had been one of their chief features.

Justinian, in effect, eliminated the distinction between legacies and *fideicommissa*. Then he seems to have changed his mind. The Novels authorize *fideicommissa* in favor of uncertain persons, and allowed what came to be known as fideicommissary substitution for four generations. fideicommissary substitutions became a feature of European law, particularly in the early modern period, parallel to the English strict settlement, until they were abolished by the modern civil codes.

15. This has already gone on quite long. I will not attempt to summarize it. There follows a list of the extensive legislative changes that we have mentioned in the course of the lecture. Perhaps we can discuss in class what their purpose was. The interplay between what the jurists were doing and the statutes is certainly worth discussing.
 - a. Il. Furia (c. 200 BC), Voconia (179 BC), Falcidia (40 BC), and Fufia Caninia (2 BC) – limitations on legacies and testamentary manumissions of slaves.
 - b. Il. Iuliae et Papiae Poppaeae (18 BC, 9 AD) – unmarried persons cannot be heirs, childless persons receive one-half of what they would otherwise receive.
 - c. SC Neronianum (54 X 68 AD) – legatees get the kind of legacy that’s effective without regard to the words used.
 - d. SC Trebellianum (56 AD) – made the beneficiary of *fideicommissum* proportionally liable for the debts of an estate.

- e. SC Pegasianum (temp. Vespasian, probably 72 AD) – extends l. Falcidia and ll. Iuliae et Papiae Poppaeae to *fideicommissa*. Probably extends prohibition on peregrines taking legacies to *fideicommissa*.
- f. SC Tertullianum (Hadrian, 117 X 138 AD) – mothers who had had three children made³⁵ heirs of their children in preference to agnates.
- g. SC (unnamed) (Hadrian, 117 X 138 AD) – *fideicommissa* to uncertain persons prohibited.
- h. rescript (Antoninus Pius, 138 X 161 AD) – a testament sealed by 7 witnesses takes priority over the civil-law intestate heirs.
- i. SC Orphitianum (temp. Marcus Aurelius, 178 AD) – children made intestate heirs of their mothers in preference to agnates.

³⁵ *ius liberorum*